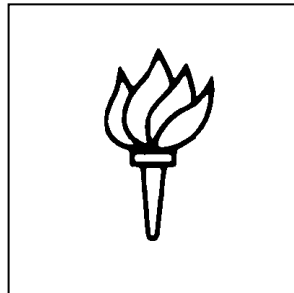


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An Anti-Monopoly Law for China – Scaling the Walls of Protectionist Government Restraints

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AN ANTI-MONOPOLY LAW FOR CHINA – SCALING THE WALLS OF
GOVERNMENT RESTRAINTS

Eleanor M. Fox^{*}

Abstract

China's new Anti-Monopoly Law (AML) prohibits abuse of "administrative powers to restrict competition." Administrative abuses include, and the law targets, measures of provincial and local governments that discriminate against and burden the flow of goods from one province or locality into another. However, the enforcement powers against these abuses are so weak as to nearly undermine the effort. The new law does not exclude from its coverage state-owned enterprises, but the most important and dominant SOEs are in strategic sectors. These enterprises remain under the supervision of the Chinese state, and they appear to be effectively exempted from the AML.

Parochial state and local restraints are among the most anticompetitive and destructive economic restraints in the Chinese economy and elsewhere. Most nations deal with abusive government restraints and abusive private restraints by separate instruments of law; antitrust law does not commonly cover protectionist trade restraints. The antitrust laws of nations vary in their coverage of monopolistic state-owned enterprise.

This article commends China for attempting to integrate control of abusive public and private power. It explains why the problems are integral and argues that they are helpfully placed under one legal roof. Examples are drawn from the United States, the European Union, and the World Trade Organization. The article recognizes the enormous practical and political limitations on enforcement of law that seeks to harness government action, but applauds China's historic step as laying a foundation for discussion, recognition, and perhaps, ultimately, acceptance of a robust enforcement system against protectionist and other abusive government restraints.

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I. INTRODUCTION

On August 30, 2007, China adopted a major law that promises to anchor its markets in a pro-competitive environment.¹

The Anti-Monopoly Law (AML) complements a set of related measures and acts that are powering China's remarkable transition to a market system. The related measures and acts include membership in the World Trade Organization (WTO), liberalization of foreign investment laws, and privatization of numerous state-owned enterprises (SOEs).

China began its economic reforms in 1978. Within the last 15 years, it has significantly accelerated its program of liberalization.² As part of the reforms, China privatized millions of state-owned enterprises (but not enterprises in strategic sectors), and it devolved power to its provinces. The provinces quickly erected barriers to free trade within China's internal market.³ Provincial and local governments proceeded to exercise their powers to keep outsiders' goods and services out of their local areas, in order to monopolize markets for themselves and their friends and, in view of China's tax laws, to avoid sharing tax revenues with neighboring provinces.⁴ They accomplished

¹ Anti-Monopoly Law of the People's Republic of China, adopted at the 29th Session of the Standing Committee of the 10th National People's Congress and promulgated on August 30, 2007, effective from August 1, 2008. Unofficial translation by T&D Associates on file with author. See Huang Yong, *Pursuing the Second Best*, 74 ANTITRUST L.J. – (2007). [Editor: fill in].

² See, for an excellent treatment of China's history, politics and economics, MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN* 95-152 (2005).

³ Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387 (1995).

⁴ See Wang Zue Zheng, "Challenges/Obstacles Faced by Competition Authorities in Achieving Greater Economic Development Through the Promotion of Competition," January 9, 2004, working document CCNM/GF/COMP/WD(2004) 16.

these restraints by imposing burdensome license requirements, unnecessary standards specifications, border taxes, and sometimes even highway blockades. These state, provincial and local abuses threaten to keep the business of China operating at a fraction of its capability.

This article concerns China's attempt to control anticompetitive and unjustified state and local restraints through the vehicle of its Anti-Monopoly Law. It sets forth the relevant provisions of the new law; explains the integral nature of abusive public and private restraints; elaborates on the virtues and possibilities of an integrated perspective through examples and analogies from the United States, the European Union and the WTO, and concludes with suggestions for China as it moves forward to write rules and regulations that will underpin the law.

Earlier drafts of the AML included tougher controls on administrative monopoly. These were controversial and were ultimately weakened in a compromise, "breaking the final barrier to an antitrust law that [had] been under discussion for 20 years."⁵ Still, the law contains foundations for control of anticompetitive and unnecessary government restraints, and this article builds upon those foundations.

⁵ Duan Hongqing and Hu Qian, *New Antitrust Law Spares Government Monopolies*, *Caijing Magazine*, Sept. 3, 2007, available at <http://www.caijing.com.cn/newcn/English/Rule/2007-09-03/28916.shtml>.

II. China's Law

A. Administrative Abuse

China's competition law includes the usual subjects of antitrust – restrictive agreements, abuse of dominance, and mergers – and then turns, in Chapter V, to “Prohibition of Abuse of Administrative Powers to Restrict Competition.” I set forth a translation of the first two articles of Chapter V in full.

Article 32

Administrative agencies and organizations authorized with administrative powers of public affairs by laws and regulations shall not abuse their administrative powers by limiting, or limiting in disguised form, organizations or individuals by requiring them to deal, purchase, or use commodities provided by designated undertakings.

Article 33

Administrative agencies and organizations authorized with administrative powers of public affairs by laws and regulations shall not abuse their administrative powers to block regional commodity circulation by employing the following behaviors:

- (i) Setting discriminatory charging items, fixing discriminatory prices, or implementing discriminatory charging standards for commodities originating from other regions;
- (ii) Stipulating technical requirements or inspection standards on commodities originating from other regions that are different from those on local like commodities, or taking discriminatory technical measures, such as repeated inspection or certification on commodities originating from other regions, so as to restrict the entry of commodities originating from other regions into the local market;
- (iii) Creating administrative licensing procedure targeting commodities from other regions to restrict the access of those commodities to the local market; or
- (iv) Setting up checkpoints on roads to block either the entry of commodities originating from other regions or the exit of local commodities.

