

Foreign Investment in China: Will the Anti-Monopoly Law be a Barrier or a Facilitator?*

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SUMMARY

I.	INTRODUCTION	127
II.	OUTLINE OF CHINA'S ECONOMIC REFORM PROCESS	128
III.	FOREIGN DIRECT INVESTMENT REGIME	132
IV.	PROVISIONS OF THE AML RELEVANT TO FOREIGN DIRECT INVESTORS	134
V.	M&A IMPLEMENTATION REGULATIONS AND MARKET DEFINITION	142
VI.	EARLY MERGER CASES REVIEWED UNDER THE AML	149
VII.	CONCLUSION	154

I. INTRODUCTION

Just over thirty years ago, under the leadership of Deng Xiao Ping, the Chinese Communist Party (CCP) made the fateful decision to reorient China's economic policy.¹ One of the major pillars of China's economic reform has been the reemergence of foreign direct investment (FDI) in China as a major force driving the modernization of industry.²

This paper will sketch the various ways in which foreign capital has become an essential part of China's strategy to update its domestic economy and, equally importantly, to create the world's greatest export-processing machine. Foreign capital (which, for these purposes, includes investment from Hong Kong, Taiwan, and other overseas Chinese investors) has been vitally important in upgrading the technological level of domestic firms as well as creating a very large number of joint venture and wholly foreign-owned enterprises (WFOEs), which have all contributed to the transformation of the Chinese economy over the last thirty years.

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1. Led by the Chinese Communist Party under the agenda "Socialism with Chinese Characteristics"; see J.B. STARR, UNDERSTANDING CHINA: A GUIDE TO CHINA'S ECONOMY, HISTORY, AND POLITICAL CULTURE 14–15 (rev. & updated ed. 2001) (discussing post-Mao economic reforms).

2. *China's Success in Economic Reform Draws Praise*, XINHUA GENERAL NEWS SERVICE, Aug. 26, 2009, http://news.xinhuanet.com/english/2009-08/26/content_11947584.htm.

This paper will then consider the impact of change in the regulatory environment over time, with a focus on the impact of China's new Anti-Monopoly Law (AML) and its merger and acquisition (M&A) control regime.³ Many commentators have been concerned that the new AML will be used as a protectionist device to shield domestic enterprises from foreign acquisitions,⁴ which in turn would also inhibit the growth of foreign-owned enterprises in significant sectors of the Chinese domestic economy. It is also widely thought that various provisions of the law may unduly favor domestic state-owned enterprises (SOEs), which still account for a very large share of China's gross domestic product (GDP).⁵

The new antitrust system and the merger control regime are still far from complete, as is the new law's regulatory infrastructure. Consequently, the conclusions reached in this paper are tentative.

This paper will suggest a range of possible outcomes and assess the impact of the enforcement regime on foreign investors.

II. OUTLINE OF CHINA'S ECONOMIC REFORM PROCESS

The initial decision to reform the agricultural system in 1978 was the key policy that allowed an agricultural surplus to be created, which kick-started an enterprise culture in the countryside.⁶ The "responsibility system" allowed farmers to privately retain and sell agricultural products that they produced in excess of the commodity levy demanded by the state. At a basic level, this reignited the capitalistic impulses of Chinese peasants after thirty years of an entirely state-controlled economy.⁷ Huang has argued that the true genesis of modern private capitalism in China was the creation of thousands of township and village enterprises in the countryside in the 1980s.⁸ Most of these were officially designated as co-operative entities while, in reality, most of them were family-owned businesses.⁹ Huang goes on to argue that, in the 1990s, the Chinese state took resources away from the agricultural sector in order to invest in urban areas and to modernize and strengthen SOEs.¹⁰ Only in the

3. Fan long duan fa [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517, available at http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm translated in LAWINFOCHINA, <http://www.lawinfochina.com/law/displayModeTwo.asp?ID=6351&DB=1&keyword> (last visited August 24, 2009) (P.R.C.).

4. Anu Bradford, *Chinese Antitrust Law: The New Face of Protectionism?*, HUFFINGTON POST, Aug. 1, 2008, http://www.huffingtonpost.com/anu-bradford/chinese-antitrust-law-the_b_116422.html.

5. See Bert Hofman & Louis Kuijjs, *A Note on Saving, Investment, and Profits of China's Enterprises*, WORLD BANK, <http://go.worldbank.org/3EQL46KTS0> (explaining that China's tradition of low dividend payments is one reason why enterprise saving in China makes up 20 percent of the GDP, and that the low dividend tradition is especially strong with regard to SOEs, which make up a large percentage of the economy).

6. YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS: ENTREPRENEURSHIP AND THE STATE* 55-56 (2008).

7. See *id.* at 55-56 (discussing the transformation of the rural regions between 1955 and the 1980s, and reporting that "[i]n the 1980s, Chinese peasants experienced the most rapid income gains in history.>").

8. See *id.* ch. 2 (arguing that it was the establishment and success of private TVEs that allowed for the development of modern private capitalism in China).

9. *Id.* at 73-76.

10. *Id.* at 44.

last few years has this trend been reversed, with more priority now being given to rural areas.¹¹

The second major economic reform made in 1978 was the establishment of special economic zones (SEZs) at China's periphery in the south and east of the country, the most important of which was Shenzhen, a rural district immediately adjacent to the then British Colony of Hong Kong.¹² The express purpose of these zones was to allow an entry point into mainland China whereby foreign investors could establish joint venture enterprises with mainland state firms.¹³ (At this stage, wholly foreign-owned businesses were not allowed to operate in China.)¹⁴ The joint venture enterprises established in the SEZs were subject to a number of requirements,¹⁵ including the importation of capital, a quota on the use of local raw materials and components, the employment of local labor, and an export requirement of 50–100 percent of the goods produced.¹⁶ Various incentives were offered, including favorable import tariff regimes, profit tax treatment, exemption from the normal rules governing state businesses in China, lax environmental and labor standards, and the provision of incentives to export.¹⁷ Repatriation of profits was allowed, and guarantees that foreign assets would not be subject to arbitrary confiscation by the state were also provided.¹⁸

In the first decade of the reform era, the majority of foreign investors were Hong Kong and Taiwanese businesses that wished to take advantage of lower production costs for their export-manufacturing businesses. Some businesses were in fact funded by “round trip” capital. Cash was illegally exported by mainland enterprises to offshore jurisdictions where shell companies were incorporated as investment vehicles.¹⁹ The shell companies then re-imported the capital, disguised as genuine FDI. These companies could then benefit from the incentives offered to foreign investors.²⁰ Later, genuine foreign investors also began to use China as a

11. *Id.* at 54.

12. HUANG, *supra* note 6, at 225.

13. Zhong wai he zi jing ying qi ye fa [Sino-Foreign Equity Joint Venture Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, revised Apr. 4, 1990, effective Aug. 1, 2008), 1990 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 24, available at http://www.npc.gov.cn/wxzl/gongbao/1990-04/04/content_1479165.htm, translated in CHINESE STOCK INFO., <http://www.chinesestock.org/show.aspx?id=2046&cid=33> (last visited Sept. 5, 2009) (P.R.C.). See also Wanda Tseng & Harm Zebregs, *Foreign Direct Investment in China: Some Lessons for Other Countries*, in CHINA, COMPETING IN THE GLOBAL ECONOMY 68, 72 (Wanda Tseng & Markus Rodlauer eds., 2003) (discussing the “open door” policy that led to the creation of SEZs in the southern and eastern provinces and the FDI that developed there as a result and eventually spread into the other provinces in the 1990s).

14. Tseng & Zebregs, *supra* note 13, at 72.

15. See MARGARET M. PEARSON, *JOINT VENTURES IN THE REPUBLIC OF CHINA: THE CONTROL OF FOREIGN DIRECT INVESTMENT UNDER SOCIALISM* 100–40 (1991) (explaining that the Chinese government retained a great deal of control over joint venture enterprises).

16. See *id.* at 128–29 (stating that the government often encouraged foreign investors to export their goods by contracting an export target between 50% and 100% of goods produced).

17. See, e.g., Zhong wai he zi jing ying qi ye fa [Sino-Foreign Equity Joint Venture Law], art. 7, (providing an incentive for foreign joint ventures to reinvest their net profits within China in the form of income tax refunds).

18. See PEARSON, *supra* note 15, at 134, 143–56 (outlining the various incentives and restrictions the government offered to foreign investors participating in joint ventures).

19. YASHENG HUANG, *SELLING CHINA: FOREIGN DIRECT INVESTMENT DURING THE REFORM ERA* 37–38 (2003).

20. Kevin H. Zhang, *Foreign Direct Investment in China: 1979–2002*, in 8 *ASIAN ECONOMIC AND POLITICAL ISSUES* 1, 5 (Frank Columbus ed., 2003).

production base to outsource the manufacture of generally high-labor but low-value products, such as textiles, footwear, toys, and low-end electrical and electronic goods.²¹

China gradually removed restrictions on the geographical location of foreign-invested firms, eventually opening the whole country to such investment.²² China also gradually removed restrictions on the legal form of foreign-invested enterprises so that it became possible for such businesses to be entirely foreign-owned without the need for a joint-venture partner.²³ Such businesses are known as wholly foreign-owned enterprises (WFOEs). Administrative incentives to invest, including favorable corporate tax rates, remained in place for an extended period, but other regulations have now been tightened, including labor and environmental standards.²⁴ China also gradually removed restrictions on the types of investments and the sectors in which FDI could be made; which culminated in the Protocols to the accession agreement that China accepted as part of its commitments on becoming a member of the World Trade Organization in 2001.²⁵ As can be seen from the following table, the stock of FDI in China increased from \$193 billion in 2000 to \$378 billion in 2008; the average annual inward FDI flows increased from \$30 billion in the period between 1990–2000 to \$108 billion in 2008.

21. Tseng & Zebregs, *supra* note 13, at 75.

22. *Id.* at 80–81 (outlining the development of Open Economic Zones in China).

23. *U.S. Companies in China Flourishing Despite Trade Dispute*, AFX NEWS LTD., Feb. 16, 2006, available at <http://www.forbes.com/feeds/afx/2006/02/16/afx2531258.html>.

24. Administrative action such as the enforcement of the new Labour Contract Law (2007) and higher environmental protection standards have increased costs, particularly in the Pearl River Delta. Together with official discouragement of low-tech, polluting industries, the old SEZs and their hinterlands have begun a transformation in recent years but much uncertainty now exists as a result of the economic crisis as to whether the momentum to raise standards will continue or whether it will falter due to weak economic conditions. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT [OECD], ENVIRONMENTAL PERFORMANCE REVIEWS: CHINA 16–26 (2007) (outlining implementation strategies and management recommendations for China’s environmental management of air, water, waste and nature).

25. See World Trade Organization, Ministerial Conference Decision of 10 November 2001, WT/L/432 pt. 1, sec. 3, available at <http://docsonline.wto.org/imrd/directdoc.asp?DDFDdocuments/t/WT/L/432.doc> (stating that “foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export; and the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.”).

Table 1:

China Foreign Direct Investment (FDI) Review, Selected Years (millions of dollars)²⁶

Years	1990	2000	2008
Inward FDI Stocks (Cumulative)	20,691	193,348	378,083
Years	1990–2000 (annual average)	2006	2008
Inward FDI Flows	30,104	72,715	108,312

The removal of many remaining geographical and sectoral limitations on foreign-owned businesses in accordance with the accession protocols has reinforced the allure of China's domestic markets to foreign investors both large and small.²⁷ China has often been seen as a potential El Dorado by many multi-national corporations (MNCs).²⁸ Until 2008, China had a high rate of economic growth (approximately 10 percent per annum), a fast expanding middle-class in its major cities, and the prospect that rapid urbanization would create a huge number of eager consumers who would be sufficiently wealthy to afford the goods and services that they could offer.²⁹ Consequently, China has been thought of as the world's largest potential consumer market.

In the eight years since its WTO entry, a steady stream of foreign investment became a flood, at least until the effect of the financial crisis became apparent in 2008.³⁰ The investment plans of MNCs have obviously been affected by the

26. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2009, COUNTRY FACT SHEET: CHINA, available at http://www.unctad.org/sections/dite_dir/docs/wir09_fs_cn_en.pdf. The data presented in the fact sheet is compiled from U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2009, U.N. Sales No. E.09.II.D.15 (2009), available at http://www.unctad.org/en/docs/wir2009_en.pdf.

