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Placing the Anti-Monopoly Commission in the Anti-Monopoly Law's Driving Seat

“No country in the world appoints so many administrative departments to enforce a law to protect market competition. Without a unified and authoritative law enforcement organ, it will be difficult to effectively enforce the Antimonopoly Law.” – Professor Wang Xiaoye¹

I. Introduction

Although China's history dates back many centuries, its laws pertaining to anticompetitive, or antitrust, behavior in its economy are relatively young. For example, one of the first laws relating to competition was adopted only twenty years ago, in 1993.² This may not be surprising given the country's economic policy: why would a socialist market economy require laws about competition?

China's decision to shift away from a centrally planned economy towards a market economy in the late 1970s led to the gradual introduction of competition legislation and regulation.³ However, this development occurred in a piecemeal fashion because of the challenges that accompanied introducing economic competition concepts in a country whose previous economic policies included little, if any, antitrust notions.⁴ A handful of very specific competition laws and regulations were passed after 1992, but it was only after a 13 year drafting period that a comprehensive competition law, the Anti-Monopoly Law (“the AML”), was passed on August

¹ Zhang Xian-Chu, *An Anti-Monopoly Legal Regime in the Making in China as a Socialist Market Economy*, 43 Int'l Law. 1469, 1479 n73 (2009) (citing Liu, Lu, *Anti-monopoly Draft Provokes Debate*, ChinaDaily, Nov. 15, 2006, http://www.chinadaily.com.cn/china/2006-11/15/content_733279.htm).

² Shang Ming, *Antitrust in China – a constantly evolving subject*, 5 Competition L. Int'l 4, 11 (2009) (stating that the AUCL of the People's Republic of China was adopted in 1993.).

³ Ming, *supra* note 2, at 4-5.

⁴ Xian-Chu, *supra* note 1, at 14710-1471.

30, 2007, by the 10th Standing Committee of China's National People's Congress (NPC).⁵ This law came into effect on August 1, 2008.⁶

The AML covers three types of monopolistic conduct: it prohibits certain monopolistic agreements between entities, it prohibits abuse by an entity of its dominant market position, and it provides a new review scheme on anticompetitive grounds for certain mergers, acquisitions, and other business transactions.⁷ It is enforced both administratively and judicially.⁸ Its administrative enforcement is described as a “two-level anti-monopoly institutional structure”: the Anti-Monopoly Commission (“the AMC”), created by the AML in 2007, formulates and coordinates enforcement among the anti-monopoly enforcement agencies (“the AMEAs”), which are antitrust offices within the Ministry of Commerce (“the MOFCOM”), the National Development and Reform Commission (“the NDRC”), and the State Administration for Industry and Commerce (“the SAIC”).⁹

Literature on the AML can be divided into two groups.¹⁰ The first group focuses on the law's legislative history, and highlights obstacles to the law's efficacy given its enforcement structure. This set of literature criticizes the administrative enforcement structure, both before and after the ministries constituting the AMEAs were formally announced. Some scholars suggest that to be effective the AML should be enforced through an independent government institution, while others suggest that the AMEAs should be led by an advisory committee. The second set of literature focuses on a specific part of the AML, the new merger review process.

⁵ Ming, *supra* note 2, at 4.

⁶ *Id.*

⁷ Nathan Bush, *Anticipating Chinese Antitrust Policy*, 35 *China Bus. Review* 46, 47 (2008).

⁸ Angela Huyue Zhang, *The enforcement of the Anti-Monopoly Law in China: An institutional design perspective*, 56 *The Antitrust Bulletin* 631, 633-638 (2011).

⁹ Adam Bobrow, Seth Dilworth, James V. Feinerman & Samuel J. Frederick, China, 42 *Int'l L.* 945, 954 (2008); Norton Rose Group, *Antimonopoly Law in China* (March 2012), 1, 8, <http://www.nortonrose.com/files/download-antimonopoly-law-in-china-63824.pdf>.

¹⁰ Separating the literature on the AML into these two groups reflects this author's opinion.

This second group analyzes guidelines, regulations, and decisions related to the merger regime in order to predict the future application of the merger regime to business transactions.

In light of the new leader's announcement in March 2013 to streamline China's government structure, this paper revisits one of the issues raised in the first group of literature and specifically examines whether the AML should be enforced administratively through one institution, instead of the current three.¹¹ Now, with almost five years' of administrative enforcement history and effects on the legal and business community available for analysis, this paper identifies three inefficiencies of the two-tier tripartite enforcement structure and recommends that, not only should there be a single administrative enforcement institution so that these inefficiencies are reduced, but that this institution should be the AMC. This article then outlines steps for a possible institutional reform, supported by examples from previous reforms in China's government structure. Therefore, this paper contributes to the existing literature by highlighting why, five years after it came into effect, the AML should now be enforced through the AMC, and how this result could be achieved.