- (v) Other acts to impede the free circulation of commodities among different regions.

Article 34 prohibits abuse of administrative power by imposing discriminatory bidding requirements on bidders from other regions, or failing to publish information they would need. Article 35 prohibits discriminatory treatment by restricting or rejecting investment from other regions or establishment of local branches by undertakings from other regions. Article 36 prohibits abuse by “compel[ling] undertakings to engage in monopolistic activities that are prohibited under this Law.”⁶ Article 37 states that “Administrative agencies shall not abuse their administrative power to make regulations that eliminate or restrict competition.”⁷

As Articles 33, 34, and 35 clarify, the abuses particularly targeted are those of provincial and local governments erecting barriers to keep outsiders (but within China) from competing with local business. Such restraints are prevalent and are well documented. For example, Mark Williams writes:

Administrative Monopoly is very widespread and is regarded as pernicious by most Chinese writers Examples of AM include differential taxation applied to goods from outside the ‘home’ territory, outright boycotts of ‘foreign’ goods, physical blockades at provincial or municipal boundaries, the use of administrative permits in a discriminatory fashion, orders to all state business answerable to the local government only to purchase supplies from local manufacturers. Forced tie-in sales of unrelated goods to benefit favoured producers and discriminatory administrative directions to local state banks to support

⁶ This provision is similar to antitrust case law of the United States and the EU that precludes states from ordering cartels and then purporting to immunize the cartelists. *See* sections IV and V *infra*. The U.S. rule is that state action is no defense to the anticompetitive *private* action; but the law does not go so far as to chastise the state for ordering or facilitating it. *See* *Schwegmann Bros. v. Calvert Distillers*, 341 U.S. 384 (1951).

⁷ This article could appear extraordinarily broad; but it is expected that emphasis would be placed on the word “abuse” and that “abuse” would not be found where the agency’s action served a public interest of China or a non-parochial interest of a provincial or local government. *See*, as to corresponding European law, section V *infra*.

local state enterprises with credits are also common. Further, abuses include the creation of profit-seeking enterprises within the local government structure which also act as the local administrative organs responsible for regulating a particular trade

* * *

Other abuses of administrative power can also be found in the service sector. China Telecom, the national telephony provider, had a policy of requiring new telephone service subscribers to purchase the handset from it before Telecom would agree to install a telephone line. The local gas monopoly also had a similar policy with regard to the supply of gas to consumers who were required to buy a cooker before gas could be laid on. . . .

These examples are merely emblematic of a chronic problem that is found throughout China.⁸

China has no Commerce Clause to counteract market-blocking restraints.

The effectiveness of law is a function of the consequences of its breach.

Are there effective remedies for the misuse of administrative powers? Here is the rub.

The remedy for administrative abuse is so weak that the prohibitory language may be mere aspiration.⁹ Article 51 is the remedial provision. Under Article 51 the

offending agency “shall be ordered by the superior authorities to correct the [abusive] act; the individuals who are directly responsible shall be given a disciplinary sanction [literally, black mark] in accordance with the law.” “The Anti-monopoly

Enforcement Authority may make a proposal to the superior authority to discipline the agency.”

⁸ See Mark Williams, *supra* note 2 at 139-40.

⁹ For many years, China prohibited administrative monopoly as unfair competition, but the law has gone unenforced. Will incorporation of administrative abuse in the competition law make a difference? Mark Williams believes that it will not, and further he argues that such a provision has no place in a competition law on grounds that competition law is properly confined to removal of private barriers. Williams, *supra* note 2 at 142-43. This article argues, to the contrary, that market-blocking public abuses have a natural home in antitrust.

Since the superior authority would be a higher authority in the same political line, e.g., a provincial agency superior to a local agency, violations might go unremedied. Still, given the last-quoted sentence, the anti-monopoly authorities have the chance to play a strong surveillance role, perhaps to use advocacy powers to catalogue and publish the (surely) thousands of illegal market-blocking restraints they may observe, to make proposals for remedies with teeth to the disciplining authority, and to tally up, publicly, the costs of the offenses to China.¹⁰

B. State-Owned Monopolies

China's competition law "is applicable to monopolistic activities" within the PRC or that harm competition in the PRC.¹¹ It applies to any "undertaking." "[U]ndertaking . . . refers to a natural person, legal person, or other organization that engages in the production or business of commodities or provides services."¹²

While "undertaking" does not exclude SOEs, the dominant SOEs are in strategic sectors, and the strategic sectors are all but exempted from the prohibitions of the AML, while remaining under the control of the state, which is empowered to supervise them "so as to protect the interests of the consumer and facilitate technological progress." Article 7 provides:

Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct

¹⁰ Compare Paolo Cecchini, *The European Challenge – 1992: The Benefits of a Single Market*, THE CECCHINI REPORT (1988). This study assessed the crippling costs of protectionist border barriers in Europe, initiating the famous program to dismantle the non-tariff barriers – 1992.

¹¹ See section VII *infra*, suggesting interpretations and rules that might help harness anticompetitive government restraints.

¹¹ Article 2.

¹² Article 12.

lawful operation by the undertakings. The State shall supervise and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technological progress.

The undertakings mentioned in the paragraph above shall operate, in good faith, in accordance with the law and in a self-disciplined manner, accepting public supervision and shall not harm the interests of the consumer from a controlling or exclusive dealing position.

Thus, the state – and not the anti-monopoly agencies – has jurisdiction to control, or not, the anticompetitive behavior of the most powerful state monopolies.