27. Jordan Brandt, *Comparing Foreign Investment in China, Post-WTO Accession, with Foreign Investment in the United States, Post 9/11*, 16 PAC. RIM L. & POL'Y J. 285, 288–289 (2007).

28. See *id.* (characterizing China as a “hot destination for foreign investment”); see also Karen Halverson, *China's WTO Accession: Economic, Legal and Political Implications*, 27 B.C. INT'L & COMP. L. REV. 319, 320 (2004) (describing China as a “magnet” for foreign investment, and in 2001, the second-largest recipient of foreign direct investment after the United States); Shan Wenhua, *The International Law of EU Investment in China*, 2 CHINESE J. INT'L L. 555, 599–600 (2002) (describing the allure of China's domestic markets to European Union investors); Eileen Francis Schneider, Note, *Be Careful What You Wish For: China's Protectionist Regulations of Foreign Direct Investment Implemented in the Months Before Completing WTO Accession*, 2 BROOK. J. CORP. FIN. & COM. L. 267, 267 (2007) (describing the rise of investor confidence in China's economic reforms post-WTO accession).

29. See JOHN DUNNING & TSAI-MEI LIN, MULTINATIONAL ENTERPRISES AND EMERGING CHALLENGES OF THE 21ST CENTURY 25 (2007) (stating that China's rate of economic growth was about 9% per annum between the 1970's until 2006); see also *id.* at 45 (describing the growing middle class).

30. U.N. CONFERENCE ON TRADE AND DEVELOPMENT, WORLD INVESTMENT REPORT 2008, at xviii, Sales No. E.08.II.D.23 (2008), available at http://www.unctad.org/en/docs/wir2008_en.pdf (describing a

contraction of Western markets; hence, many ambitious expansion plans in China have been either scrapped or postponed until economic conditions improve.³¹ Nevertheless, China's promise as the world's largest market will no doubt encourage MNCs to expand in China as soon as the economic situation stabilizes.³²

III. FOREIGN DIRECT INVESTMENT REGIME

China's current FDI regime is governed by a number of statutes and regulations sponsored by the Ministry of Commerce (MOFCOM). Some of the principal legislation and regulations include: *Regulations Issued on Restructuring of State-Owned Enterprises with Foreign Funds (2002)*,³³ *Law of the People's Republic of China on Wholly Foreign-Owned Enterprises (2000)*,³⁴ *Law of the People's Republic of China on Chinese-Foreign Contractual Joint Ventures (2000)*,³⁵ *Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors (the 2006 M&A Regulation)*,³⁶ *Regulations for the Takeover of Listed Companies (2006)*,³⁷ and the newly-amended *PRC Company Law*.³⁸

combination of factors which have led to China's position as the top destination for FDI among all developing countries).

31. *Multinational Corporations Still Confident to Invest in China's Economy*, PEOPLE'S DAILY ONLINE, Feb. 24, 2009, <http://english.peopledaily.com.cn/90001/90778/90857/90860/6599666.html> (last visited Oct. 15, 2009).

32. However, China is not an easy market to enter, as many overly ambitious MNCs have found. That being said, as the Chinese domestic market matures, increasing numbers of MNCs have been able to make their Chinese investments profitable by greater access to various mainland markets. See JOE STUDWELL, *THE CHINA DREAM* 138–55, 219–26 (2002) (examining the failure of MNCs in the Chinese domestic market).

33. Li yong wai zi gai zu guo you qi ye zan xing gui ding [Regulations Issued on Restructuring of State-Owned Enterprises with Foreign Funds] (promulgated by St. Econ. & Trade Comm., Ministry Fin., St. Admin. Indus. & Com., and St. Admin. Exch. Control, Aug. 11, 2002, effective Jan. 1, 2003) 2002 ST. ECON. & TRADE COMM., MINISTRY FIN., ST. ADMIN. INDUS. & COM., and ST. ADMIN. EXCH. CONTROL 42 (P.R.C.).

34. Wai zi qi ye fa [Law on Wholly Foreign-Owned Enterprises] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 12, 1986, revised Oct. 31, 2000, effective on Oct. 31, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. 41 (P.R.C.), available at www.bjmbc.gov.cn/download/waizi/wzqyf.doc.

35. Zhong wai he zuo jing ying qi ye fa [Law on Chinese-Foreign Contractual Joint Ventures] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 13, 1988, revised Oct. 31, 2000, effective on Oct. 31, 2000) 2000 STANDING COMM. NAT'L PEOPLE'S CONG. 40 (P.R.C.).

36. Guan yu wai guo tou zi zhe bing gou jing nei qi ye de gui ding [Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors] (promulgated by Ministry Com., St. Council St.-owned Assets Supervision & Admin. Comm'n, St. Admin. Tax'n, St. Admin. Indus. & Com., Nat'l Sec. Supervision & Mgmt. Comm., and St. Admin. Exch. Control, Aug. 8, 2006, effective Sept. 8, 2006) 2006 MINISTRY COM., ST. COUNCIL ST.-OWNED ASSETS SUPERVISION & ADMIN. COMM'N, ST. ADMIN. TAX'N, ST. ADMIN. INDUS. & COM., NAT'L SEC. SUPERVISION & MGMT. COMM., and ST. ADMIN. EXCH. CONTROL 10 (P.R.C.).

37. Shang shi gong si shou gou guan li ban fa [Regulations for the Takeover of Listed Companies] (promulgated by Nat'l Sec. Supervision & Mgmt. Comm., Sept. 1, 2006, revised on May. 19, 2009, effective on May. 19, 2009) 2009 NAT'L SEC. SUPERVISION & MGMT. COMM. 11 (P.R.C.), available at <http://www.csrc.gov.cn/n575458/n776436/n804965/n3300690/n3300837/n3331795/11258526.html>.

38. Gong si fa [Company Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1993, revised on Oct. 27, 2005, effective on Jan. 1, 2006) 2005 STANDING COMM. NAT'L PEOPLE'S CONG. 42 (P.R.C.), translated at http://www.npc.gov.cn/englishnpc/Law/2007-12/13/content_1384124.htm (last visited Sept. 29, 2009)).

China takes a relatively permissive approach to the sectors in which foreign investment is encouraged or permitted, with a relatively narrow range of sectors that are discouraged or prohibited. MOFCOM's investment catalogue lists sectors in which foreign investment is "permitted," "restricted," or "prohibited."³⁹

Establishing a local subsidiary under China's domestic laws is relatively straightforward. Wholly foreign-owned enterprises can be used to acquire domestic Chinese enterprises, although a number of burdensome bureaucratic steps do have to be followed.⁴⁰

Investment in several industries still requires specific approval from sector regulators. The financial services and telecommunications sectors, in particular, remain protected to a significant extent, and certain industries are entirely off limits.⁴¹ The WTO accession protocols did provide for the substantial opening of a number of service industries to foreign investment; in fact, the concessions granted by China were substantially more permissive than those required from any other developing country as the price of admission to WTO membership.⁴²

The obvious alternative route to establishing a new business, which seeks to expand through organic growth, is to obtain a substantial market presence in a mainland market through merger with, or acquisition of, a domestic enterprise. This option has advantages to a foreign business that wants to obtain market share rapidly in a Chinese domestic market. However, such an acquisition may need to be approved by the Ministry of Commerce both under the 2006 M&A Regulations and the AML.⁴³ Further, where specific sensitivities exist regarding national security, a

39. See generally *Wai shang tou zi chan ye zhi dao mu lu (2007 nian xiu ding)* [Catalogue for the Guidance of Foreign Investment Industries (2007 revision)], 1, 17–19, 22–24, National Development and Reform Commission (last visited Sept. 20, 2009) available at http://www.fdi.gov.cn/pub/FDI_EN/Laws/GeneralLawsandRegulations/MinisterialRulings/P020071121358108121219.pdf (delineating encouraged foreign investment industries).

40. See LUTZ-CHRISTIAN WOLFF, *MERGERS AND ACQUISITIONS IN CHINA: LAW AND PRACTICE* 9, para. 1-315 (2d ed. 2008) (detailing how "[t]he legal framework governing WFOEs has traditionally been much tighter than the rules governing EJVs and CJVs. Many of the former restrictions, however, were removed because of China's accession to the WTO, which led to a revision of the PRC Wholly Foreign-owned Enterprise Law (WFOE Law) originally enacted on 12 April 1986").

41. See, e.g., *Wai zi jin rong ji gou zhu hua dai biao ji gou guan li ban fa* [Measures on the Administration of Foreign-Funded Financial Institution's Representative Offices in China] (promulgated by the China Banking Regulatory Commission (CBRC), June 13, 2002; effective July 18, 2002), translated in <http://www.lehmanlaw.com/resource-centre/laws-and-regulations/banking/measures-on-the-administration-of-foreign-funded-financial-institutions-representative-offices-in-china-2002.html> (outlining rules with which foreign-funded financial institutions must comply); see also Gov.cn, *Major Responsibilities*, para. 6, http://www.gov.cn/english/2005-10/02/content_74176.htm (last visited Sept. 13, 2009) (outlining the major responsibilities of the Ministry of Industry and Information Technology and including among them the "supervision and control over telecommunications and information service market").

42. See Halverson, *supra* note 28, at 323 ("No country has endured as lengthy an accession process to the GATT/WTO as China, nor has any country acceding to the WTO been asked to take on as many concessions as the price of admission.").

43. See *Making Sense of the New 2006 M&A Regulations and the New 2006 Takeover Regulations: Political and Technical Regulatory Responses to Changing Market Realities*, LOVELLS CORP. BULL., Sept. 2006, at 1–16, available at http://www.lovells.com/NR/rdonlyres/32F55C5C-1741-4DB2-8AE5-DFE5EFBEB9F0/7712/CorporateBulletin_0609_MAandTakeoverRegulations_Re.pdf (describing how "[t]he key differences between the 2006 and 2003 versions of the M&A Regulations from a foreign strategic investor's perspective include the new provisions providing for a 'national economic security' type review by the Ministry of Commerce ('MOFCOM') in Beijing of proposed acquisitions of certain

third review process may also be required; these matters will be dealt with in more detail below.

The Chinese foreign investment regime has evolved substantially over the last thirty years and now provides a relatively benign system for foreign investors.⁴⁴ Unfortunately, the new AML has created a degree of anxiety given the significant ambiguities in the law and the uncertainties as to how the statute will be implemented by the overly complex administrative structure that has been created to enforce the law.⁴⁵ As we will see in the next section, it is still too early to know whether these concerns are significant or not, given that the law has been operational only since August 1, 2008.⁴⁶

IV. PROVISIONS OF THE AML RELEVANT TO FOREIGN DIRECT INVESTORS

The AML was enacted on August 30, 2007 by the Standing Committee of the National People's Congress.⁴⁷ It contains general provisions that forbid overly restrictive anticompetitive agreements, abuse of a dominant market position, and the over-concentration of undertakings.⁴⁸ In addition, the AML forbids the abuse of administrative power to eliminate or restrict competition and establishes a mechanism for the investigation, adjudication, and punishment of anticompetitive abuses.⁴⁹ Wholly foreign-owned enterprises established in China and MNCs trading with China will need to comply with the normative antitrust provisions in the AML. The "abuse of market dominant position" provisions will not be a major concern to the vast majority of FDI enterprises in China because they will not generally qualify for investigation given that most large-scale businesses in China are still state owned.⁵⁰ Moreover, very few foreign businesses have enough power in their respective market to reach the threshold for antitrust scrutiny.⁵¹ However, if market definitions are drawn sufficiently narrow, high market shares might result, which could trigger regulatory attention.

FDI enterprises will, conversely, be concerned about the provisions of the AML that appear to shelter dominant state enterprises from antitrust scrutiny. These

categories of sensitive domestic targets, and the new provisions fleshing out the procedures for cross-border share swaps"); *see also* Fan long duan fa [Anti-Monopoly Law], ch. V, art. 31 ("Where a foreign investor merges and acquires a domestic enterprise or participate[s] in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.").

44. Stephan W. Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 77-83 (2007) (describing the process by which China opened its borders and, starting in 1979, departed from its isolationist policies).