After reviewing the development of competition law in China (Part II(a)), this paper describes the AML and criticisms of the law's enforcement structure (Part II(b)), then reviews the functions of the AMEAs antitrust departments (Part (c)). Then, this article identifies three inefficiencies that result from this structure and how they are perceived by the legal community (Part III). The following section puts forward a two-step institutional reform plan, the benefits of

¹¹ Tania Branigan, *China's new premier, Li Keqiang, vows to tackle bureaucracy and corruption*, THE GUARDIAN (Mar. 17, 2013, 6:24 EDT), <http://www.guardian.co.uk/world/2013/mar/17/china-premier-li-keqiang-bureaucracy>, ("China's new premier has promised to tackle bureaucracy, government excess and corruption as he began his term."); *See also China scraps railways ministry in streamlining drive*, BBC NEWS CHINA (Mar. 10, 2013, 4:47 EDT), <http://www.bbc.co.uk/news/world-asia-china-21732566>, (Reporting that in March 2013 the following ministries were being restructured to boost government efficiency: the railways ministry was dissolved and would come under the transport ministry; the family planning commission would join the health ministry; the food and drug administration would become a fully-fledged ministry; and a number of maritime agencies would be pulled into a single administration.).

this plan, and likely obstacles that would accompany proposing this reform (Part IV). Lastly, this paper concludes by reminding the reader the context in which these structural recommendations are made, and that these suggestions do not address all of the challenges still facing antitrust enforcement in China.

It should be noted that this paper does not provide or analyze in specific detail private AML enforcement, nor the interaction between administrative monopolies or state-owned enterprises and the AML. Although important aspects of AML, these three subjects are outside the scope of this paper.¹²

II. Development of antitrust law and its current enforcement structure in China

This section first reviews how China's economic policies since 1949 have led to the adoption of the AML in 2007 by grouping China's competition law evolution into three stages.¹³ Then, this section reviews the provisions of the AML and its administrative enforcement structure. It is helpful to understand how competition law was enforced prior to the AML because it sheds light on why the current administrative antitrust enforcement mechanism, although seemingly saturated with institutions, was adopted by the State Council.¹⁴

a. Three periods of competition law development: pre-1978, 1978-1992, 1992-2008

¹² See generally Changqi Wu & Zhicheng Liu, *A Tiger Without Teeth? Regulation of Administrative Monopoly Under China's Anti-Monopoly Law*, 41 *Review of Industrial Organization* 133-155 (2012) (for a review of the AML and administrative monopolies); Joel R. Samuels, "Tain't What you Do": *Effect of China's Proposed Anti-Monopoly Law on State Owned Enterprises*, 26 *Penn. St. Int'l L. Rev.* 169-202 (For a review of the relationship between an anti-monopoly law and China's state-owned enterprises); Zhang, *supra* note 8 (For a brief review of China's judicial enforcement of the AML.).

¹³ Ming, *supra* note 2, at 4; See also Susan Ning, Hazel Yin & Yunlong Zhang, *The Antimonopoly Law of China: What have we seen in 2012?*, LEXOLOGY (Feb. 8, 2013), <http://www.lexology.com/library/detail.aspx?g=0a32d1c7-49c3-46f9-a04e-211416fd67ef>.

¹⁴ Zhang, *supra* note 8, at 633.

From 1949 to 1978 China's economic policy consisted of maintaining its centrally-planned economy.¹⁵ During this period the domestic economy was organized through national planning, and therefore there was no competition in the economy.¹⁶ China shifted away from this policy to a planned market economy in 1978 when it adopted the Reform and Opening-Up Policy (ROUP).¹⁷ Under this second phase China "embarked on a policy of 'opening' to foreign influence" that was strictly limited to the economic realm.¹⁸ As such limited competition took place, and legislation related to competition in the market place was "isolated and rare."¹⁹ In 1992 the Chinese Communist Party announced its goal to establish a socialist market economy.²⁰ It is during this third period that one observes a handful of competition-related regulations and legislation (at least nine texts were promulgated) enacted domestically, and enforced by mostly three institutions, the MOFCOM, the NDRC, and the SAIC.²¹ For example, the Anti-unfair competition law ("the AUCL") was adopted in 1993, and prohibits tying, price fixing, and bid rigging, but does not address other anticompetitive behavior, such as the formation of monopolies.²² The AUCL is currently enforced by the SAIC.²³ Following the AUCL, the Price Law was adopted in 1998, and prohibits particular types of pricing conduct, such as predatory

¹⁵ Jessica Su & Xiaoye Wang, *China: The Competition Law System and the Country's Norms*, in THE DESIGN OF COMPETITION LAW AND INSTITUTIONS, 194, 194 (Eleanor M. Fox and Michael J. Trebilcock eds., 2013).

¹⁶ Ming, *supra* note 2, at 4.

¹⁷ *Id.*

¹⁸ MARK WILLIAMS, COMPETITION POLICY AND LAW IN CHINA, HONG KONG, AND TAIWAN 111 (2005).

¹⁹ Ming, *supra* note 2, at 4 (Discussing two such texts were the Provisional Regulation on the Development and Protection of Socialist Competition enacted in 1980, and the Regulation on the Administration of Advertisement of the People's Republic of China enacted in 1987. The former was the first rule to curb monopolies, and administrative monopolies in particular, by development and protecting socialist competition. The latter regulation was related to advertising activities, and stated that 'monopolies and unfair competition in advertising activities are prohibited.').