The exemption of state monopolies in strategic sectors could drive a huge hole in China's efforts to help the market work. While China has privatized much of its business, monopolies in the key sectors, including telecommunications, banking, electricity, petroleum, railroads, aviation and insurance, remain under state control.¹³ These SOEs are not subject to market discipline; they are lavishly funded by the state banks, and both the banks and the SOEs “in their turn are . . . insolvent by internationally accepted criteria.”¹⁴ Moreover, SOEs in general are more likely than privately-owned firms to behave anticompetitively and sluggishly, e.g. by choosing inefficient technologies, raising rivals' costs, and erecting barriers to entry.¹⁵ State-owned monopolies, along with regional market-blocking abuses, “are seen as posing a far more significant problem to China's burgeoning market economy than monopolies created by private enterprise.”¹⁶

¹³ Bruce M. Owen, Su Sun and Wentong Zheng, *Antitrust in China 2006: The Problem of Incentive Compatibility*, in *POLICY REFORM AND CHINESE MARKETS: PROGRESS AND CHALLENGES*, p. 73, 79 (B.M. Fleisher et al., eds., Edward Elgar 2007 in publication), also available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=978810.

¹⁴ Williams, *supra* note 2, at 115.

¹⁵ See David E.M. Sappington and J. Gregory Sidak, *Competition Law for State-Owned Enterprises*, 71 *ANTITRUST L.J.* 479 (2003).

¹⁶ Owen et al., *supra* note 13, at 80.

If Article 7 does indeed provide an exemption, the scope of the exemption remains to be defined. It can be broadened or narrowed by rules and interpretations.

C. Trade Associations

Trade associations in China are, to an extent, emanations of the state or work closely in tandem with the state.¹⁷ In the throes of adopting the AML, the National People's Congress increased the industrial policy powers of trade associations. Article 11 provides:

The Trade associations shall strengthen the self-discipline of industries to lead undertakings toward competing in accordance with the law and protecting the order of market competition.

Trade associations, like state monopolies and state blockage of trade, are often the biggest culprits in abusing power and harming consumers.¹⁸ This danger might be magnified if state involvement puts trade-association cartels beyond the reach of the AML or – which is virtually the same thing – if the AML is construed to give trade associations a mandate of orderly marketing, and if their beneficiary-members are thereby shielded from the AML.

Article 16, however, helpfully provides: “The trade association shall not organize the undertakings in the industry to be engaged in monopolistic conducts prohibited by this chapter.” Will Article 16 counteract Article 11 and require prosecution of cartelists

¹⁷ “[G]overnment ministries have been converted to industrial associations, [and] the industrial associations often permit or encourage anticompetitive practices by their members.” Owen et al., *supra* note 13. As to medicines and health products, see Eleanor Fox and Dennis Davis, *Industrial Policy and Competition – Developing Countries As Victims and Users*, Chap. 8 in 2006 FORDHAM CORP. L. INST., INTERNATIONAL ANTITRUST LAW & POLICY (B. Hawk ed. 2007), at 156-57.

¹⁸ See Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker and Ernest A. Nagata, *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005)..

despite orderly-market guidance by their trade association? Or will trade associations effectively shield their members?¹³

Interpretations unfriendly to competition are possible. But so too are interpretations that favor competition and consumers. When the National People's Congress and the anti-monopoly authorities issue interpretations and implementing regulations, they will have the important challenge and opportunity to write pro-competition rules.

The following section of this article is comparative and deals principally with parochial cross-border restraints harming trade and competition within a country or community, giving support to China's concept – more robust in earlier drafts – of integrating control over public and private market abuse.

III. THE INTEGRATION OF TRADE AND COMPETITION: THE TIGHT RELATIONSHIP BETWEEN PUBLIC AND PRIVATE RESTRAINTS

The theory of market competition presupposes freedom from both public and private restraints.¹⁹ Both harm the market, consumers, efficient business, competitiveness, and a robust economy. Often, private restraints cannot work their evil without public support, for the private power may wither in the face of forces of competition that only government can suppress.²⁰

¹⁹ I use “restraints” here to signify abusive restraints, unjustified in the case of government by non-parochial public interests, and unjustified in the case of business as a response to the market or a means to get better, cheaper or more product or services to consumers.

²⁰ *See*, for an exposition of the harms from public anticompetitive restraints and the importance of an antitrust policy that addresses them, Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective*, Chap. 22 in 2003 FORDHAM CORP. L. INST., *INTERNATIONAL ANTITRUST LAW & POLICY* (B. Hawk ed. 2004), at 517-38.

Often, public and private restraints are hybrid and symbiotic. They may be alternatives and they may be complements. Powerful business actors may put up private barriers to protect themselves, or they may persuade (lobby) the state to do it for them. Competitors in different regions may divide geographic markets among themselves, with or without the help of the state.²¹ They may use or manipulate government measures or industry standards (public or private) for their own private ends.²² If a business is state-owned, whatever action it takes or privileges it gets to entrench its monopoly or favor its local suppliers is truly hybrid; it is commercial action cloaked in government authority. By giving integral restraints one home, China designed a modern law.²³ But by removing enforcement powers from the antitrust agencies, China seems to have undercut that promise.

²¹ See Case 41/69, *ACF Chemiefarma v. Commission*, 1970 E.C.R. 661 (quinine producers in Europe divided geographic markets).

²² See Creighton et al., *supra* note 18, 72 *ANTITRUST L.J.* at 983-89.

²³ Competition laws of several other transitional or newly revitalized antitrust regimes, including Russia, Hungary and Mexico, also apply to restraints by state and local governments.