45. Jun Wei & Janet McDavid, *China's Anti-Monopoly Law*, NAT'L L. J., Mar. 23, 2009, available at <http://www.law.com/jsp/law/international/LawArticleIntl.jsp?id=1202429178088>.

46. *Id.*

47. Fan long duan fa [Anti-Monopoly Law], *supra* note 3.

48. *Id.* ch. I, art. 3.

49. *See id.* ch. I, art. 8 (prohibiting administrative organizations from abusing their administrative powers to eliminate or restrict competition); *see also id.* ch. I, art. 9 (providing for the establishment of an Anti-Monopoly Commission and laying out its functions).

50. Xiaoye Wang, *Highlights of China's New Antimonopoly Law*, 75 ANTITRUST L.J. 133, 142-43 (2008).

51. *Id.* at 138.

provisions may deprive them, as well as domestic firms and consumers, of the protection afforded by the prohibition of market power abuse.⁵²

The prohibition of unduly anti-competitive agreements will apply to FDI enterprises in the same way as they will apply to domestic enterprises.⁵³ However, many sectors of the economy remain directly or indirectly in state hands, where the state has considerable influence through state-sponsored industrial associations. These organizations have a history of organizing cartels. The situation may well arise where an FDI enterprise is the victim of supplier cartels as opposed to a participant in hard-core cartel activities.⁵⁴ That is not to say MNCs are blameless. Internationally-organized cartels have targeted China in the past and may continue to do so. If such cartels eliminate or restrict competition in China, they will be subject to the AML given its effects-based doctrine of jurisdiction.⁵⁵

The last general issue of interest to FDI enterprises is the special chapter devoted to “administrative monopoly” in the AML.⁵⁶ Administrative monopolies involve the misuse of administrative power to prevent, distort, or restrict economic competition; they often consist of discriminatory regulatory standards, discriminatory taxation, and other barriers to internal trade.⁵⁷ The malign effect of these abuses has long been a source of concern to FDI enterprises as much as to the domestic private sector.⁵⁸ The AML now provides a general prohibition of such activities in Articles 32–37, and provides a non-exhaustive list of acts of “Administrative Monopoly.”⁵⁹

Unfortunately, the enforcement regime for these provisions is particularly weak. Article 51 merely provides that the superior administrative entity of the attending state organ has the power to discipline its subordinate and take disciplinary action against individual cadres.⁶⁰ This mechanism is unlikely to prove effective as the superior organ usually either orders the offending act or is complicit

52. Candice Mak, *Enforcement Fear of China Anti-Monopoly Law*, INT. FIN. L. REV., July 24, 2008, available at <http://www.iflr.com/Article/2006970/Enforcement-fear-over-China-Anti-Monopoly-Law.html>.

53. See Fan long duan fa [Anti-Monopoly Law] ch. I, art. 2 (stating that the Anti-Monopoly Law applies to all monopolistic practices within China and monopolistic conduct occurring outside of China's territory that impinges on economic competition within China).

54. For example, an interesting case is currently before the U.S. Federal Courts in which a number of Chinese SOE vitamin manufacturers are defending a cartel suit brought by American commercial consumers who allege that they suffered damage as a result of naked price fixing. *In re Vitamin C Antitrust Litig.*, 584 F.Supp.2d 546, 548–49 (E.D.N.Y. 2008). The most interesting aspect of the case is the light shed on the activities of the Chinese government, who the defendants claim sponsored, coordinated, and enforced the cartel's activities as a matter of state policy. *Id.* at 554. The defendants have claimed that they are not liable as a result of sovereign compulsion and evidence was introduced that demonstrated government involvement. *Id.* at 550–52. However, the U.S. District Court denied the defendants' summary judgment motion on this ground. *Id.* at 560.

55. See Fan long duan fa [Anti-Monopoly Law] ch. I, art. 2 (prohibiting monopolistic practices outside of China's territory that impinge on economic competition within China).

56. See *id.* ch. V, arts. 32–37 (addressing the use of administrative power to hinder economic competition).

57. *Id.* ch. V, art. 33 (giving examples of acts constituting an “administrative monopoly”).

58. Wang, *supra* note 50, at 148–49.

59. See Fan long duan fa [Anti-Monopoly Law] ch. V, art. 33 (listing some prohibited administrative acts).

60. See *id.* ch. VII, art. 51 (establishing the authority of the “superior authority” to regulate administrative organs that abuse their administrative power).

in the unlawful activity.⁶¹ Therefore, it is unlikely that such administrative abuses will be tackled so as to provide relief from the unlawful exactions of rent-seeking officials.⁶²

Article 6 of the AML, which prohibits undertakings that abuse dominant market power, is amplified with more detailed prohibitory rules in Articles 17–19.⁶³ However, Article 7 provides that the state shall protect the legitimate business activities of SOEs and statutory monopolies and shall implement a system of regulatory control to ensure consumer interests are protected.⁶⁴ This provision has raised the specter of special and more favorable treatment of SOEs, although they are still nominally subject to the general provisions of the AML.⁶⁵

Turning now to the general scheme of the AML, Article 1 sets out the general purposes of the law; it provides that the AML has multiple objectives, including the prohibition of monopolistic conduct, safeguarding “fair” competition, improving economic deficiencies, protecting consumer and public interests, and promoting the “healthy development of a socialist market economy.”⁶⁶ As can be readily appreciated, several of the objectives are potentially incompatible, and it should be noted that China does not purport to accept a “market” economic system, but instead pursues the more ambiguous “socialist market” model concept.⁶⁷ This concept should not be underestimated as a mere rhetorical disguise for Chinese capitalism. The state has been China’s dominant economic actor in the past and this is not likely to change in the foreseeable future.⁶⁸ There is no suggestion that this *status quo* will change anytime soon; in fact, many observers have suggested that the AML will be used to bolster the status quo and may even be a tool for nakedly protectionist and nationalistic ends.⁶⁹

Article 2 provides the jurisdictional base of the law, and it includes a widely drawn effects doctrine which is derived from U.S. precedent.⁷⁰ This choice to prefer the more expansive U.S. doctrine is interesting given the fact that, as a whole, the AML draws substantially on European Community competition law.⁷¹ Article 5 confirms that it does not prevent or restrict mergers of enterprises that are conducted within the proper legal limits and have the effect of increasing competition in the domestic market.⁷² On the surface, this provision appears to be

61. Wang, *supra* note 50, at 149.

62. *Id.*

63. Fan long duan fa [Anti-Monopoly Law] ch. I, art. 6, ch. II, arts. 17–19.

64. *Id.* ch. I, art. 7.

65. *See id.* ch. I, art. 8 (providing that no administrative organ “may use its powers to eliminate or restrict competition”); *but see id.* ch.1, art. 7 (providing for state-protection of the industries controlled by the state-owned economy).

66. *Id.* ch. I, art. 1.

67. *Id.*

68. Chan Mei Sheung & Lian Wei, *The Impact of China’s Anti-Monopoly Law on Foreign-Funded Mergers and Acquisitions*, LEXIS HONG KONG LEGAL COMMUNITY, Oct. 6, 2008, <http://law.lexisnexis.com/webcenters/hk/Hong-Kong-Lawyer-/The-Impact-of-Chinas-Anti-Monopoly-Law-on-Foreign-Funded-Mergers-and-Acquisitions>.

69. *Id.*

70. Nathan Bush, *China: Antimonopoly Law*, in GLOBAL COMPETITION REV., ASIA-PACIFIC ANTITRUST REVIEW 2009 (2009), available at <http://www.globalcompetitionreview.com/reviews/16/sections/59/chapters/618/china-antimonopoly-law/>.

71. Peter J. Wang, H. Stephen Harris Jr. & Yizhe Zhang, *New Chinese Anti-Monopoly Law*, JONES DAY COMMENTARIES, Oct. 2007, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S4662.

72. Fan long duan fa [Anti-Monopoly Law] ch. I, art. 5.

enlightened in stating that, as a general principle, mergers are not perceived to be necessarily anticompetitive.⁷³ China does not appear to subscribe to the view that “big is bad.”⁷⁴ This provision, as do all the others, ostensibly applies equally to both domestic and foreign enterprises, defined as “undertakings” in Article 12.⁷⁵ Natural persons, legal persons, and other organizations engaging in manufacturing, commodity trading or extraction, operating, or providing services fall within that definition.⁷⁶ However, while the law does not facially discriminate on the basis of the nationality of an undertaking, Article 7 appears to provide special treatment for industries that are dominated by the state economy and have a direct bearing on national security and economic well-being, as well as industries that conduct exclusive and monopolistic sales in accordance with the law.⁷⁷ As discussed above, the law appears to grant such SOEs special protection without objective justification. This could lead to discriminatory treatment despite official assurances that foreign and domestic entities will be treated equally.

It is not clear how wide these provisions are or exactly to which industries they apply. If the level and scope of protection are over-broad, then foreign investors may be disadvantaged. Given the language of these provisions, it may also be that foreign investors will not be allowed to buy businesses operated by SOEs. At present, it is unclear how these principles will be implemented. However, upcoming new rules on the valuation of state-owned assets and the tighter regulation of their sale may, when combined with its AML merger provisions discussed below, prove to have a chilling effect on FDI merger and acquisition activity.

Article 11 of the AML may also be adverse to foreign investors’ interests. It provides that industrial associations are mandated to “intensify industrial self-discipline, guide business operators to lawfully compete, [and] safeguard the competition order in the market.”⁷⁸ This provision could potentially be dangerous. As mentioned above, industrial associations in China are generally established by the state, with the government playing a leading role in many of them.⁷⁹ They are not independent producer associations as is common in Western developed economies.⁸⁰ An example of the closeness of the Chinese government and industry is provided by the ongoing vitamin cartel litigation in the United States.⁸¹ Government-backed or organized industry associations have often been suspected of

73. *Id.*

74. Thomas R. Howell, Alan Wm. Wolff, Rachel Howe & Diane Oh, *China’s New Anti-Monopoly Law: A Perspective from the United States*, 18 PAC. RIM L. & POL’Y J. 53, 66 (2009).

75. Fan long duan fa [Anti-Monopoly Law], ch. I, art. 12 (providing that “[f]or the purposes of this Law ‘business operator’ refers to a natural person, legal person, or any other organization that is in the engagement of commodities production or operation or service provision, and ‘relevant market’ refers to the commodity scope or territorial scope within which the business operators compete against each other during a certain period of time for specific commodities or services”). Also note that in some translations of the statute, these enterprises are referred to as “business operators.”

76. *Id.*

77. *Id.* ch. I, art. 7.

78. *Id.* ch. I, art. 11.

79. Howell et al., *supra* note 74, at 9.

80. Taikang.com, Chinese Industrial Associations to be a Weak Link after Joining WTO, <http://statics.taikang.com/EnglishSite/Finance%20and%20Economy6.html> (last visited Sept. 14, 2009).

81. *In re Vitamin C Antitrust Litig.*, 584 F.Supp.2d at 548 (describing how the defendant moved to dismiss on the ground that they were acting at the behest of the Chinese government).

organizing cartels or other anti-competitive activities.⁸² Indeed, during the final legislative session that debated the AML in August 2007, an association of noodle manufacturers decided to announce a uniform simultaneous price increase, which caused a public outcry.⁸³ This led to the insertion of a new article in the AML, confirming that industry associations are prohibited from instigating, organizing, or enforcing cartels.⁸⁴ From the perspective of a foreign investor, the fact that the state is closely involved with many such associations could be an obstacle to the even-handed enforcement of the law.