²⁰ *Id.*; See also WILLIAMS, *supra* note 19, at 95 (The term 'socialist market economy' is used in Article 15 of the People's Republic of China, but it is not defined or explained.).

²¹ Susan Beth Farmer, *The Evolution of Chinese Merger Notification Guidelines: A Work in Progress Integrating Global Consensus and Domestic Imperatives*, 18 Tul. J. Int'l & Comp. L. 1, 7 (2009-2010).

²² Thomas Brook, *China's Anti-monopoly Law: History, Application, and Enforcement*, 16 Appeal: Rev. Current L. & L. Reform 31, 33 (2011).

²³ Su et al., *supra* note 15, at 199.

pricing and price discrimination.²⁴ It is currently enforced by the NDRC.²⁵ Before the AML was enacted, the MOFCOM reviewed mergers and acquisitions of domestic enterprises by foreign investors, pursuant to the Provisions on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors 2006 (“Provisions 2006”). These provisions included four articles relating to antitrust review of pending mergers.²⁶ Since the AML was enacted, the 2006 Provisions have been amended to conform with the merger notification requirements set forth in the AML.²⁷ In addition to these two competition laws, China also has a Contract Law, adopted in 1999, and a Bidding Law, promulgated in 2000.²⁸

While these laws that focused on particular economic behavior were enacted, an antitrust law was already included on the legislative agendas of the 8th, 9th, and 10th National People’s Congress (NPC).²⁹ A working group established by the State Council in 1994 began the legislative process for an antitrust law, but it was only in 2006 that a draft of the current AML was submitted to the Standing Committee of the NPC.³⁰ The AML was promulgated by the Standing Committee on August 30, 2007.³¹ It became effective on August 1, 2008.³² Scholars suggest that the law’s drafting period lasted almost thirteen years for several reasons: the law was controversial given China’s economic history and political structure, it was difficult to create a space for a comprehensive competition law in an economy where regulating anticompetitive

²⁴ Ming, *supra* note 2, at 5.

²⁵ H. STEPHEN HARRIS, JR., PETER J. WANG, MARK A. COHEN, YIZHE ZHANG & SEBASTIEN J. EVRARD, ANTI-MONOPOLY LAW AND PRACTICE IN CHINA 351 (2011).

²⁶ Su et al., *supra* note 15, at 195-196.; *See also* Brook, *supra* note 22, at 34.

²⁷ Yee Wah Chin, *M&A Under China’s Anti-Monopoly Law* Bus. L. Today, A.B.A. Business Law Section 1, 2-3 (Sept. 2010), <http://apps.americanbar.org/buslaw/blt/content/articles/2010/09/0002.pdf>.

²⁸ HARRIS, JR. ET AL., *supra* note 25, at 361.

²⁹ Su et al., *supra* note 15, at 197.

³⁰ Xian-Chu, *supra* note 1, at 1470; *See also* Farmer, *supra* note 21, at 6 (Stating that the MOFCOM was the principle drafter of the AML), *and* Brook, *supra* note 22, at 34 (Describing that international anti-trust experts provided comments to the AML during the drafting phase of the law, and today comments from the United States and European anti-trust enforcement agencies are viewed as having shaped the current AML.), *and* Su et al., *supra* note 15, at 197.

³¹ Ming, *supra* note 2, at 4.

³² Farmer, *supra* note 21, at 6.

behavior had only just began, an antimonopoly law would question the role of local protectionism and administrative monopolies in China's particular market economy, and throughout the drafting period the MOFCOM, the NDRC, and the SAIC vied for exclusive jurisdiction to enforce the new anti-monopoly law.³³

b. Overview of the AML

Despite its name, the AML does not cover solely monopolies and monopolistic conduct. The competition laws in existence prior to the AML were narrow and specific, and the goal of the AML was to establish a "coherent competition policy" in China.³⁴ Thus, the law targets three types of monopolistic conduct, similar to antitrust laws in other countries: monopolistic agreements, abuse of dominant market position, and mergers and acquisitions.³⁵

The law has eight chapters and 57 articles.³⁶ The first section describes the law's general provisions, such as scope and definitions of relevant terms.³⁷ Chapter Two describes the types of prohibited monopoly agreements under the law and any exceptions, while Chapter Three reviews the definition of market dominance abuse and its prohibited conduct.³⁸ Chapter Four examines notification procedures for mergers and acquisitions, and administrative monopolies are the subject of Chapter Five.³⁹ Approved investigation procedures are contained in Chapter Six, penalties are covered in Chapter Seven, and lastly Chapter Eight excludes the "lawful exercise"

³³ Xian-Chu *supra* note 1, at 1470; *See also* Wang Xiaoye, *The Antimonopoly Law of the People's Republic of China*, 3 *China Legal Dev. Y.B.* 105, 106 (2009), and Bruce M. Owen, Su Sun, & Wentong Zheng, *China's Competition Policy Reforms: the Anti-Monopoly Law and Beyond*, 75 *Antitrust L.J.* 231, 232 (2008-2009), and Salil K. Mehra & Meng Yanbei, *Against Antitrust Functionalism: Reconsidering China's Antimonopoly Law*, 49 *Va. J. Int'l L.* 380, 396 (2008-2009).