IV. ANTICOMPETITIVE STATE RESTRAINTS – THE UNITED STATES

U.S. law limits the ability of state and local governments to restrain trade and competition in two ways. Most importantly, the Commerce Clause of the U.S. Constitution prohibits states of the United States from adopting and enforcing measures that unduly burden interstate commerce. Under the Commerce Clause, states may not impose discriminatory burdens on outsiders.²⁴ In addition, the Sherman Antitrust Act preempts state laws and rules that are irreconcilably in conflict with it; although few such conflicts have been found.²⁵

While states themselves in their sovereign capacity are not subject to U.S. antitrust proscriptions,²⁶ local governments may violate the U.S. antitrust laws. Local governments once credibly argued that their acts were equivalent to acts of U.S. states and that they, too, were entitled to deference as sovereigns. The U.S. Supreme Court rejected this argument. It said (by plurality opinion):

²⁴ See *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (Massachusetts could not legally impose a tax on all milk and use the revenues from out-of-state sources to subsidize the Massachusetts dairy farmers, who were struggling to compete with the lower-priced out-of-state milk); *National Association of Optometrists & Opticians v. Lockyer*, 463 F. Supp. 2d 1116 (E.D. Cal. 2006) (California could not legally bar out-of-state optical firms from offering optometrist services in their California eyeglass stores. See also *United Haulers v. Oneida-Herkimer Solid Waste Management Authority*, 127 S. Ct. 1768 (2007) (municipalities' waste flow control ordinance that gave preference to in-state waste facilities as part of a project that made environmental protection of the community possible did not violate the Commerce Clause; the program internalized costs).

²⁵ See *Costco Wholesale v. Hoen*, 407 F. Supp. 2d 1234 (W.D. Wash. 2005), supplemental order, 2006 WL 1805575 (W.D. Wash. Mar. 7, 2006) (state statutes and regulations requiring uniform prices of beer and wine and forbidding discounts irreconcilably conflicted with the Sherman Act and were preempted).

²⁶ The states of the United States are not “persons” reached by the U.S. antitrust laws. *Parker v. Brown*, 317 U.S. 341 (1943). The doctrine “state action exemption” allows private actors following the policy and will of a state of the United States to invoke this defense under narrow circumstances. See Yee Wah Chin, *Administrative Monopoly: The State Action Doctrine under U.S. Antitrust Law*, The Fifth International Symposium on Competition Law and Policy (CASS), Beijing, China, March 11-12, 2007 (on file with author). The state action exemption does not free the state from the reach of the Commerce Clause or the preemption doctrine.

Petitioners . . . argue that the antitrust laws are intended to protect the public only from abuses of private power and not from actions of municipalities that exist to serve the public weal.

Petitioners' contention that their goal is not private profit but public service is only partly correct. Every business enterprise, public or private, operates its business in furtherance of its own goals. In the case of a municipally owned utility, that goal is likely to be, broadly speaking, the benefit of its citizens. But the economic choices made by public corporations in the conduct of their business affairs, designed as they are to assure maximum benefits for the community constituency, are not inherently more likely to comport with the broader interests of national economic well-being than are those of private corporations acting in furtherance of the interests of the organization and its shareholders. . . .

* * *

. . . If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established. . . .²⁷

Accordingly, the City of Lafayette, Louisiana, was required to stand trial for requiring purchasers of its monopoly water and gas services to buy its electricity and not to buy electricity supplied by competitors outside of its borders.²⁸

A prudential political response, however, narrowed the exposure. A 1984 statute relieves local governments and their officers and employees acting in official capacity of liability for damages from violation of the antitrust laws.²⁹

²⁷ *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 400, 403, 407-08, (1978) (plurality opinion; a majority favored some antitrust liability for local governments, but did not agree on the controlling principle).

The plurality opinion added: "The [state action] doctrine . . . preserves to the States their freedom . . . to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 415-16.

²⁸ For acts of city government and its officials to be exempt, the state must have "delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985) (elaborating on the test in *City of Lafayette*).

²⁹ Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36.

U.S. antitrust law itself has seldom involved administrative abuses. In one notable case it did so,³⁰ although the recorded victory was short-lived.³¹ Wal-Mart, the large, low-priced retail food chain, sought to acquire Supermercados Amigo, a supermarket chain in Puerto Rico, which is a commonwealth of the United States, and is more autonomous than states of the United States. The merger (after spin offs required by the U.S. Federal Government) raised no significant antitrust problems. However, the Puerto Rican Secretary of Justice, Anabelle Rodriguez, feared that Wal-Mart would shift its purchases away from local suppliers and that the merger would eliminate Puerto Rican jobs. Relying on the Puerto Rican Anti-Monopoly Act, she sued to stop the merger in the Puerto Rican courts. She then sought to settle the case by exacting promises from Wal-Mart that it would retain the employees of Supermercados Amigo and would continue purchasing its supplies from the local growers. Wal-Mart identified the Secretary's conduct as (in effect) an administrative abuse. It sued in federal court to enjoin the Secretary from proceeding with her lawsuit. The federal court granted the injunction.

Addressing the buy-local condition that Secretary Rodriguez sought to impose, the federal court declared: This condition "falls within the type of protectionist state policies" that are "virtually invalid per se [under the Commerce Cause]."³² The court said:

Whereas state and local enterprises operating in a commercial capacity are bound by the U.S. antitrust laws, subject to the rules above, the United States Post Office was held not to be "a person separate from the United States" and not subject to the antitrust laws. *United States Postal Service v. Flamingo Industries (USA) Ltd.*, 540 U.S. 736 (2004).

³⁰ *Wal-Mart Stores Inc. v. Rodriguez*, 238 F. Supp. 2d 395, 414-15 (D.P.R. 2002), settled and vacated at request of parties, 322 F.3d 747 (1st Cir. 2003); *see note 35 infra*.

³¹ *See note 35 infra*.