Turning to the provisions relevant to the concentration of undertakings, Article 20 defines “concentration of undertakings” to include: a merger between undertakings; obtaining control through the acquisition of shares or assets, or by means of contract or otherwise; the acquisition of control over another undertaking’s activities; or an ability to enjoy decisive influence over the affairs of another undertaking.⁸⁵ Notification thresholds and the clearance procedure were omitted from the AML.⁸⁶ These details were left to supplementary delegated legislation.⁸⁷ The AML provides an exemption where one undertaking already has de facto or de jure control of an undertaking, and merely increases its level of ownership.⁸⁸

Article 21 provides that prior notification is mandatory in all qualifying cases.⁸⁹ Articles 23 and 24 provide an outline of the notification of requirements in terms of documentation that needs to be lodged with the authorities once a qualifying merger is contemplated.⁹⁰ Articles 25 and 26 provide time limits for the review process and set out a two-stage review. The first stage of review is to be undertaken within thirty days, and the second-stage process for an in-depth review for an additional ninety days.⁹¹ This may be extended by an additional sixty days if the undertakings agree to extend the time limit, the authorities deem the provided documentation to be insufficient, or material changes (which are undefined) have occurred with regard to relevant circumstances since the filing of the merger notification.⁹² Article 26 provides that if no decision is made within that extended limit (a maximum of 180 days from the first notification), then the transaction will be deemed to have been approved.⁹³

82. The media frenzy caused by public furor prompted immediate response from MOFCOM. Zhang Hao, *Price Noodling Turns Spotlight on Food Cartels*, CAIJING MAGAZINE, July 31, 2007, <http://english.caijing.com.cn/2007-07-31/100025733.html> (“collective efforts are typical of . . . hardcore cartels”).

83. *Id.*

84. *Id.*

85. Fan long duan fa [Anti-Monopoly Law], ch. IV, art. 20.

86. *See id.* ch. IV, art. 21 (“Where a concentration reaches the threshold of declaration stipulated by the State Council, a declaration must be lodged in advance with the Anti-Monopoly Authority under the State Council, or otherwise the concentration shall not be implemented.”).

87. Guo wu yuan guan yu jing ying zhe ji zhong shen bao biao zhun de gui ding [Department of State Regulation on Notification Thresholds for Concentrations of Undertakings] (promulgated by the State Council, Aug. 3, 2008, effective Aug. 3, 2008), para. 3, available at http://www.gov.cn/zwggk/2008-08/04/content_1063769.htm (P.R.C.).

88. Fan long duan fa [Anti-Monopoly Law], ch. IV, art. 22.

89. *Id.* ch. IV, art. 21.

90. *Id.* ch. IV, arts. 23–24.

91. *Id.* ch. IV, arts. 25–26.

92. *Id.*

93. *Id.* (adding the amount of times given in articles 25 and 26 allows the author to conclude that the maximum amount of time that may be allowed is 180 days).

Articles 27 to 31 provide an outline of the standards of review to be adopted by the authorities in deciding whether to approve a relevant merger.⁹⁴ Unsurprisingly, the following factors will be taken into account: the share of the participating undertaking in the relevant market; the degree of market participation; the concentration ratio of the relevant market; and the effect of the proposed merger on market access, technological progress, consumers, and other relevant undertakings in the market.⁹⁵ The articles also provide two additional, more vague factors that the authorities may legitimately take into account when analyzing the effects of a proposed merger. First, the authorities may account for the effect the proposed concentration will have on the development of the economy; second, they may account for “other elements that may have an effect on the market competition and shall be taken into account as regarded by the Anti-[M]onopoly Authority under the State Council.”⁹⁶ These two factors appear to be overly broad and may well provide sufficient discretion for the authorities to account for non-economic factors when assessing merger applications.

Article 28 provides that where a relevant merger or other qualifying merger has or may have the effect of eliminating or restricting competition, the authorities may prohibit the transaction, impose conditions, decide that the positive effects on competition outweigh the negative effects, or decide that the concentration is in the national interest, notwithstanding its anticompetitive effects.⁹⁷ Again, this discretionary provision allows Chinese authorities substantial leverage when making controversial decisions concerning purely domestic mergers, acquisitions of Chinese businesses by foreign undertakings, and business turnovers between two foreign undertakings that qualify the transactions for notification.⁹⁸

One of the most controversial provisions that became part of the AML at the late stage of the legislative process is contained in Article 31.⁹⁹ This provision is discriminatory as it applies only to mergers with and acquisition of domestic enterprises by foreign investors, or other forms of concentration involving foreign investors that concern national security.¹⁰⁰ This provision appears to be quite distinct from the merger-review process and appears to provide for a second review on undefined “national security” grounds. The law provides no details as to what constitutes “national security,” which authority is competent to undertake this review, or the process by which that review will be undertaken.¹⁰¹ This provision provoked criticism and was seen by some as a means of expanding the merger-review process into the purely political arena, which has little or nothing to do with economic or antitrust considerations.¹⁰² China has no doubt learned from its

94. See Fan long duan fa [Anti-Monopoly Law], ch. IV, arts. 27–31 (outlining how the Anti-monopoly Authority should evaluate the legality of a merger under the Anti-Monopoly Law).

95. *Id.* ch. IV, 27.

96. *Id.*

97. *Id.* ch. IV, art. 28.

98. *Id.*

99. John M. Toth, *Cross-Border M&A Deals: National Security Interest Reviews Raise Flags*, GLOBAL PERSP., January 2008, at 21.

100. See Fan long duan fa [Anti-Monopoly Law] ch. IV, art. 31 (“Where a foreign investor merges and acquires a domestic enterprise or participate[s] in concentration by other means, if state security is involved, besides the examination on the concentration in accordance with this Law, the examination on national security shall also be conducted in accordance with the relevant State provisions.”).

101. *Id.*

102. Toth, *supra* note 99, at 21.

experience in attempting to acquire overseas businesses; particularly from the attempt by a Chinese petroleum company to acquire Unocal in the United States, which failed as a result of political pressure applied by some members of the U.S. Congress.¹⁰³

Two other provisions of the law may also be of concern to foreign investors. First, as discussed above, the AML has a special chapter devoted to administrative monopoly. This chapter essentially outlaws all forms of abuse of administrative power to inhibit domestic trade between various regions of China; for example, the imposition of differential taxes or other regulatory barriers to trade.¹⁰⁴ As previously stated, the enforcement provisions of this chapter are extremely weak because the antitrust agencies of the central government only have the power to make proposals to the superior agency of the delinquent authority to remedy the breach of law. In addition, the central AML enforcement agency has no power to investigate or punish individuals or departments who are responsible for such activities. But, the AML does appear to provide the option of bringing an administrative law suit against the offending agency. However, thus far only one such action has been reported and the local court rejected it on procedural grounds.¹⁰⁵

The second provision in the AML that has unnerved foreign investors is the prohibition contained in Article 55. It provides that while the AML does not apply to the exercise of intellectual property (IP) rights by undertakings pursuant to the provisions contained in IP laws and administrative regulations, the AML does apply when an undertaking's conduct eliminates or restricts competition by "abusing their intellectual property rights."¹⁰⁶ This broadly worded provision does not provide any clarity or definition as to what conduct constitutes an abuse that would violate the AML. Given that China has been very anxious about the ability of foreign technology firms to obtain positions of power in mainland technology markets, this provision may be seen as an attempt to fire a warning shot across the bows of foreign software and hardware manufacturers that have substantial market shares in mainland markets.¹⁰⁷ Chinese officials have previously alleged that Microsoft constitutes a potential threat to various software markets and that Intel also falls into this category.¹⁰⁸ These officials are also well aware of the extensive litigation undertaken by the European, Korean, Japanese, and American authorities in relation to some practices in the high-technology sector.¹⁰⁹ This provision may also

103. AsiaNews.it, *Failed CNOOC-Unocal deal leaves China scrambling for energy supplies*, Aug. 4, 2005, <http://www.asianews.it/view.php?l=en&art=3855>.

104. See Fan long duan fa [Anti-Monopoly Law] ch. V, arts. 32–37 (addressing the use of administrative power to hinder economic competition).

105. Zhao Hongmei, *Chinese Court Rejects Antitrust Suit Against State Organ*, ECON. OBSERVER, Sept. 8, 2008, at 7, available at <http://www.eeo.com.cn/ens/Industry/2008/09/10/113223.html> (describing a case in which four enterprises brought suit against the State Administration of Quality Supervision, Inspection and Quarantine (SAQSIQ), alleging that the state organ has used its administrative powers to force industry players to join an electronic supervision system for the purpose of quality control at huge expense to the enterprises concerned and at considerable profit to itself).

106. Fan long duan fa [Anti-Monopoly Law] ch. VIII, art. 55.

107. Lester Ross, *China's Antimonopoly Law*, 22 ANTITRUST 66, 69–70 (2008).

108. See Harry Yang, *China Anti Monopoly Warm-up, A Hard Journey*, CHINA INTELL. PROP. MAG., Oct. 2008, available at <http://www.chinaipmagazine.com/en/journal-show.asp?id=431> (trans. Li Guanqun) (discussing the allegations against Microsoft); see also, *Thirty-five companies hold monopolies in China's high-tech industry—report*, CHINA TELECOMM. NEWSWIRE, Aug. 7, 2008 (discussing the classification of both Microsoft and Intel in a report to the State Council's Anti-Monopoly Commission).

109. Antitrust actions taken against Microsoft Corporation started as early as 1995 in the United

be of concern to market leaders in other industries where Chinese companies are relatively weak.¹¹⁰

A final aspect of the new AML has been a matter of considerable negative comment both domestically and abroad; according to foreign observers, this final aspect is the problematic issue of enforcement regime.¹¹¹ In earlier drafts of the law, it was envisaged that a single, unified, high-profile antitrust enforcement agency would be established.¹¹² This ministerial-level body would have the necessary administrative power to enforce its antitrust decisions against both the various departments of the central and local governments and powerful SOEs.¹¹³ Unfortunately, the three main central government economic regulatory agencies disliked this proposal, each having had an existing interest in aspects of antitrust enforcement and other areas of economic regulation.¹¹⁴

MOFCOM established a unit that vetted foreign investment including foreign-related acquisition activity.¹¹⁵ The State Administration for Industry and Commerce (SAIC) had powers under the Unfair Competition Law (1993) to investigate and punish various anticompetitive activities, while the Bureaus of Commodity Prices enjoyed broad powers under the Price Law (1997) to monitor market prices, deter bid rigging, and prevent cartels in essential commodities.¹¹⁶

These three agencies did not want to give up their existing regulatory power, and they each fought to prevent other agencies from obtaining sole jurisdiction over AML enforcement.¹¹⁷ At the same time, all three were thoroughly opposed to the idea of a new high-ranking single agency taking responsibility for AML matters.¹¹⁸ The result was several years of gridlocked negotiations between the three agencies. Despite mediation by senior government ministers, the result was an unsatisfactory compromise whereby the enforcement activities under the AML were divided

States. See, e.g., Case T-201/04, *Microsoft v. Comm'n of the European Cmty.* (2007), available at (finding that Microsoft abused its dominant position in the market); Ranjit Mathoda, *Gates v. Reno: Microsoft's Antitrust Woes*, B.C. INTELL. PROP. & TECH. F. (1997) (discussing the U.S. Justice Department's complaint against Microsoft, alleging that Microsoft violated a 1995 court order forbidding it from requiring personal computer manufacturers to license other Microsoft products in order to have a license to its operating system products); see also Jay Lyman, *Microsoft Rebuffs Japanese Antitrust Inquiry*, TECHNEWSWORLD, July 13, 2004, <http://www.technewsworld.com/story/35093.html> (describing Microsoft's response to the Japan Fair Trade Commission's request that it retroactively nullify its contract provisions that limit the legal recourse of personal computer manufacturers in Japan).

110. Tanya Fong, *Microsoft introduce novel piracy defence*, ALB LEGAL NEWS, Sept. 2, 2008, <http://au.legalbusinessonline.com/news/breaking-news/29332/details.aspx>.

111. Mak, *supra* note 52.

112. H. Stephen Harris, Jr., *Legal Implications of a Rising China: The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 170-171 (2006).

113. *Id.*

114. *Id.* at 169.

115. *Id.* at 180.

116. Fa bu zheng dang jing zheng fa [Anti-Unfair Competition Law] (promulgated by the Standing Comm. Nat'l People's Cong. Gaz., Sept. 2, 1993, effective Dec. 1, 1993) 1993 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 10; Jia ge fa [Price Law] (promulgated by the Standing Comm. Nat'l People's Cong. Gaz., Dec. 29, 1997, effective May 1, 1998) 1997 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 92, http://www.ngsh.gov.cn/zcfg/xzgz/200805/20080501154915_11786.html, translated in http://www.saic.gov.cn/english/LawsRegulations/Others/200603/t20060303_55264.html.