³⁴ Xian-Chu, *supra* note 1, at 1472.

³⁵ Bush, *supra* note 7, at 46-50.

³⁶ The People's Republic of China Anti-Monopoly Law (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), *translated in* CHINA LAW & PRACTICE (Oct. 1, 2007).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

of intellectual property rights and monopolies within the agricultural sector from prosecution under the AML.⁴⁰

China's two other important competition laws, the AUCL and the Price Law, are still effective and are enforced in parallel with the AML.⁴¹ However, the AML differs from these laws in terms of the context in which it is applied, and the leniency provisions it makes available to implicated parties. For example, the AUCL is very specific in that it only prohibits the "abuse of power of public enterprises," and penalties for violating this law were minimal.⁴² Similarly, the Price Law "emphasizes more the examination of whether the conduct itself stays in compliance with provisions of the law" and does not require that the implicated party have a dominant market position.⁴³ The AML, on the other hand, "emphasizes the examination of the impact of such conduct on competition in the market," and the party involved must have a dominant market position.⁴⁴ The AML also has a broader objective than these two other laws: it seeks to prevent and restrain monopolies, protect fair competition in the market, enhance economic efficiency, safeguard the interests of consumers, and promote the healthy development of the socialist market economy.⁴⁵

c. Administrative enforcement of the AML

⁴⁰ *Id.*; Brook, *supra* note 22, at 35.

⁴¹ Norton Rose Group, *supra* note 9, at 7.

⁴² Xiaoye, *supra* note 33, at 105.

⁴³ Fei Deng, H. Stephen Harris, Jr. & Yizhe Zhang, *Interview with Xu Kunlin, Director General of the Department of Price Supervision Under the National Development and Reform Commission of People's Republic of China*, THE ANTITRUST SOURCE (Feb. 2011),

http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_fullsource.authcheckdam.pdf, 1, 4 (The SAIC and the NDRC have "stepped up communications and cooperation" since the AML was enacted.)

⁴⁴ Fei Deng, H. Stephen Harris, Jr. & Yizhe Zhang, *Interview with Ning Wanglu, Director General of the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau Under the State Administration for Industry and Commerce of the People's Republic of China*, THE ANTITRUST SOURCE (Feb. 2011),

http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_fullsource.authcheckdam.pdf, 1, 4 (The SAIC has "experimented with NDRC in setting up a case coordination mechanism.").

⁴⁵ Xiaoye, *supra* note 33, at 106. *See also* HARRIS, JR. ET AL., *supra* note 25 (for additional information on the substantive provisions of the AML.).

This subsection describes the AML's current administrative enforcement and scholars' comments on this enforcement. As described previously, the competition laws existing before 2007 were scattered among various laws and regulations that were enforced by three separate ministries.⁴⁶ This division of enforcement among multiple ministries is reflected in the current administrative enforcement of the AML, and allowed pursuant to Articles 9 and 10 of the law:

“The State Council will set up the Anti-Monopoly Commission (“AMC”), which is responsible for organizing, coordinating and supervising anti-monopoly-related activities, and performs the following functions: (1) researching and formulating competition policies; (2) organizing investigation and evaluation of the overall market competition condition and publishing evaluation reports; (3) formulating and publishing anti-monopoly guidelines; (4) coordinating administrative enforcement of the AML; and (5) other functions specified by the State Council. The organization and working rules of the AMC shall be formulated by the State Council.⁴⁷ The Anti-monopoly Enforcement Authority designated by the State Council to undertake the responsibilities of the AML enforcement (hereinafter referred to as Anti-monopoly Enforcement Authority under the State Council, “AMEA”) is responsible for the enforcement of the Anti-Monopoly Law. The AMEA, if necessary, may authorize corresponding organs of the People's Governments of provinces, autonomous regions, and provincial level municipalities to be responsible for relevant anti-monopoly enforcement activities in accordance with this Law.”⁴⁸

These two articles illustrate that the AML is administratively enforced through two levels of governance: the AMC and the AMEA.⁴⁹ The entity designated to be the AMEA is left to the discretion of the State Council, and the law leaves open the State Council's possibility to name multiple agencies as the AMEA.

⁴⁶ Ming, *supra* note 2, at 5.

⁴⁷ HARRIS, JR. ET AL., *supra* note 25, at 377; *See also* PRC Anti-monopoly law, *supra* note 36, art 9.

⁴⁸ HARRIS, JR. ET AL., *supra* note 25, at 378; *See also* PRC Anti-monopoly law, *supra* note 36, art. 10.

⁴⁹ Zhang, *supra* note 8, at 633.