³² The Puerto Rican court was quoting from *Pharmaceutical Research and Manufacturers of America v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001). The *Concannon* case is a Constitutional law case, interpreting

Defendant suggested in her various press releases that the people of Puerto Rico would be negatively affected by the merger of Wal-Mart and Amigo since there was no guarantee that they would buy the same level of merchandise and agricultural goods from local suppliers and distributors as Amigo had in the past. But Wal-Mart understood that these requests were not only unfair but contrary to the interest of the people of Puerto Rico. Knowledge of imposed quotas on Wal-Mart would limit its bargaining power with suppliers, who would end up selling goods at higher prices in light of the quotas, and that increment would have to be passed on to consumers, of course, the people of Puerto Rico....³³

* * *

In the face of this direct and discriminatory interference with interstate commerce, the Secretary of Justice offers no legitimate purpose. . . . [S]he invokes the public policy of the administration she currently works with as her source of authority that allows her to make these demands from Plaintiffs during their negotiations. She stated in a press release that “the public policy is directed at protecting the necessary balance that should exist between Puerto Rican and foreign capital and the benefits that it entails for the consumers.” . . .

the Commerce Clause of the U.S. Constitution, Art. 1, § 8, clause 3. The Commerce Clause provides that the U.S. Congress has the power to regulate interstate commerce. The case law interprets the Commerce Clause to prohibit states of the United States from burdening interstate commerce. This negative command is called the dormant Commerce Clause. Under the case law interpreting the dormant Commerce Clause, a state statute that directly controls commerce occurring wholly outside its boundaries “is a per se violation of the Commerce Clause.” A statute that discriminates against interstate commerce is “scrutinized under a ‘virtually per se invalid rule,’ which means that the statute will be invalid unless the state can ‘show that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’” *Id.* at 79.

The Supreme Court has said: When a state statute “discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.” *Brown-Forman Distillers Corporation v. N.Y. State Liquor Authority*, 476 U.S. 573, 579 (1986).

There is a third category. When a statute regulates evenhandedly for a legitimate public purpose but has incidental effects on interstate commerce, “it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Concannon* at 80.

³³ *Wal-Mart* at 412.

The court continued:

In both its effect and purpose, the requirement differentiates between local Puerto Rico growers and out-of-state producers by mandating a quota of local products to be purchased annually. This differential treatment favors the interests of Puerto Rico growers, who are given a guaranteed market for the products sheltered from the usual perils of the market, while shutting out out-of-state growers from the potentially lucrative business relationship with Wal-Mart. Regardless of the quality of their products, the consistency of their supply, or the prices they offer, local growers would have a guaranteed and insurmountable advantage over out-of-state growers. This, in part, violates Wal-Mart's right to engage in interstate commerce. . . . *Id.* at 415

[C]onfronted with facially discriminatory remarks such as this one, we can and do determine that the Secretary is engaging in state protectionism prohibited by the federal constitution.³⁴

A strategic end to the story leaves the opinion without legal effect, however accurate it is as a statement of consumers' interests and possibly the law. The Puerto Rican Minister of Justice appealed the judgment, she pressed for a settlement of the case on condition that the federal district court opinion be vacated, the case was settled, and the opinion was vacated.³⁵

* * *

In sum, the United States has a policy against parochial state and administrative restraints. These restraints are bad for America, and the U.S. tradition is against them. But, apart from the Commerce Clause, control of parochial administrative restraints is difficult to achieve.

³⁴ *Wal-Mart* at 415-16.

³⁵ The parties petitioned the federal appellate court to vacate the federal injunction and related opinion on grounds that they undermined state enforcement powers and violated the federalist abstention doctrine. In the exercise of the federal appellate court's equitable powers, it granted the motion to vacate.

V. ANTICOMPETITIVE STATE RESTRAINTS – THE EUROPEAN UNION

While the United States has complementary law (constitutional and antitrust) against state measures and private restraints, the European Union has a more nearly seamless set of laws against parochial restraints, public and private.

Restraints by a Member State that discriminate against or handicap nationals of other Member States are strictly forbidden. They are considered the worst type of economic restraint. Moreover, state-owned enterprises and those enterprises holding special privileges from the state are expressly bound by the competition law, subject to the exception that they may do what is necessary to enable them to perform public tasks assigned to them.

There are four trade-or-competition windows through which one may attack European state (i.e., national) measures and acts of state-owned or state-privileged enterprise.

First, Articles 28 and 29 of the Treaty of Rome establishing the European Economic Community (the “EC Treaty”) prohibit Member States from imposing discriminatory and other unjustified restrictive measures on imports or exports from and to other Member States. Case law of the European Court of Justice gives the Member States ample room to adopt measures that are ordinary, reasonable, non-parochial measures of the state. But measures that on their face intentionally discriminate against nationals of other Member States are strictly forbidden;³⁶ and measures such as standards that have the effect of impeding the import of outsiders’ products are forbidden unless justified by important non-parochial interests of the state and unless they are proportional

³⁶ *E.g.*, Case 178/84, *Commission v. Germany (German Beer)*, 1987 E.C.R. 1227.

to those interests.³⁷ Protecting nationals from cross-border competition is always regarded as parochial and is not a cognizable public interest. Thus, Germany was not allowed to set alcohol-content standards for liqueur that kept out French liqueurs and had no reasonable basis in health and safety.³⁸

Articles 28 and 29 of the EC Treaty resemble the Commerce Clause of the U.S. Constitution but constitute a much stronger mandate against undue state restraints. The strength of this mandate relates to the predicament of Europe in the early 1950s. Europe faced a dense web of nationalistic measures and privileged state-owned monopolies that isolated each state from the others. Europe needed proactive economic law.