117. See Mak, *supra* note 52 (explaining the "long-standing turf war" among the three agencies).

118. See *id.* (discussing each agency's reluctance to yield power due to interagency rivalries).

between the three existing agencies.¹¹⁹ This *modus vivendi* is suboptimal, and there is still no clarity as to how the three agencies will work together, particularly in relation to antitrust conduct that straddles the competence of more than one enforcer.¹²⁰ However, the AML does provide for an Anti-Monopoly Commission that has a broad role of overseeing competition policy and coordinating enforcement activities under the law.¹²¹

Thus, the AML contains a number of provisions that may become matters of significant concern to foreign investors in the Chinese market. When the law was passed in 2007, the Ministry of Commerce was at pains to reassure investors that the law was not discriminatory or protectionist and that China's markets were open to foreign investment to the full extent provided for under the WTO Accession agreements.¹²² The Ministry of Commerce was very anxious to ensure that foreign entrepreneurs' investment plans were not upset by the fear of discriminatory or protectionist treatment by the new AML authorities.¹²³ However, as discussed below, recent developments have reignited those concerns.

V. M&A IMPLEMENTATION REGULATIONS AND MARKET DEFINITION

The original merger regulations concerning the acquisition by foreign enterprises of domestic businesses were issued in 2003 and amended in 2006.¹²⁴ The *Regulations on Foreign Investors Merging with or Acquiring Domestic Enterprises 2006* (2006 Regulations) essentially provide a system of approval for foreign firms that acquire a substantial interest in a domestic enterprise. The 2006 Regulations deal with the acquisition of control, rather than the merger of foreign and domestic enterprises. It should be noted that special rules apply when a foreign investor acquires a substantial interest in a listed company.¹²⁵ Both the 2003 and 2006 regulations provide a notification and approval process.¹²⁶ Approval of either type of

119. Andrew McGinty & Kirstie Nicholson, *China: New Law Rolls Out*, in INT'L FIN. L. REV., THE 2008 GUIDE TO COMPETITION AND ANTITRUST, Oct. 1, 2008, available at <http://www.iflr.com/Article/2025666/China-New-law-rolls-out.html>.

120. *Id.*

121. The State Council of the central government established the Anti-Monopoly Commission, but the Commission does not have administrative or decision-making powers. Jun Wei & Kevin Bai, *China Update: State Council Introduces Regulatory and Enforcement Powers and Pre-Concentration Notification Criteria Under the New Chinese Anti-Monopoly Law*, ANTI-TRUST UPDATE 1, July 29, 2008, <http://www.amcham-china.org.cn/amcham/upload/wysiwyg/HoganHartson0807.pdf>. Although the majority of the Commission's responsibilities will be shouldered by the AML Bureau established by MOFCOM, the SAIC and NRDC both retain substantial powers. *Id.* at 2.

122. *China Reassures Foreign Investors on M&As*, XINHUA NEWS AGENCY, Aug. 2, 2007, available at <http://xxhs2.mofcom.gov.cn/aarticle/commonnews/200708/20070804952387.html>.

123. *Competition Law to be Applied Equally*, PEOPLE'S DAILY ONLINE, Aug. 4, 2008, <http://english.peopledaily.com.cn/90001/90776/90884/6466193.html>.

124. *Making Sense of the New 2006 M&A Regulations and the New 2006 Takeover Regulations: Political and Technical Regulatory Responses to Changing Market Realities*, LOVELLS CORP. BULL., Sept. 2006, at 1, available at http://www.lovells.com/NR/rdonlyres/32F55C5C-1741-4DB2-8AE5-DFE5EFBEB9F0/7712/CorporateBulletin_0609_MAandTakeoverRegulations_Re.pdf.

125. *Id.* at 381.

126. See generally *id.* at 1-16 (offering an analysis of the differences between the 2003 and 2006 regulations and discussing the changes in the latter regulation's review process).

transaction lies with MOFCOM.¹²⁷ Part V of the 2006 Regulations contains an antimonopoly examination procedure which was in place two years before the new AML merger regime came into force.¹²⁸ The 2006 regulations relating to antitrust examination were extremely limited and caused considerable confusion.¹²⁹ These Regulations also provided for a “national security review” in Article 12, a precursor to Article 31 of the AML.¹³⁰ Both the antitrust and national security review procedures were poorly defined and caused significant unease in the FDI community at the time.¹³¹ Both provisions have been amplified in the AML, which carries greater weight in the Chinese legal system because it is a national law rather than a ministerial-level regulation.¹³² Unfortunately, it is unclear as to whether the AML and its implementing regulations entirely supersede the 2006 Regulations or not.

Between the enactment of the AML in August 2007 and its implementation in August 2008, MOFCOM conducted an exercise to consult interested parties on the M&A thresholds that would trigger AML merger review once it was implemented on August 1, 2008.¹³³

In March 2008, MOFCOM issued a Comment Draft of Regulations on the Notifications of Concentration of Undertakings.¹³⁴ The Draft Regulations dealt with a number of issues necessary to implement the new AML merger regime.¹³⁵

The original Draft Regulations provided more detailed guidance on a number of important issues than the final version, but as a result of comments received from various consultants on the Draft Regulations, the final version issued on August 3,

127. *See generally id.* (outlining MOFCOM’s approval authority for both types of transactions).

128. Huang Xuhua, *China: Anti-monopoly Review*, INT’L FIN. L. REV., Apr. 2007, available at <http://www.iflr.com/Article/1977263/Anti-monopoly-review.html>.

129. McGinty & Nicholson, *supra* note 119.

130. *Making Sense of the New 2006 M&A Regulations and the New 2006 Takeover Regulations: Political and Technical Regulatory Responses to Changing Market Realities*, *supra* note 124, at 5 (“Central MOFCOM must approve the acquisition of enterprises involving ‘key industries’ (not defined), ‘elements that may affect national economic security’ (not defined) If approval is not applied for, MOFCOM, together with other relevant Chinese authorities may unwind any transaction which **has or may have** a material effect on national economic security or take other measures to eliminate the impact.”).

131. U.S. GOV’T ACCOUNTABILITY OFFICE, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES, REPORT TO THE HONORABLE RICHARD SHELBY, RANKING MEMBER, COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. SENATE 45–46 (2008), available at <http://www.gao.gov/new.items/d08320.pdf>.

132. *The Anti-Monopoly Law of the PRC—Caveat Who?*, LOVELLS CORP. BULL., Sept. 2007, at 3, available at http://www.lovells.com/NR/rdonlyres/FED77DFC-E173-4024-A6FC-06DAC6A66070/0/CorporateBulletin_0709_AntiMonopolyLaw_Bulletinonly.pdf.

133. *See* ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (OECD), INVESTMENT FOR DEVELOPMENT, INVESTMENT POLICY COOPERATION WITH NON-OECD ECONOMIES, ANNUAL REPORT 2007, at 99 (2007), available at <http://www.oecd.org/dataoecd/18/57/39715895.pdf> (describing China’s agreement to provide a reasonable period of time for comment to relevant authorities prior to the enactment of laws that will have an effect on international trade).

134. Guan yu jing ying zhe ji zhong shen bao biao zhun de gui ding (zheng qiu yi jian gao) [Regulations on Notifications of Concentrations of Undertakings (Draft for Comments)] (issued by the Legis. Aff. Off. St. Council, Mar. 27, 2008) LEGIS. AFF. OFF. ST. COUNCIL (P.R.C.), available at http://www.gov.cn/gzdt/2008-03/27/content_930438.htm; *see also* Peter J. Wang & Yizhe Zhang, *China Publishes Draft Merger Review Regulations*, METROPOLITAN CORP. COUNS., May 1, 2008, <http://www.metrocorpocounsel.com/current.php?artType=view&artMonth=July&artYear=2009&EntryNo=8247> (last visited Sept. 17, 2009).

135. *Id.*

2008 was extremely limited.¹³⁶ Indeed, there are only three operative sections. They are:

- (1) A definition of a “concentration of businesses.” This includes the merger of business operations, the acquisition of control by one business operator of another by way of acquisition of assets, or the acquisition of control by a business operator who is able to exercise decisive influence by way of contract or other means (Article 2);
- (2) The requirement for filing an advance notification of a contemplated concentration applies when an aggregate global turnover of all the parties to a concentration in the preceding financial year exceeds RMB 10 billion, with at least two of the operators having an aggregate turnover in China in the preceding financial year of at least RMB 400 million, or when business operators or parties to a concentration in China in the preceding year have a turnover that exceeds RMB 2 billion, and at least two of the parties must have a turnover in China in the preceding year of at least RMB 400 billion (Article 3); and
- (3) Where a concentration does not satisfy any of the criteria, but it nevertheless has the effect of restricting or eliminating competition, the antimonopoly authorities may nevertheless conduct an investigation into such a transaction (Article 4).

These provisions are substantially deficient in several respects. For example, they do not define what constitutes a change of control or the exercise of decisive influence, nor do they provide any guidance regarding the necessary filing procedures for clearance under the AML. Moreover, they address neither how turnover is to be calculated,¹³⁷ nor important issues such as the confidentiality of information provided by the parties to the authorities.¹³⁸

The “catch-all” provision is also highly contentious, because it allows the authorities to investigate mergers even where the thresholds are not met.¹³⁹ One improvement on the draft was the deletion of a market-share threshold. The

136. Guan yu jing ying zhe ji zhong shen bao biao zhun de gui ding [Regulations on Notifications of Concentrations of Undertakings] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 1, 2008, effective Aug. 1, 2008) 2008 STANDING COMM. NAT'L PEOPLE'S CONG. 529 (P.R.C); *see also* Wei & Bai, *supra* note 121 (providing a summary of the final version).

137. Mei guo lü shi xie hui fan long duan fa bu yi ji guo ji fa bu you guan “guo wu yuan guan yu jing ying zhe ji zhong shen bao de gui ding (zheng qiu yi jian gao)” de yi jian [AMERICAN BAR ASSOCIATION, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION'S, SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON ‘DRAFT COMMENTS OF THE STATE COUNCIL REGULATIONS ON NOTIFICATION OF CONCENTRATIONS OF UNDERTAKINGS’], 3–4, 11–12, Apr. 11, 2008, *available at* <http://www.abanet.org/intlaw/leadership/policy/Comments%20-%20ABA%20prcsmernotificationregdraftfinal%20SAL%20SIL%204%2008.pdf> (discussing both the calculation of turnover and the issues of confidentiality).

138. *Id.* at 8–9.

139. Guan yu jing ying zhe ji zhong shen bao biao zhun de gui ding [Regulations on Notification Thresholds for Concentrations of Undertakings] (promulgated by the St. Council, Aug. 3, 2008, effective on Aug. 3, 2008) 2008 ST. COUNCIL 529 (P.R.C.), *available at* http://www.mallesons.com/publications/2008/Aug/The_Order_of_the_State_Council.pdf (last visited Oct. 13, 2009); *see also* Peter J. Wang, H. Stephen Harris Jr. & Yizhe Zhang, *New Merger Notification Thresholds Under the AML Published*, JONES DAY COMMENTARY, Aug. 2008, at 2, *available at* <http://www.jonesday.com/files/Publication/2608d290-7dba-4f23-b871-d95dc69dd3d3/Presentation/PublicationAttachment/35842994-6ab2-44ee-b3a7-dec7261cf421/New%20Merger.pdf> (characterizing as “troubling” MOFCOM's ability to initiate investigations based on evidence of restricting or eliminating competition).

original market-share test was severely criticized for being unsuitable given the considerable uncertainties that surround the definition of “relevant product markets.”¹⁴⁰ This uncertainty is especially relevant to cases involving parties engaged in a range of commercial activities and in a number of different and overlapping product markets. The change was welcomed by most commentators, subject to what has already been mentioned in relation to the calculation of turnover.¹⁴¹

In January 2009, MOFCOM issued guidance relating to M&A activity:¹⁴²

- (a) Guidance for Notification of Concentrations of Undertakings (the Procedural Guidance);
- (b) Guidance for Notification Documents and Materials for Concentration of Undertakings (the Information Requirement Guidance);
- (c) A flowchart which outlines the merger control review process by MOFCOM;
- (d) Working Guidance for Notification Review (the Working Guidance), which is mostly a reiteration of the relevant AML provisions.