It was uncertain whether the State Council would designate a single agency or multiple government agencies as the AMEA when the AML was passed in 2007.⁵⁰ However, there was speculation that the AMEA would be composed of the three agencies enforcing competition laws at the time, the MOFCOM, the NDRC, and the SAIC.⁵¹ Once the State Council and its ministries underwent structural reform in March 2008, it became clear that these three ministries would be involved in the AML's enforcement because the structural reform included the creation of antitrust offices ("the AMEAs") within all three ministries.⁵²

The literature on the AML's drafting and enactment period states that while the law was in its drafting stage, the State Council could not choose one existing ministry to enforce the AML because the MOFCOM, the NDRC and the SAIC refused to cede their jurisdiction over competition matters to an existing or new entity.⁵³ However, both the MOFCOM and the SAIC agreed that an antitrust body should be formed under the State Council, with each ministry retaining enforcement authority.⁵⁴ Therefore, although the existing two-tier, tripartite enforcement structure is institution heavy, there is method to this madness: given the channels used to enforce competition laws in China prior to 2007, the AML's enforcement structure is a compromise between the ministries involved with enforcing competition law prior to the AML maintaining their enforcement abilities, and the need for a separate body responsible for

⁵⁰ Jones Day Commentary, *New Chinese Anti-Monopoly Law*, 1,5 (Oct. 2007), <http://www.jonesday.com/files/Publication/eb6dcb2a-624d-4242-b791-cc8faa3a1e52/Presentation/PublicationAttachment/4836e746-cc52-49cd-b96c-d764ae9bea1a/New%20Chinese%20Anti-Monopoly.pdf>.

⁵¹ *Id.*; See also Farmer, *supra* note 21, at 7.

⁵² Jones Day Commentary, *Structure and Responsibilities of Enforcement Agencies Under China Anti-Monopoly Law Clarified* (Jul. 2008), <http://www.jonesday.com/files/Publication/d74085e3-0c9e-4c6c-8886-30ce91b29caa/Presentation/PublicationAttachment/63d181b9-bbc1-45cf-886b-f6e250060937/China%20AML%20Clarified.pdf>; See also Jones Day Commentary, *The China Anti-Monopoly Law Becomes Effective* 1,8 (Aug. 2008), <http://www.jonesday.com/files/Publication/aba8c9e2-bea8-4f33-8a6f-38b5c6ab7848/Presentation/PublicationAttachment/3059dfbd-15a1-4804-a409-0074ded6dc4c/China%20Anti-Monopoly.pdf>.

⁵³ Zhang, *supra* note 8, at 635.

⁵⁴ Xian-Chu, *supra* note 1, at 1478.

“pushing forward China’s competition policies,” since few existed, and coordinating enforcement among the AMEAs.⁵⁵ An additional attractive feature of this structure is that it most likely assured faster approval of the AML because enforcement of the law could be delegated to existing institutions.⁵⁶ Enforcing antitrust law through more than one entity is not uncommon. In the United States for example, the federal antitrust laws are enforced by the United States Department of Justice Antitrust Division and the Federal Trade Commission.⁵⁷

That being said, China’s AML administrative enforcement structure is not without its disadvantages. These are also reflected in the literature on the AML’s structure.⁵⁸ With respect to the AMEAs, these criticisms highlight that this structure does not provide for an independent AMEA that is not “subjugated to an existing ministry,” which the AMEA would require in order to carry out its statutory functions.⁵⁹ Also, by placing the AMEA under an existing ministry, it would have to compete for resources, thus perhaps limiting its performance.⁶⁰ Lastly, given that the AMEAs are placed within existing ministries, they are relatively low in China’s bureaucratic hierarchy, thus reducing their power with respect to investigating state-owned enterprises and administrative monopolies, other ministries, and other government offices.⁶¹ Lastly, regarding the AMC, one criticism is that it also lacks “independence and impartiality” because of its composition and its requirement to report to the State Council, both of which indicate that the

⁵⁵ Xiaoye, *supra* note 33, at 108; *See also* HARRIS, JR. ET AL., *supra* note 25, at 264, and Xian-Chu, *supra* note 1, at 1478, and Owen et al., *supra* note 33, at 260-261.

⁵⁶ HARRIS, JR. ET AL., *supra* note 25, at 265; *See also* Owen et al., *supra* note 33, at 261.

⁵⁷ Farmer, *supra* note 21, at 8.

⁵⁸ Owen et al., *supra* note 33, at 260-265; *See also* Xian-Chu, *supra* note 1, at 1476-1479.

⁵⁹ Owen et al., *supra* note 33, at 261.

⁶⁰ *Id.*

⁶¹ Jones Day Commentary, *The China Anti-Monopoly Law Becomes Effective*, *supra* note 53, at 9 (Stating that “the relatively low hierarchy of these authorities in the Chinese bureaucratic system may render enforcement actions against large state-owned enterprises or local governmental “administrative monopolies” more difficult and may render competition decisions more susceptible to the influence of factors unrelated to competition issues.”); *See also Confusion lingers of China Anti-Monopoly law*, ASIALAW (Sept. 2008), <http://www.asialaw.com/Article/2005006/Confusion-lingers-over-China-Anti-Monopoly-Law.html?Print=true&Single=true>.