Second, under Article 86 of the EC Treaty, state-owned and licensed enterprises are subject to the European competition law except as necessary to perform public tasks. Moreover, Article 31 bars states from discriminating against non-nationals in procurement and marketing of goods. Both provisions are powerful constraints on state enterprises. Thus, a state- or city-owned mail delivery service, or one with an exclusive license, could not legally prevent the entry of a private fast-delivery service except to the extent that exclusivity was necessary to achieve a public mission.³⁹

³⁷ *Id.* See also Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (Cassis de Dijon), 1979 E.C.R. 649. Compare Joined Cases C-267 & 268/91, *Keck and Mithouard*, 1993 E.C.R. I-6097, distinguishing rules that are non-discriminatory and merely set the time, place and manner of the sale of goods. The latter rules are not prohibited.

See generally, for the European Union's jurisprudence on free movement, PETER OLIVER, *FREE MOVEMENT OF GOODS IN THE EUROPEAN COMMUNITY* (4th ed. 2003).

³⁸ *Cassis de Dijon*, *supra*. See, similarly, Case C-170/04, *Klas Rosengren v. Riksaklagaren*, 2007 E.C.R. (not yet officially reported), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-170/04>. Sweden could not assign to its alcohol monopoly, Systembolaget, the sole right to import alcoholic beverages, thus preventing consumers from importing alcohol on their own (and at much lower prices), where Sweden failed to show that the restriction was suitable and proportionate to protecting health or life.

³⁹ See Case C-320/91, *Régie des Postes v. Corbeau*, 1993 E.C.R. I-2533.

Third, Article 10 of the EC Treaty obliges Member States to take all appropriate measures to ensure fulfillment of the Treaty obligations and to “facilitate the achievement of the Community’s tasks.” Article 81 prohibits anticompetitive agreements, and Article 82 prohibits abuse of a dominant position. The European Court of Justice has ruled that Articles 10, 31, 81, 82, and 86 must all be read together. By reason of these integrated obligations, a Member State may not authorize private firms to take anticompetitive action. If the desired result is important in the public interest, the state must take the action itself, and the measure must be proportional and justifiable. Thus, when Italy established a match cartel by ordering the Italian match producers to apportion quotas for the sale of matches in Italy, and the match producers (predictably) did so in a way that kept German and Swedish match makers out of Italy, the Court of Justice held that Italy had the duty to “disapply” its law.⁴⁰

The European Union, like the United States, has a state action defense, so that private actors can defend their actions by pleading: The state made me do it. The *Italian matches* case is also an example of the limits of that defense. The Italian match producers could not hide behind Italy to the extent that they took autonomous action. That is, in setting quotas, the competitors could not successfully invoke state action immunity, where their quota allocation was more exclusionary than necessary to fulfill the mandate of the law. To the extent that measures of Italy excluded the Germans and

⁴⁰ Case C-198/01, *Conorzio Industrie Fiammiferi (Italian matches)*, 2003 E.C.R. I-8055. Compare Cases C-94/04 and 202/04, *Cipolla v. Meloni*, 2006 E.C.R. I-09521, where Italy set a mandatory minimum fee schedule for lawyers, disadvantaging out-of-state lawyers (among others) in their attempts to compete by discounting. The Court held that the measure did restrain cross-border services, but that it could be justified if it met overriding requirements relating to the public interest such as protection of consumers and administration of justice, and if it was not disproportionate.

the Swedes, it violated Articles 10/28/81. To the extent that the Italian match producers were the source of the exclusion, they violated Article 81.

Fourth, the European Union has a State Aids discipline. Articles 87 and 88 of the EC Treaty prohibit Member States from granting subsidies and other state aids (such as forgiveness of export taxes or interest-free loans) to its businesses, unless justified according to demanding rules. Saving a bankrupt business is not a justification, unless a rational investor expecting to profit from the investment would similarly have invested the funds. Subsidies to state-owned enterprises are equally prohibited unless they pass through a narrow gateway of justification. The State Aid jurisprudence was deemed necessary by the founders of the European Community particularly because of the unfair and anticompetitive advantages enjoyed by the numerous state-owned enterprises that were groomed as national champions.

The State Aids rules not only protect competition; they help Member States resist the unwelcome pressure of powerful national firms for money and protection.

EC law, unlike U.S. law in relation to the U.S. states, provides strong remedies against Member States for abuse of administrative powers. When a Member State has acted in violation of EC law, it is subject to substantial fines. It is also subject to suit for damages by the victims of the illegal measures or acts.

The law is mindful of the need to avoid chilling proper government action. Therefore, for damage liability, the state must commit a “sufficiently serious” offense. The test is whether the Member State “manifestly and gravely disregarded the limits on

its discretion.”⁴¹ Intentional parochial discrimination is a paradigm case of actionable abuse.

VI. NATION-STATE ANTI-COMPETITIVE RESTRAINTS – THE WORLD SYSTEM

The WTO is a government-to-government organization. It has been slow to deal with the problem of hybrid public/private restraints. In the case of *Eastman Kodak/Fuji Film*,⁴² Japan had formally eliminated certain government barriers, as it was required to do by its WTO obligations. Then, according to the United States, Japan “privatized protection” – turning over to Fuji Film the right to re-close the Japanese market to outsiders. The United States brought a complaint in the WTO, but it lost its case in part because the state measures of Japan and the private conduct of Fuji Film were treated under separate bodies of law. The private acts were analyzed under the antitrust law; the state acts were analyzed under the trade law. The synergistic effects of exclusion were never observed.

Meanwhile, WTO nations adopted a Telecommunications Agreement with antitrust obligations. They did so against a particular background: Many WTO nations had state-owned telecommunications monopolies or recently privatized telecommunications monopolies, and nations tended to protect their national monopolies from outside competition, thus undermining the efficiency and competitiveness of the world telecommunications system.