These guidelines fill a number of significant gaps in the procedural and substantive requirements needed to establish a workable merger regime. The

140. Jonathan Gowdy & Bradley S. Lui, *China Takes First Steps in Implementing New Anti-Monopoly Law by Revising Pre-Merger Notification Filing Thresholds and Dividing Enforcement Responsibility*, MORRISON & FOERSTER LEGAL UPDATES & NEWS, Aug. 2008, <http://www.mofo.com/news/updates/files/14290.html> (last visited Sept. 17, 2009) (contending that “the new regulations have eliminated the market share thresholds, which were inherently subjective and sometimes difficult and time-consuming to analyze”). In addition, article five of the 2006 M&A Regulations provides indications of the factors that may be taken into account while defining “relevant market” under “product” or “geographical.” For product market, product characteristics, customer demands and preferences in relation to the product, and the degree of substitutability of the product are relevant factors. To define a “geographical market,” the characteristics of the industry, the nature of the product in the industry, the support sectors such as transport and insurance and the patterns of consumption may be relevant factors.

141. “*Fan long duan fa*” *di yi xiang pei tao fa gui jing jian chu tai* [*The First Supporting Regulation of Anti-Monopoly Law Introduced*], ORIENTAL MORNING POST (P.R.C.), Aug. 5, 2008, available at <http://it.chinabyte.com/52/8248052.shtml> (explaining that “many experts” said there was an urgent need for the relevant implementation details and operational norms for the “broad-brush” Anti-Monopoly Law and that the Regulations on Notification Thresholds for Concentrations of Undertakings will be important to achieving this end).

142. Freshfields Bruckhaus Deringer LLP, *China’s MOFCOM Publishes First Round of Merger Control Guidance*, Jan. 2009, at 1, available at <http://www.freshfields.com/publications/pdfs/2009/jan09/24964.pdf> (naming the four sets of guidelines as listed. The following are citations to these documents with their respective names: Guan yu jing ying zhe ji zhong shen bao de zhi dao yi jian [Guidance Opinion on Concentrations Notifications] (issued by Anti-Monopoly Bureau MOFCOM, Jan. 5, 2009) ANTI-MONOPOLY BUREAU MOFCOM (P.R.C.), available at <http://fldj.mofcom.gov.cn/aarticle/xgzx/200901/20090105993824.html> (last visited Oct. 13, 2009); Guan yu jing ying zhe ji zhong shen bao wen jian zi liao de zhi dao yi jian [Guidance Opinion on the Documents and Materials Required for Concentrations of Undertakings] (issued by Anti-Monopoly Bureau MOFCOM, Jan. 5, 2009) ANTI-MONOPOLY BUREAU MOFCOM (P.R.C.), available at <http://fldj.mofcom.gov.cn/aarticle/xgzx/200901/20090105993841.html> (last visited Oct. 13, 2009); Jing ying zhe ji zhong fan long duan shen cha liu chen tu [Flow Chart for Anti-Monopoly Investigation into Concentrations of Undertakings] (issued by Anti-Monopoly Bureau MOFCOM, Jan. 1, 2009) ANTI-MONOPOLY BUREAU MOFCOM (P.R.C.), available at <http://fldj.mofcom.gov.cn/aarticle/xgzx/200901/20090105993080.html> (last visited Oct. 13, 2009); Jing ying zhe ji zhong fan long duan shen cha ban shi zhi nan [Guidelines for Anti-Monopoly Investigation into Concentrations of Undertakings] (issued by Anti-Monopoly Bureau MOFCOM, Jan. 1, 2009) ANTI-MONOPOLY BUREAU MOFCOM (P.R.C.) available at <http://fldj.mofcom.gov.cn/aarticle/xgzx/200902/20090206034057.html> (last visited Oct. 13, 2009)).

guidelines formalize notification procedures, increase the quantity and quality of information required from applicants, and provide that certain non-competition factors may be considered as part of the merger review process.¹⁴³ The effect of these requirements may be to prolong the review process and to increase the complexity of compliance. The pre-notification discussion process is also formalized in the guidance.¹⁴⁴ This formalization may frontload the whole process and allow MOFCOM to decide whether or not there are objectionable aspects to the proposed transaction,¹⁴⁵ but it may also increase compliance costs in cases where no substantive review is necessary.

The guidelines also provide for the deposit of documents at a specific registration center, and it appears that the official commencement of the review process is only after officials have made a preliminary review of the submitted documentation.¹⁴⁶ However, no timeline is provided for the period between the submission of documents and the official notification of the review's commencement.¹⁴⁷ The new Information Requirement Guidance has significantly increased both the quality and quantity of information that an applicant must provide. It appears that MOFCOM may require information from inside or outside China that is not relevant to the transaction under consideration.¹⁴⁸ MOFCOM also appears to be able to require the submission of a wide range of expert reports, and this could substantially increase the costs of the merger notification process.¹⁴⁹

A further difficulty arises from the fact that the Information Requirement Guidance now enshrines the principle that non-competition-related factors also have to be addressed. The Notification form provides for the inclusion of opinions of parties who are not involved in the transaction.¹⁵⁰ These may include government entities, industrial associations, and the general public. Further, regardless of whether or not the authorities may have a legitimate competition interest in these matters, the parties are obliged to disclose solvency issues, any matters that concern national security, industrial policy, the utilization of state-owned assets, and the acquisition of famous Chinese trademarks.¹⁵¹

While these guidelines are undoubtedly necessary, they appear to indicate that MOFCOM is not only concerned with antitrust considerations when deciding whether to approve a qualifying merger, but also a range of extraneous factors that

143. Freshfields Bruckhaus Deringer LLP, *supra* note 142, at 1.

144. *Id.* at 2.

145. *See id.* (indicating that the formal pre-notification process will help MOFCOM evaluate the transaction).

146. *See id.* (stating the case team at the registration center for submission of notifications will not confirm the start of the review period until after reviewing the filing).

147. Hannah C. L. Ha & Gerry P. O'Brien, *China Published New Guidance on Its Merger Filing Regime*, MAYER BROWN LLP, Jan. 12, 2009, <http://www.mayerbrown.com/chinaantimonopolylaw/article.asp?id=6008&nid=11757> (last visited Sept. 17, 2009).

148. *See* Freshfields Bruckhaus Deringer LLP, *supra* note 142, at 2 (acknowledging that one of the additional information burdens that will “increase the time and effort” to prepare a notification is the requirement to provide information regarding “other markets outside the relevant markets”).

149. *Id.*

150. *Id.* at 3.

151. This obligation is a reiteration of Article 12 of the 2006 M&A Regulations. *See The Anti-Monopoly Law of The PRC—Caveat Who?*, *supra* note 132, at 9 (highlighting the fact that the AML and M&A requirements are similar for State review of a foreign investor acquiring actual control over a key industry, famous Chinese trademark or some element that affects the State's economic security or national security).

could loosely be described as “factors of public interest.”¹⁵² This is in direct opposition to the direction toward which European and other developed merger control systems have been gravitating over the last decade.¹⁵³ Most developed control regimes now focus squarely on the economic effects of the transaction and the resulting effect on the creation of market power.¹⁵⁴ Unfortunately, China appears to be deviating significantly from the best international practice in this respect.

Despite these deficiencies, the new merger guidance provides greater transparency in relation to the information requirements and clarifies various practical matters that have concerned practitioners. Also, the standardization of the application processing may improve the efficiency with which applications are assessed. Unfortunately, some matters remain unaddressed, including the calculation of turnover and the question of which entities are to be taken into account when making this calculation.¹⁵⁵ Some of the requirements, such as those relating to translation and notarization, are overly complex and will unfortunately involve considerable extra cost to the parties concerned.¹⁵⁶

MOFCOM appears to be fully aware of many of these deficiencies, and in January 2009 the Ministry issued a Draft Guideline on the definition of “relevant markets.”¹⁵⁷ This concept is vital to both merger review and to cases involving the abuse of dominant market position. The Draft Guideline is similar to the EC Competition law in that it adopts a broadly economic analytical approach.¹⁵⁸ The

152. Freshfields Bruckhaus Deringer LLP, *supra* note 142, at 3 (stating that the objectives of the MOFCOM in conducting a merger include considering the “public interest” and “the healthy development of the socialist market economy”).

153. The tests used by the major antitrust agencies in the United Kingdom, United States, EU, and Canada in deciding merger notifications are predominantly economic. *See, e.g.,* Maurizio Conti, *EU Merger Analysis*, COMPETITION LAW INSIGHT, May 9, 2006, at 7, available at <http://www.eer.co.uk/download/2006%20ema.pdf> (reporting that the EU and United States have increasingly relied on merger simulation models in the last decade to test the effects of a merger on market outcomes).

154. *See id.* at 7–8 (suggesting the merger control systems of the EU and United States rely on merger simulation models for econometric analysis of merger consequences). In the United Kingdom, the Enterprise Act 2002 largely removed political discretion in the approval of qualifying mergers but the current economic crisis has potentially undermined this resolve to place competition concerns at the heart of merger control. *See* Ian S. Forrester & Stefan Mahoney, *Exceptional Approval of Major Mergers: London and Brussels Compared*, WHITE & CASE, 2009, at 2–3 (stating that the United Kingdom has long renounced political intervention in mergers; however, the government minister recently intervened in a merger due to concerns about the stability of the U.K. financial system), available at http://www.whitecase.com/files/Publication/a8c25f8f-4ae5-46fd-98ca-98e7a90a46e1/Presentation/PublicationAttachment/542d2d77-4fc0-4e0f-8e5b-994b3e70762b/artilce_Exceptional_Approval_of_Major_Mergers_London_and_Brussels.pdf.

155. Gowdy & Lui, *supra* note 140.

156. *See The Anti-Monopoly Law of The PRC—Caveat Who?*, *supra* note 132, at 11 (considering the concerns and potential difficulties for some parties due to omissions and unclear provisions in the AML).

157. Guan yu xiang guan shi chang jie ding de zhi nan (cao an) [Guidelines for the Definition of Relevant Market (Draft)] (published for public consultation by MOFCOM, Jan. 5, 2009) MOFCOM (P.R.C.), available at <http://fldj.mofcom.gov.cn/aarticle/zcfb/200901/20090105993492.html> [hereinafter The Draft Guidelines for the Definition of Relevant Markets].

158. *See* Herbert Smith, *China*, ASIA COMPETITION L. E-BULLE., Feb. 2009, <http://www.herbertsmith.com/NR/rdonlyres/DC896EE3-0F72-47F3-82FF55E64C8FE52C/9754/02NewAMLrulesGJJ.htm> (noting that the guidelines adopt an economic analytical approach similar to the EC competition law).

American Bar Association's Antitrust Section has produced a substantial commentary on the draft provisions.¹⁵⁹ This guideline, while showing some technical deficiencies, is to be welcomed because MOFCOM appears to have accepted the case for internationally agreed-upon norms when undertaking market analysis.¹⁶⁰ This is clearly a hopeful sign that the Chinese authorities will adopt competition-analysis techniques analogous to those used in mature jurisdictions and will focus on the protection of competition rather than on other extraneous factors.¹⁶¹

In addition to this consultation, MOFCOM has also published four other Draft Regulations which concern: 1) the investigation of *unnotified mergers*, 2) the collection of *evidence* in relation to mergers which fall below the merger notification threshold but might still threaten to eliminate or distort competition, 3) further aspects of the *notification* process, which include a non-exhaustive list of definitions as to what is meant by obtaining "control" of another undertaking,¹⁶² and 4) further aspects of the *examination* process not covered under the current merger review provisions.¹⁶³

Some of the draft provisions may be overbroad because they may catch a number of joint ventures that do not impair competition in relevant markets.¹⁶⁴ Nonetheless, most of the draft measures should be welcomed because they will help complete the current regime. They also include some basic rules for turnover calculations and a new threshold test for joint ventures to qualify as a "merger of undertakings."¹⁶⁵ Other issues considered include the withdrawal of a merger notification, the ability of MOFCOM to convene hearings on notified mergers, the imposition on MOFCOM to provide a reasoned statement of objections to notifying parties, and the right of parties to reply to those concerns before a final decision is reached.¹⁶⁶ Finally, MOFCOM is also given power to propose restrictive conditions or modifications to the notified merger which may then allow the transaction to proceed should the parties be prepared to accept these stipulations.¹⁶⁷

It is clear that MOFCOM's antimonopoly unit is now becoming more confident in addressing the large number of outstanding issues that the AML left unaddressed.¹⁶⁸ MOFCOM also appears to be seeking to construct a merger control

159. AMERICAN BAR ASSOCIATION, *supra* note 137.

160. See The Draft Guidelines for the Definition of Relevant Markets, *supra* note 157 (using familiar tests and measurements to define relevant markets).