AMC is “subject to the administrative personnel and budgetary control of the Central Government.”⁶² Nevertheless, this is the AML’s current enforcement structure. As discussed below, the AMC has the role of an oversight body and the AMEAs are responsible for enforcing the law.⁶³

i. The AMC

The AMC is a policy body organized under the State council.⁶⁴ It was established in August 2008 pursuant to Article 9 of the AML.⁶⁵ It was specifically created to assist in the public enforcement of the AML.⁶⁶ Essentially, it is a “coordinating body under the State Council” responsible for “drafting competition related policies, organizing investigations, assessing the overall market competition, publishing assessment reports and anti-monopoly guidelines, and coordinating anti-monopoly law enforcement.”⁶⁷ The importance of the AMC is its role in promoting market competition since China had a very small competition culture prior to the AML.⁶⁸ Additionally, the AMC is supposed to coordinate enforcement of the AML among the AMEAs.⁶⁹ Therefore, the AMC does not enforce any part of the law, but assists in its application by providing, for example, definitions of terms applicable to any enforcement under the law.⁷⁰ The AMC reports directly to the State Council.⁷¹

⁶² Xian-Chu, *supra* note 1, at 1479.

⁶³ *Id.*

⁶⁴ Jun Wei, Kevin Bai & Keddy Huang, *NDRC maps out its main responsibilities, internal organizations, and personnel*, LEXOLOGY (Dec. 16, 2008), <http://www.lexology.com/library/detail.aspx?g=f5bf8d01-4dcb-8334-ca41316980ad>.

⁶⁵ HARRIS, JR. ET AL., *supra* note 25, at 266.

⁶⁶ *The China Anti-Monopoly Law Becomes Effective*, *supra* note 48, at 1; See also Michael Gu, *An Introduction of the Anti-Monopoly Law in China*, CHINA LAW VISION (Oct. 23, 2012), <http://www.chinalawvision.com/2012/10/articles/competitionantitrust-law-of-th/an-introduction-of-the-antimonopoly-law-in-china/>.

⁶⁷ Gu, *supra* note 66.

⁶⁸ Xiaoye, *supra* note 33, at 108.

⁶⁹ *Id.*

⁷⁰ HARRIS, JR. ET AL., *supra* note 25, at 266; See also Cleary Gottlieb Alert Memo, *China’s Antimonopoly Commission of the State Council Issues Final Guidelines for the Definition of Relevant Market*, (Jul. 24, 2009),

The AMC contains officials from the NDRC, the SAIC, and the MOFCOM, in addition to representatives from other ministries that are responsible for “commerce or industrial policy.”⁷² It is important to note that it was only in June 2011 that the State Council approved the formal establishment of an AMC office.⁷³ Prior to this it seems that the AMC’s responsibilities were assumed by the MOFCOM’s office responsible for antitrust enforcement, the Anti-Monopoly Bureau (MOFCOM-AMB).⁷⁴ Now that the State Council has approved its formal establishment, the AMC appears to be a body recognized outside of the MOFCOM-AMB, indicated by the creation of an AMC office in September 2011.⁷⁵ This office handles the day-to-day tasks that were previously performed by the MOFCOM-AMB.⁷⁶ As developed in Part IV, it is the author’s opinion that this establishment could be interpreted as a signal that the AMC will be assigned

<http://www.cgsh.com/files/News/7d9d0894-47fb-468d-a24d-a1c24063521e/Presentation/NewsAttachment/eacf6ebf-a284-4882-a8cb-a70111c0ca11/CGSH%20Alert%20-%20MOFCOM%20guidelines%20on%20market%20definition.pdf>, 1, 1 (Stating that in July 2009 the AMC issued guidelines on how the term ‘relevant markets’ should be defined in antitrust analysis), and John V. Grobowski & Yiqiang Li, *Guidelines on the Definition of Relevant Market*, Faegre Baker Daniels Updates & Events (Sept. 1, 2009), <http://www.faegrebd.com/10165> (The guidelines define a ‘relevant market’ as a product, or group of products, that the consumer can easily substitute for one another. The guidelines further define the terms ‘relevant geographic market’ and ‘relevant product market.’ Almost all antitrust violation investigations will likely require a determination of the relevant market at issue.).

⁷¹ Norton Rose Group, *supra* note 9, at 8.

⁷² Brook, *supra* note 22, at 40; See also Norton Rose Group, *supra* note 9, at 9, and Susan Ning & Yin Ranran, *Formal Establishment of Ant-Monopoly Commission Office within MOFCOM Approved*, CHINA LAW INSIGHT (June 17, 2011), <http://www.chinalawinsight.com/2011/06/articles/corporate/antitrust-competition/formal-establishment-of-antimonopoly-commission-office-within-mofcom-approved/> (The following officials that served on the AMC in 2011 included the following: (1) Director: Vice-Premier of the State Council; (2) Vice-Directors: a. Minister of MOFCOM; b. Director of the NDRC; c. Director of the SAIC; d. Vice-Secretary-General of the State Council. (3) Commissioners: a. Vice-Minister of MOFCOM; b. Vice-Director of the NDRC; c. Vice-Director of SAIC; d. Vice-Minister of the Ministry of Industry and Information Technology; e. Vice-Minister of the Ministry of Supervision; f. Vice-Minister of the Ministry of Finance; g. Vice-Minister of the Ministry of Transport; h. Deputy Director-General of the State-owned Assets Supervision and Administration Commission; i. Vice-Director of the State Intellectual Property Office; j. Vice-Director of the Legislative Affairs Office of the State Council; k. Vice-President of the China Banking Regulatory Commission; l. Vice-President of the China Securities Regulatory Commission; m. Vice-President of the China Insurance Regulatory Commission; n. Vice-President of the State Electricity Regulatory Commission.).