⁴¹ Joined Cases C-46, 48/93, *Brasserie du Pêcheur SA v. Germany (Brasserie du Pêcheur) and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd. (Factortame III)*, 1996 E.C.R. I-1029.

⁴² Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper (United States v. Japan)*, WT/DS44/R, adopted April 22, 1998.

Sixty-nine nations, including Mexico, signed a Reference Paper agreeing that “[a]ppropriate measures shall be maintained for the purpose of preventing . . . major [telecom services] supplier[s] from engaging in or continuing anticompetitive practices.” Mexico (like other nations) also agreed to charge no more than a reasonable fee for terminating telephone calls within its borders; e.g., telephone calls from the United States via a U.S. carrier into Mexico.

The Mexican regulatory agency then proceeded to “privatize” protection. It adopted administrative rules that handed over the right to charge an excessive termination fee to the recently privatized Teléfonos de Mexico (Telmex), and required all Mexican competitors that were authorized to receive (“terminate”) out-of-state calls to raise their termination fee to the level charged by Telmex. Mexico argued that the acts by Telmex (charging a supracompetitive price) and its competitors (converging to that supracompetitive price) were not “anticompetitive practices” within the meaning of its WTO obligations because the acts were emanations of public acts, and as public acts they were outside of the bounds of Mexico’s obligations; they were a legitimate regulatory choice of Mexico.

The WTO panel found against Mexico.⁴³ As the panel observed, in its WTO obligations, Mexico had agreed to take measures to prevent its major telephone service suppliers from engaging in anticompetitive practices. It could not escape its obligation by *ordering* the major suppliers to adopt anticompetitive acts and then call the acts public, not private.

⁴³ Panel Report, *Mexico: Measures Affecting Telecommunications Services*, WT/DS204/R, adopted June 1, 2004. See Eleanor M. Fox, *The WTO’s First Antitrust Case – Mexican Telecom: A Sleeping Victory for Trade and Competition*, 9 J. INT’L ECON. L. 271 (2006); Eleanor M. Fox, *The WTO’s First Antitrust Case – Mexican Telecoms: Modest World Antitrust*, ANTITRUST 21 (2006).

As was noted by the WTO panel as well as the Mexican press, the regulatory rules in point were adopted at the expense of the Mexican consumers as well as American suppliers. The Mexican monopolist (and friend of Mexican presidents) was the beneficiary.⁴⁴ To borrow from the words of the Chinese law, Mexico had engaged in abuse of administrative monopoly.

VII. THE NEXT STEP FOR CHINA: INTERPRETATIONS AND RULES

In this interim period between enactment and effective date of the law on August 1, 2008, the National People's Congress may issue interpretations. Moreover, after the Anti-Monopoly Enforcement Authority has been formed, it or its designee is expected to issue rules and regulations. Interpretations could be either hospitable or inhospitable towards competition.

I offer the following suggestions as a path that may be likely to serve the people as consumers and to advance technology and efficiency. I address these suggestions to regional blockage, the state component of trade associations, and state-owned monopolies.

The suggestions may be only poorly linked to what is possible in China today. If that is the case, I offer them purely as suggested interpretations of what might become possible and desired in the future.

⁴⁴ See note 43 *supra*.

Interpretations and rules regarding administrative abuses:
market blocking measures of provincial or local government

Article 33 is clear and precise. It prohibits parochial blockages of markets. The principal challenge will be in the enforcement. Whereas earlier drafts would have brought these abuses under the control of the anti-monopoly enforcement agencies, and some early drafts would have specified as remedies the demotion or termination of the individuals responsible for the abuse,⁴⁵ these procedures and remedies were not enacted into law and therefore the authorities will be obliged either to seek more creative remedies or simply to tolerate the abuses.

Interpretations of Article 51⁴⁶ and related rules might helpfully incorporate provisions such as the following:

It would be useful to identify who are the “superior authorities” who have the enforcement power over the abuses by provincial and local governments. It would be useful to assure that those authorities actually have the power to discipline the offending individuals and to assure correction of the abusive acts.

Interpretation and rules might require the superior authorities to identify abuses and to impose punishments and remedies sufficient for deterrence, as well as to correct the conduct and try to assure that it does not recur. Superior authorities might be encouraged to invite complaints by harmed consumers and business people, to investigate all credible complaints, and to publicize their findings.

⁴⁵ See Owen et al., *supra* note 13, p. 94.

⁴⁶ See text following note 9 *supra*.

Article 51 entitles the Anti-Monopoly Enforcement Authority to propose suggestions for discipline and remedies. Rules might helpfully require the superior authority to invite such suggestions at the appropriate time.

The Anti-Monopoly Committee might be designated as a repository for the data on regional blocking abuses. If data on the costs to the people and the economy of regional blocking can be assembled and publicized, this itself might provide an incentive and spur for on-going enforcement and economic reform in China, as it was in Europe.⁴⁷

Pursuant to Article 50, “undertakings that violate the provisions of [the AML] and cause damage to others shall bear civil liability.” An interpretation could usefully state that Article 50 applies to abuses of administrative powers, if that interpretation is a possible one. In that case, consumers and blocked sellers would have an incentive to detect violations and to jump-start enforcement of the law. The Chinese law would then import a procedural feature of the law of the European Union⁴⁸ that has contributed greatly to its effectiveness.

Interpretations and rules regarding trade associations

Trade associations, as noted, are often emanations of the state or include significant involvement by state officials. Article 11 requires trade associations to “strengthen the self-discipline of industries”; to guide firms toward “competing in accordance with the law and protecting the order of market competition.” Article 16 states that “the trade association shall not organize the undertakings in the industry to be

⁴⁷ See Cecchini Report, *supra* note 10, cataloguing the costs to Europe from the internal market barriers.

⁴⁸ See, e.g., Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1.

engaged in monopolistic conduct prohibited by [Chapter II],” which prohibits cartel agreements such as price fixing.