161. See Wang, *supra* note 50, at 7 (analyzing highlights, challenges, and future of China's new Anti-Monopoly Law).

162. Such control may be obtained through the acquisition of 50% or more of the shares of the target company, or if it falls below that threshold, through the ability of the acquirer to make decisions on key operational matters, which include the financial budget and business sales. Smith, *supra* note 158, at 4.

163. *Id.*

164. *Id.* at 3.

165. *Id.*

166. *Id.*

167. *Id.*; see also McDermott, Will & Emery, *China's MOFCOM Issues Additional Draft Merger Review Rules for Public Comments*, Feb. 2, 2009, http://www.mwe.com/index.cfm/fuseaction/publications.nldetail/object_id/af95ebde-bbd2-4bdc-8494-3de08627ca11.cfm (last visited Oct. 22, 2009).

168. See Ha & O'Brien, *supra* note 147 (indicating that China's Anti-Monopoly Enforcement Authorities are ramping up their enforcement activities regarding the AML). See also Sheung & Wei, *supra* note 68 (explaining that developments following the enactment of the AML indicate that anti-monopoly awareness is growing); David Pilling, *Will China's Coke Moment Spark Retaliation?*, FTCHINESE.COM, http://www.ftchinese.com/story_print.php?lang=en&storyid=001025498 (last visited

system that is largely in line with international practice, though with a number of substantive and procedural deviations.¹⁶⁹ This incongruity may be explained by the unfamiliarity of the mainland authorities with the in-depth merger review that is practiced in developed economies.¹⁷⁰ It may also be explained by the particular nature of the Chinese legal and administrative system or by the influence of particular Chinese political circumstances.¹⁷¹ It is likely that all of these factors contribute to the unique characteristics of the Chinese system once it is fully functional. It remains uncertain whether these idiosyncrasies will prove to be beneficial or act as a barrier to increased foreign investment in the Chinese domestic market. The next section of this paper will briefly consider the few cases that have been processed under the AML to determine whether they provide any guidance as to how future foreign investment in China will be treated.

VI. EARLY MERGER CASES REVIEWED UNDER THE AML

Two substantial cases have been notified to MOFCOM since the AML came into force. One case relates to an international merger that had substantial but not vital economic links to China, and the second case relates to the acquisition of a well-known Chinese entity by Coca-Cola.

In Anheuser-Busch–InBev (InBev), InBev NV/SA sought to acquire the whole of the issued capital of Anheuser Busch, Inc. This transaction was notified to MOFCOM because Anheuser-Busch held a 27% share in Tsing Tao Brewery Co. Ltd. and InBev held a 28.56% share in Zhu Jiang Brewery, both substantial players in the Chinese beer market.¹⁷² Clearly, this major international transaction had more competition-related concerns in jurisdictions other than China. Nevertheless, this case was deemed important because it was the first case decided under the new AML provisions.¹⁷³ The decision noted that while the transaction would give the merged entity a significant share of the beer market, it did not pose a substantial anticompetitive threat.¹⁷⁴

However, MOFCOM required InBev to obtain its consent before increasing any equity stakes in either Tsing Tao or Zhu Jiang, or attempting to acquire any further stake in two other substantial domestic brewers.¹⁷⁵ InBev was also required

Sept. 17, 2009) (discussing China's increased confidence regarding the United States and the possible effects on competition law).

169. Freshfields Bruckhaus Deringer LLP, *supra* note 142, at 2.

170. *Id.*

171. See MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN* 95–152 (Cambridge University Press 2005) (providing an overview of legal, administrative, and political issues influencing China's competition policy).

172. Mayer Brown LLP, *Lessons to be Learned from China's Latest High Profile Merger Review*, MAYER BROWN CLIENT ALERT, Nov. 20, 2008, at 1, <http://www.mayerbrown.com/chinaantimonopolylaw/article.asp?id=5861&nid=11757> (last visited Sept 17, 2009).

173. Practitioners have been focused on the Anheuser-InBev merger as possibly giving clues as to how MOFCOM will deal with future transactions. *Id.* at 4.

174. W. Stephen Smith, Tej Srimushnam, & Xiaohu Ma, *China: Inbev-Anheuser-Busch: China's First Public Merger Decision Under the AML*, MORRISON & FOERESTER LLP, Dec. 4, 2008, at 1, <http://www.mondaq.com/article.asp?articleid=71064> (last visited Sept. 17, 2009).

175. *Id.* at 2 (forbidding purchase of stake in two of the largest domestic brewers in China—Beijing Yanjing Brewery and China Resources Snow Breweries—without MOFCOM's consent).

to inform MOFCOM of any substantial change in its controlling shareholders.¹⁷⁶ The imposition of “prior notification,” where no direct competition concerns arise, appears to deviate from international practice.¹⁷⁷ It also appears to be a precautionary measure to prevent even the possibility of further concentration in China’s beer market. This preemptive approach appears to show a concern by the regulator of a substantial increase in foreign participation in the beer market rather than an overt concern for purely adverse competition effects. This decision was not fully reasoned, and appears to be, to some extent, a policy decision to set the parameters of acceptable foreign expansion in the beer market through the acquisition of domestic enterprises.¹⁷⁸

The second case concerns the acquisition by Coca Cola, Inc. of Huiyuan Juice Group.¹⁷⁹ This acquisition is part of Coca Cola’s global strategy to diversify its business to include segments of the beverage market beyond carbonated drinks.¹⁸⁰ The combined entity would apparently have close to a 37 percent share of China’s fruit-juice market.¹⁸¹ Importantly, this would not increase Coca Cola’s share in the carbonated beverage market, as Huiyuan does not produce carbonated beverages. In short, this acquisition would not appear to raise substantial competition concerns in relation to over-concentration in the domestic fruit-juice market.¹⁸² Interestingly, Huiyuan is a private company and has never been state-owned; so any problem concerning “national security” or “public interests” would appear to be unlikely.¹⁸³

However, there has been significant public sensitivity about an American MNC purchasing an iconic domestic brand that is a market leader in China.¹⁸⁴ MOFCOM began a stage-two merger review in December 2008 and the final decision was made on March 18, 2009.¹⁸⁵ This decision was keenly awaited by both the antitrust legal community and foreign investors because it was an indication of the Chinese authorities’ attitude toward substantial foreign-related acquisitions.¹⁸⁶

176. *Id.*

177. *See id.* at 1 (noting the difference between the practices of MOFCOM and the U.S. Federal Trade Commission).

178. H. Stephen Harris Jr., Peter J. Wang, & Yizhe Zhang, *China’s Antitrust Agency Provides Insights into the Merger Review Process under the New Anti-Monopoly Law*, JONES DAY COMMENTARY, Dec. 2008, http://www.jonesday.com/pubs/pubs_detail.aspx?pubID=S5678 (last visited Sept. 17, 2009).

179. Zhou Yan, *Coca-Cola Seeks Anti-Trust Nod for Huiyuan Deal*, CHINA DAILY, Dec. 3, 2008, at 14, available at http://www.chinadaily.com.cn/china/2008-12/03/content_7264252.htm.

180. China Today.com, *Coca-Cola Deal Major Test for China’s New Anti-Monopoly Law*, Sept. 4, 2008, <http://www.chinatoday.com/law/china.law.case.01.htm> (last visited Sept. 17, 2009).

181. Kwong Man-ki, *Huiyuan Shares Surge 164% on Takeover Offer*, CHINA DAILY (HONG KONG ED.), Sept. 4, 2008, at 3, available at http://www.chinadaily.com.cn/hkedition/2008-09/04/content_6996088.htm.

182. Lisha Zhou & Takashi Toyokawa, *China Huiyuan Juice: Coca-Cola’s Bid may be Subject to Approval by State*, FIN. TIMES, Feb. 17, 2009, available at <http://www.ft.com/cms/s/2/311e7924-fcf5-11dd-a103-000077b07658.html>.

183. *Id.* Note that such issues did not arise in the decision.

184. Nie Peng, *Coca-Cola’s Huiyuan Offer Sparks Concern*, CHINA DAILY, Sept. 4, 2008, available at http://www.chinadaily.com.cn/bizchina/2008-09/04/content_6999688.htm.

185. *See, e.g.*, Sundeep Tucker et al., *China Blocks Coca-Cola bid for Huiyuan*, FIN. TIMES, Mar. 18, 2009, available at <http://www.ft.com/cms/s/0/5c645830-1391-11de-9e32-0000779fd2ac.html>; Lester Ross et al., *Coca-Cola/Huiyuan: China Prohibits Its First Merger Under the AML*, WILMER HALE, Mar. 20, 2009, available at <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publication=8849>.

186. Sheung & Wei, *supra* note 68.

In a surprise decision, MOFCOM prohibited the transaction.¹⁸⁷ The text of the ruling contained just 1,481 Chinese characters, and most of the decision consists of a description of the procedure MOFCOM used in considering the application.¹⁸⁸ Analytical detail of the antitrust review is scant and the decision swiftly arrives at a conclusion to prohibit the merger. This structure is not unusual in Chinese administrative practice, but this approach provides little interpretative value in relation to the merger review process or the methodology used by MOFCOM to evaluate the validity of the proposed transaction.¹⁸⁹

The decision described the procedural history of the notification and the investigative process MOFCOM undertook to establish relevant facts. Following consideration of the information provided by the parties, MOFCOM sought comment from a wide variety of stakeholders, including other government departments, industry associations, competitor enterprises, upstream fruit producers and downstream beverage distributors, as well as other “legal, economic and agricultural experts.”¹⁹⁰

MOFCOM went on to state that it considered not only written submissions but also the outcomes of various seminars, onsite investigations, hearings, and personal interviews.¹⁹¹ It did not detail the exact nature of these investigations, the weight given to such information, how confidential data was used or protected, or whether the parties were given the opportunity to respond or to challenge factual assertions made by the various shareholders.¹⁹²

MOFCOM stated that its investigation concentrated on several issues in deciding the parties’ relevant market share and market power, namely the degree of market concentration, the impact of the merger on market access and technological progress, the effect of the concentration on consumers, competition and national economic development, and the effect of the Hui Yuan juice brand on the fruit-juice beverage market.¹⁹³

In the decision, MOFCOM identified three negative effects on competition:¹⁹⁴

- (1) Coca-Cola’s dominance in the carbonated drinks market would be “carried over” into the fruit-juice market by the acquisition.
- (2) The Hui Yuan juice brand-name was a key factor influencing competition in the juice market and that after the concentration was complete, Coca-Cola would control two of China’s most well-known brands. Given Coca-Cola’s dominant position in the carbonated-drinks market and the carry-over effect, the merger would raise barriers to entry for potential competitors.

187. Shang wu bu jui ke kou ke le gong si shou gou zhong guo hui yuan gong si an fan long duan shen cha zuo chu cai jue [Ministry of Commerce makes a decision regarding the anti-monopoly investigation of Coca-Cola’s acquisition of Hui Yuan], Announcement of Ministry of Commerce of the People’s Republic of China No.22, Mar. 18, 2009. Effective Mar. 18, 2009 para. VI, <http://www.mofcom.gov.cn/aarticle/ae/ai/200903/20090306108388.html>, translated in <http://www.mwechinalaw.com/documents/mofcom09-22.htm>.

188. *Id.*

189. *Id.* paras. II–IV.

190. *Id.* para. III.

191. *Id.* para. II.

192. *Id.* para. VI.

193. Announcement of Ministry of Commerce of the People’s Republic of China No.22, *supra* note 187, para. II.

194. *Id.* para. IV.

(3) Consequently, the concentration would squeeze out small and medium-sized domestic competitors in the juice market, adversely affecting competition and preventing the sound development of the fruit-juice market.