⁷³ Ning et al., *supra* note 72.

⁷⁴ HARRIS, JR. ET AL., *supra* note 25, at 267.

⁷⁵ Gu, *supra* note 66.

⁷⁶ *Id.*

additional responsibilities regarding the AML, perhaps elevating its role in the development of the law.

ii. *The MOFCOM*

The MOFCOM is a “ministry-level agency.”⁷⁷ It is mainly responsible for negotiating China’s trade agreements, and regulating trade and investment, both domestic and foreign.⁷⁸ Pursuant to the 2006 Provisions, one of this ministry’s responsibilities was to review proposed mergers, acquisitions, and other business dealings for their possible antitrust effects.⁷⁹ The MOFCOM-AMB was formed within MOFCOM in August 2008, and is the bureau through which MOFCOM enforces the AML’s merger control regime.⁸⁰ Therefore given the ministry’s responsibility before the AML was enacted, the MOFCOM-AMB has jurisdiction to review antitrust matters related to mergers, acquisitions, and other business transactions.⁸¹ This office also guides Chinese enterprises in defending antitrust suits overseas and coordinates bilateral and multilateral cooperation on competition policy issues.⁸² The office is comprised of six divisions.⁸³ The AMB has the bureaucratic level of General Directorate.⁸⁴

This bureau enforces the merger control regime of the AML by requiring that it be notified of mergers, acquisitions, and similar business dealings that meet a specified turnover threshold, so

⁷⁷ HARRIS, JR. ET AL., *supra* note 25, at 270.

⁷⁸ Su et al., *supra* note 15, at 199.

⁷⁹ HARRIS, JR. ET AL., *supra* note 25, at 268.

⁸⁰ Norton Rose Group, *supra* note 9, at 8.

⁸¹ Jun Wei, Sherry Y. Gong & Kevin Bai, *Head of China’s Anti-monopoly Bureau further explains antitrust matters*, LEXOLOGY (Dec. 11, 2008), <https://www.lexology.com/library/detail.aspx?g=ab3be5f4-cd5c-4e87-b3ad-6788d924a2a4>.

⁸² HARRIS, JR. ET AL., *supra* note 25, at 271.

⁸³ Su et al., *supra* note 15, at 204 (The divisions include the General Office, the Competition Policy Division, the Consultation Division, the Legal Division, the Economics Division, and the Supervision and Enforcement Division.).

⁸⁴ HARRIS, JR. ET AL., *supra* note 25, at 271.

that it can review and clear them, before these dealings occur.⁸⁵ The MOFCOM-AMB is only required to publish its AML decisions in two situations: if it blocks or if it imposes conditions on the business transaction in question.⁸⁶ However in an effort to increase transparency, in January 2013 the MOFCOM-AMB released all of its decisions, including those where the business dealing was cleared unconditionally.⁸⁷

The MOFCOM-AMB has been extremely active in its enforcement of the AML over the last five years, and has reviewed more than 500 cases.⁸⁸ Additionally, it has issued at least 13 implementing regulations and guidelines concerning enforcement of the AML.⁸⁹ However, it was publicly acknowledged that many deals still are not notified to the MOFOM-AMB.⁹⁰ Unlike the SAIC's and the NDRC's antitrust bureaus, the MOFCOM-AMB has not delegated its enforcement responsibilities to its local or provincial counterparts.⁹¹

iii. *The NDRC*

The NDRC is also a “ministerial-level entity” under the State Council that is responsible for preparing policies concerning China’s national economic development.⁹² As such, it assists in

⁸⁵ Norton Rose Group, *supra* note 9, at 28, 31 (In practice, the AML’s rules sometimes require that the MOFCOM-AMB be notified of transactions that “bear little or no connection” with China.).

⁸⁶ Philip F. Monaghan, *China: Antimonopoly Law*, GLOBAL COMPETITION REVIEW, THE ASIA-PACIFIC ANTITRUST REVIEW 2013 SECTION 2: COUNTRY CHAPTERS, www.globalcompetitionreview.com/reviews/51/sections/175/chapters/1969/china-antimonopoly-law/.

⁸⁷ Susan Ning, Kailun Ji & Kate Peng, *Chinese antitrust regulators provided updates on their enforcement activities* (Jan. 28, 2013) <http://www.chinalawinsight.com/2013/01/articles/corporate/antitrust-competition/a-considerable-step-of-chinese-antitrust-regulators-in-the-road-heading-for-transparency/>, (stating that in 2012, MOFCOM had accepted 186 cases, 154 of which had been cleared unconditionally, and 6 cleared with conditions).