The danger here is that trade associations will be regarded as the state and the state involvement or presence will be held to insulate private anticompetitive action;⁴⁹ that this claim may be bolstered by Article 11, which could be construed as authorizing “orderly marketing,” and that trade associations will simply order or suggest quotas, perhaps in the style of Japanese administrative guidance, rather than organizing industry agreements, in order to avoid the strictures of Article 16.

Interpretations could helpfully clarify, if feasible, that a trade association is a collective of competitors, not a separate entity and not the state, and that the presence or guidance of state officials does not change this treatment. To the extent that particular trade associations might in fact be arms of the state, it might be clarified that such trade associations fall within Article 36 as “organizations authorized with administrative powers of public affairs.” Such organizations are required by Article 36 not to abuse their administrative powers to compel undertakings to engage in monopolistic activities that are prohibited under this Law.” “Compel” might be defined to include administrative guidance even though it falls short of coercion.

The suggested interpretations would still, appropriately, leave trade associations with a wide range of lawful activities, such as those respected in the European Union and the United States. Trade associations typically and lawfully do a great deal of market research and members of the association share information about the conditions of the market, to increase knowledge and facilitate, not suppress, competition.

⁴⁹ See defense of Chinese vitamins’ producers in the cartel action against them, Fox and Davis, *supra* note 17.

Interpretations and rules regarding state-owned monopolies

The status of the state-owned monopolies is essentially controlled by Article 7, for the state-owned monopolies are in the strategic sectors⁵⁰ which, under Article 7, “shall be protected by the State to conduct lawful operation by the undertakings.” Moreover, “the State shall supervise and control the price of the commodities and services by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technological progress.” “The undertakings mentioned . . . shall not harm the interests of the consumer from a controlling or exclusive dealing position.”

Interpretations or rules could, first, usefully clarify what industries are covered and what are not covered. What are the strategic industries or markets contemplated by Article 7? What are the state-owned enterprises within each? What legislation or rules regulate these industries or markets? Is entry by non-SOEs permitted?

Second, interpretations could clarify whether or not the AML provides a full exemption. The wording of Article 7 is not inconsistent with some antitrust jurisdiction over these monopoly firms. Might the SOEs in the covered markets be subject to the competition rules except as necessary to satisfy important interests of the state? If this interpretation is possible, state-owned monopolies even in strategic sectors might be subject to the AML when antitrust coverage would “protect the interests of the consumer and facilitate technological progress” – specified goals – when no interest of the state is

⁵⁰ That is, “Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertakings.”

threatened. Such an interpretation would bring into the Chinese competition law a concept that has worked well in Europe.⁵¹

Moreover, the Chinese state is mandated to “supervise and control the price of commodities and services” in the markets subject to Article 7, can might be modulated by methods other than price control even in highly concentrated markets. For example, authorities can remove barriers to competition, where feasible, without directly controlling price. Rules might require the state to examine alternate means (means other than price control) where alternate means might better protect the interests of consumers and technological progress, and no strategic interest of China is harmed. Such an alternative has recently been embraced by the South African Competition Tribunal in a case of excessive pricing of steel.⁵²

The AML requires, and rules must allow, the state to protect national security interests and “sectors relied upon by the national economy.” Rules might usefully define and link the protection of these interests to a need to shelter firms and markets from competition, having in mind that the country may not want to harm the interests of consumers and technological progress when that would not serve a national purpose.

⁵¹ This is the gravamen of Article 86 of the EC Treaty. *See, e.g.*, Case C-41/90, Höfner v. Macrotron GmbH, 1991 E.C.R. I-1979.

⁵² *See* Case 13/CR/Feb04, Harmony Gold Mining Limited, Durban Roodepoort Deep Limited and Mittal Steel South Africa Limited, Macsteel International Holdings BV, Competition Tribunal of South Africa, Sept. 6, 2007, available at http://www.comptrib.co.za/list_judgement.asp?jid=97. The decision requires Mittal to remove barriers to competition in flat steel products by prohibiting contract provisions requiring export of excess steel and removing barriers to arbitrage.

In general

China may consider adopting the international best practice that competition law enforcement does not discriminate based on nationality.⁵³ Derogations may be allowed in specified instances in which the discrimination is regarded as important to the country's interests, such as national security.

If it is possible within the structure of the law, interpretive rules might usefully give the Anti-Monopoly Committee an advocacy role. The advocacy role could include a public watchdog function against state interventions that harm competition and hurt consumers. Pursuant to its advocacy role, the Anti-Monopoly Committee might be encouraged to facilitate the dismantling of market-blocking abuses of administrative powers, to facilitate deregulation of markets in which competition has become feasible, to help eliminate unnecessary protections and privileges of state-owned monopolies, and to help guide regulatory agencies choose the tools that will best aid consumers and technological progress.

CONCLUSION

China faces the happy prospect and daunting challenge of implementing its new competition law. It has the opportunity to harness abuses of state as well as private

⁵³ See <http://www.internationalcompetitionnetwork.org>. See especially documents-posted from each of the six annual conferences thus far held. See, e.g., Advocacy and Competition Policy, Report Prepared by the Advocacy Working Group of the International Competition Network, Naples, Italy 2002. See also Guiding Principles and Recommended Practices for Merger Notification and Review (Sept. 28, 2002), available at <http://www.internationalcompetitionnetwork.org/index.php/en/library/conference>.

power. Early efforts to legislate containment of state abuses met serious obstacles along the way, but the law as enacted still reflects those efforts.

This article has examined the importance of counteracting anticompetitive and unnecessary state restraints of competition. It encourages the competition authorities of China to use the tools available to them to build a foundation for freeing their economy of such restraints, if not in the short term, then in the longer term.