The notice continues by stating that despite negotiations, satisfactory undertaking by the parties to address these concerns had not been achieved.¹⁹⁵ Consequently, MOFCOM found that in light of the adverse effects, the transaction would eliminate or restrict competition in the Chinese fruit-juice beverage market¹⁹⁶ and would adversely effect the sound development of the fruit-juice industry.¹⁹⁷

Finally, because the parties had not shown that the positive effects of the transaction outweighed the negative or that it was in the public interest, the transaction was prohibited.¹⁹⁸

The decision certainly helps to explain how MOFCOM will process future applications under the AML merger review provisions, but it does not provide a great deal of information as to how MOFCOM analyzes factual data, how international antitrust analytical tools are used (if at all), and how much weight is given to the competitors' opposition (not based on antitrust concerns). The importance of the national industrial policy agenda and political concerns surrounding the acquisition of famous domestic brands and trademarks by foreign investors are entirely omitted from the decision, though they are thought to have played a significant role in the actual outcome.¹⁹⁹

The decision does not specify how the "relevant" market was identified or even whether it was the "fruit-juice beverage" market, or a combined "fruit-juice and carbonated drinks market" that was held to be germane, although it seems as if MOFCOM did consider them as separate.²⁰⁰ No detail is given about MOFCOM's assessment of substitutability between product markets, or how the carry-over effect of dominance in one market was to operate if the transaction had proceeded.²⁰¹ However, a MOFCOM press release suggested that the major concern was that Coca-Cola would tie sales of carbonated drinks with those of fruit-juice so as to increase market share and erect a significant barrier to entry by controlling significant distribution channels.²⁰²

195. *Id.* para. V.

196. *Id.* para. VI.

197. *Id.* para. IV.

198. *Id.* (summarizing why the deal was rejected).

199. See, e.g., Eric Ng, Jasmine Wang, & Martin Zhou., *Rejection Sets Legal Precedent for Future Mergers*, S. CHINA MORNING POST, Mar. 19, 2009, (discussing the ministry's willingness "to block deals that it believes creates competitive problems").

200. There was constant comparison between the "market of carbonated soft drinks" and the "market of fruit-juice drinks" in the Announcement of Ministry of Commerce of the People's Republic of China No.22, *supra* note 187. However, in the subsequent MOFCOM press release the distinction was blurred, as both markets were treated as "non-spirit soft drinks." See *Ministry of Commerce Discloses Details of Failed Coca-Cola Deal*, PEOPLE'S DAILY ONLINE, Mar. 25, 2009, <http://english.peopledaily.com.cn/90001/90776/90884/6622297.html> (last visited Sept. 17, 2009) (explaining how the soft drink and fruit-juice markets can be tied together).

201. However, MOFCOM spokesperson Mr. Yao Jian made a statement that since the markets are so "closely intertwined," Coca-Cola could have used its position to "transfer its dominance" from the "carbonated beverage market to the juice beverage market." Chris Buckley & Susan Fenton, *China Says Coca-Cola Could Have Abused Juice Deal*, REUTERS, Mar. 25, 2009, available at <http://www.reuters.com/article/innovationNews/idUSTRE52O0JH20090325>.

202. Shang wu bu xin wen fa yan ren yao jian jiu ke kou ke le gong si shou gou hui yuan gong se fan long duan shen cha jue ding da ji zhe wen [Ministry of Commerce spokesperson Yao Jian answers

The decision is a disappointment on several levels. Lack of analytical detail makes it of little use in guiding future applicants as to how MOFCOM will assess future transactions on their substantive merits. The theory of harm adopted is controversial, and MOFCOM neither explains how such harm would work in this particular case, nor does it consider countervailing issues such as buyer-power concerning sales to large retail chains as distinct forms of supplier power compared with independent retailers.²⁰³ Nor does MOFCOM analyze the ability of existing or potential competitors to restrain the potentially merged enterprises, should it attempt to pursue such a market strategy.²⁰⁴

Protection for small and medium-sized domestic competitors does appear to have been an objective of MOFCOM as does “industrial policy” considerations, neither of which conventionally form a legitimate basis to prohibit a merger in most jurisdictions.²⁰⁵

Concerns over foreign growth in the domestic market or foreign acquisition of an iconic domestic brand name do not form part of the rationale of the decision.²⁰⁶ But, given the political furor over the transaction, it would be surprising if officials did not have these matters in mind when considering their decision.²⁰⁷ In fact, it has been speculated that the AML-MOFCOM Unit may well have been required to follow instructions from more senior officials, given the politically-sensitive nature of the transactions and the potential effect it would have on foreign investor confidence.²⁰⁸

The foreign reaction to the prohibition has been universally negative with many commentators opining that this decision sends a very negative signal to foreign investors.²⁰⁹ It has been suggested that if there had been a genuine antitrust concern with respect to tying or bundling, these could have been adequately addressed through behavioral undertakings by Coca-Cola to not engage in such practices and that substantial antitrust fines under the above provisions of the AML could have

reporters' questions regarding the decision on the anti-monopoly investigation of Coca-Cola's acquisition of Hui Yuan], March, 25, 2009, official MOFCOM press release, *available at* <http://www.mofcom.gov.cn/aarticle/zhengcejid/bj/200903/20090306124140.html?1283873521=1359828982>; *see also* *Ministry of Commerce Discloses Details of Failed Coca-Cola Deal*, *supra* note 200.

203. Announcement of Ministry of Commerce of the People's Republic of China No.22, *supra* note 187; *see also* Freshfields Bruckhaus Deringer LLP, *China's MOFCOM Prohibits Coca-Cola's Acquisition of Huiyuan*, Mar. 2009 (reviewing the problems with the theories of harm cited by MOFCOM), *available at* <http://www.freshfields.com/publications/pdfs/2009/mar09/25486.pdf>.

204. Announcement of Ministry of Commerce of the People's Republic of China No.22, *supra* note 187; *China's MOFCOM Prohibits Coca-Cola's Acquisition of Huiyuan*, *supra* note 203.

205. *See China's MOFCOM Prohibits Coca-Cola's Acquisition of Huiyuan*, *supra* note 203 (citing MOFCOM's antitrust concerns in blocking the merger).

206. This was a repeated assertion in the subsequent press release. Buckley & Fenton, *supra* note 201; *see also* *China Defends Ruling on Huiyuan Deal*, WALL ST. J., Mar. 26, 2009 (recounting China's official reasons for rejecting Coca-Cola's bid).

207. *See Squeezed Out: China Indicates the Real Targets of its Anti-Monopoly Law: Outsiders*, ECONOMIST (London), Mar. 18, 2009 (discussing how the anti-monopoly law is serving as an impediment to genuine competition).

208. *See id.* (speculating how pressure from the government could be the cause of foreign companies liquidating their stakes in Chinese companies).

209. *See id.* (positing that the anti-monopoly law targets foreign companies).

adequately deterred such anticompetitive conduct.²¹⁰ Commentators have also suggested that the decision is really a thinly disguised form of protectionism over Chinese brand-names and producers.²¹¹ Some also commented that this decision may provide ammunition to governments worldwide who want to prevent or restrict Chinese (generally government-financed SOE) investments in foreign markets, especially with regard to commodity suppliers; the Chinalco investment in Rio Tinto mining operations in Australia was specifically mentioned.²¹²

VII. CONCLUSION

This paper has sought to explain China's system for foreign direct investment and its interaction with the nascent merger control under the AML, which undoubtedly has a number of unique features. These include the requirements for the establishment of special legal entities to undertake foreign investment activities in China, the plethora of administrative requirements with which undertakings must comply, and the increasing number of regulatory interventions in relation to large scale merger or acquisition activity. The antitrust review system and the opaque national security review mechanism all complicate the picture.

China's allure to foreign investors as potentially the world's largest market means that China's regulatory climate and decisions made by the Chinese authorities are amongst the most significant globally.²¹³ The traditional opacity of decision making and the imprecision of many legal provisions in China have traditionally caused substantial concerns amongst legal professionals and their foreign-investor clients. Notwithstanding this institutional and legislative framework, FDI in China has increased enormously over the last 30 years. The current economic crisis may continue to reduce foreign investment flows for several years.²¹⁴ However, once the global economy recovers, it is very likely that the scale of FDI will once again accelerate.

The ongoing global economic crisis, with its effect on both the international trade in goods and services and FDI, adds uncertainty to even the most tentative of conclusions. The crisis has severely damaged China's export markets (particularly the United States and Europe); but, this sudden slump in exports may serve as a catalyst to transform China's export-reliant economy, which is substantially

210. See, e.g., David Pilling, *Will China's Coke Moment Spark Retaliation?*, FIN. TIMES COMMENT, Mar. 26, 2009, available at <http://www.ftchinese.com/story.php?storyid=001025498&lang=en> (speculating as to Beijing's real motive for rejecting the Coca-Cola deal).

211. See, e.g., Tom Holland, *Beijing's Rejection of Juice Deal Carries a Nasty Whiff*, S. CHINA MORNING POST, Mar. 19, 2009 (drawing the conclusion that the ministry's decision may have been motivated by protectionism).

212. See, e.g., Naomi Rovnick, Jasmine Wang, & Woods Lee, *China Raises Chills as Coke Bid Bottled Up Experts See Little Ground for Competition Ruling*, S. CHINA MORNING POST, Mar. 19, 2009 (stating that Australia's Foreign Investment Review Board plans to review a Chinese company's bid for an Australian company); Matthew Stevens, *Chinalco Losing its Fizz as Coke's Takeover Canned*, AUSTRALIAN, Mar. 20, 2009 (pointing to the lack of investment reciprocity in China). However, the Australian Consumer and Competition Commission (ACCC) decided that it would not block the acquisition on competition grounds on March 25, 2009. For details of the decision, see <http://www.accc.gov.au/content/index.phtml/itemId/866064/fromItemId/751043>.

213. See *China Defends Ruling on Huiyuan Deal*, supra note 206 (reporting that China is a top destination for foreign investment).

214. See *Foreign Investment in China Falls*, BBC NEWS, Mar. 16, 2009, available at <http://news.bbc.co.uk/2/hi/business/7945477.stm> (discussing the effect of the global recession on China).

sustained by domestic capital investment in infrastructure and housing, to one that is more focused on domestic consumption.²¹⁵ As of March 2009, the final outcome of the ongoing crisis is entirely uncertain and the large domestic stimulus package announced in November 2008²¹⁶ may not persuade domestic consumers to spend more and save less without substantial institutional reform providing improved social goods such as: affordable healthcare; a better educational system; and enhanced social security provisions including universal unemployment, sickness benefits, and old-age pensions.

Only an enhanced and dependable social security infrastructure will ultimately induce a lower precautionary savings rate and higher consumption expenditure, which would allow China's economy to become more "normal."²¹⁷ One of the world's greatest economic transformations can only continue smoothly and fulfill the MNC's expectations of China becoming their most promising global market if the government undertakes these improvements in social infrastructure.

The effects of China's new competition law on foreign investors must be evaluated in light of decisions taken by the Chinese authorities. Currently, we are at a very early stage of the regime's developments, and the signs are that the mainland authorities are taking careful note of international standards of review. MOFCOM in particular is making an effort to ensure that the AML M&A Regulations and its decisions align substantially with the best international practices. This does not mean that all individual decisions will be consistent with international norms, but by the same token, it also does not mean that the door to investment in China is closed. China will adopt a pragmatic policy that will welcome international participation in its domestic markets where the authorities perceive that China will achieve a substantial benefit. China is likely to continue to adopt an attitude of enlightened self-interest regarding foreign investment. This is mainly due to the fact that China continues to require huge investment to upgrade its industrial base and to improve the living standards for its hundreds of millions of citizens who have yet to substantially benefit from the economic revolution. Foreign investment has played an important role in modernizing the Chinese economy, and it will continue to do so in the future.

215. See, e.g., *Official: China to Focus on Domestic Consumption Amid Global Uncertainties*, XINHUA GENERAL NEWS SERVICE, Nov. 3, 2008, http://news.xinhuanet.com/english/2008-11/03/content_10299224.htm (last visited Sept. 17, 2009) (chronicling China's need to expand domestic consumption).

216. Paul Maidment, *China Announces Massive Stimulus Package*, FORBES, Nov. 9, 2008, available at http://www.forbes.com/2008/11/09/china-stimulus-economy-biz-cx_pm_1109notes.html.

217. HUANG, *supra* note 6, at 268.