⁸⁸ Jones Day Commentary, *Lessons from Four Years of Antitrust Enforcement in China* 1, 2 (Sept. 2012), <http://www.jonesday.com/files/Publication/6079ef96-f8e2-40c0-acca-20b395741423/Presentation/PublicationAttachment/080caf11-2f8e-4cbe-9681-2248d8491fef/Lessons%20from%20Four%20Years%20of%20Antitrust.pdf>.

⁸⁹ Norton Rose Group, *supra* note 9, at 42-44.

⁹⁰ *More Muscle*, CHINA LAW & PRACTICE (Feb. 2012), <http://search.proquest.com.ezproxy.shu.edu/docview/993531218/13C6FB4CC8833534AC/95?accountid=13793>.

⁹¹ HARRIS, JR. ET AL., *supra* note 25, at 272.

⁹² *Id.* at 277.

managing China's transition from a planned economy to a socialist market economy.⁹³ The NDRC unit responsible for enforcing the AML is the Department of Price Supervision (NDRC-DPS), which has nine divisions.⁹⁴ Given that the NDRC has jurisdiction to enforce the Price Law, its investigatory powers and enforcement under the AML are limited to suspicious price-related conduct of monopoly agreements and abuse of dominant market positions.⁹⁵ This department conducts its AML enforcement by carrying out investigations of suspected prohibited conduct that are relayed to the office following a "complaint, case transfer from another authority, or by acting on its own initiative."⁹⁶ Pursuant to Article 10 of the law, the NDRC-DPS has delegated its enforcement powers to its provincial bureaus.⁹⁷ It may, but is not required to, publish its decisions.⁹⁸

When compared to the MOFCOM-AMB, the NDRC-DPS appeared relatively quiet the first two years following the AML's adoption.⁹⁹ It has been suggested that this could stem from three possible reasons: its ministry was under-resourced and thus could not investigate antitrust matters, it was in the process of drafting its own regulations and guidelines in order to enforce the law, or its lack of involvement was illusory because it is not required to publish its decisions.¹⁰⁰ Since 2008, the NDRC-DPS has issued only four texts providing further regulations and guidelines on its antitrust enforcement.¹⁰¹ However, since it issued regulations in 2011, it does not seem to have shied away from applying the AML to anticompetitive

⁹³ *Id.* at 277.

⁹⁴ *Id.* at 278; *See also* Su et al., *supra* note 15, at 203 (These divisions include the Price Monopoly Division I, the Price Monopoly Division II, and the Competition Policy and International Cooperation Division.).

⁹⁵ Norton Rose Group, *supra* note 9, at 21.

⁹⁶ *Id.* at 8.

⁹⁷ HARRIS, JR. ET AL., *supra* note 25., SUPRA NOTE 25, at 279.

⁹⁸ Norton Rose Guide, *supra* note 7, at 22; HARRIS, JR. ET AL., *supra* note 25, at 278.

⁹⁹ *Anti-monopoly: Agencies walk a fine line*, CHINA LAW & PRACTICE (Jan. 2010), <http://search.proquest.com/proxy.shu.edu/docview/224792924/13C6F89F27A154A1481/77?accountid=13793>.

¹⁰⁰ *Id.*

¹⁰¹ Norton Rose Guide, *supra* note 7, at 42-44.

behavior.¹⁰² In January 2013 this department announced in its first disclosure to the public of its AML caseload that it had investigated 49 price-related cases, two of which resulted in penalties, since the AML went into effect.¹⁰³

iv. The SAIC

The SAIC is also a “ministerial-level entity” under the State Council.¹⁰⁴ The office responsible for enforcing the AML is the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau (SAIC-AMAUCEB), which has five divisions.¹⁰⁵ Similar to the NDRC-DPS, it has delegated AML enforcement authority to its provincial, sub-provincial, and local bureaus.¹⁰⁶ Since the SAIC currently enforces the AUCL, the State Council gave the SAIC’s AMEA jurisdiction under the AML to enforce all non-price related antitrust matters concerning monopoly agreements and abuse of dominant market positions.¹⁰⁷ The SAIC-AMAUCEB’s enforcement of the law follows the same channels as that of the NDRC-DPS, therefore the former also conducts its enforcement by carrying out investigations of suspected prohibited conduct that are relayed to the office following a “complaint, case transfer from another authority, or by acting on its own initiative.”¹⁰⁸ Also similar to the NDRC-DPS, the SAIC-AMAUCEB was not as active the first two years following the AML’s enactment. It seems to

¹⁰² *Id.* at 17 (In 2011 the NDRC announced its imposition of a RMB 7 million fine on two pharmaceutical companies engaged in exclusive supply agreements, a violation of article 17(4) of the AML.), *See also China: Record fines imposed in Chinese Maotai Liquor RPM Cases*, MONDAQ (Mar. 12, 2013), <http://www.mondaq.com/x/226126/Antitrust+Competition/Record+Fines+Imposed+In+Chinese+Maotai+Liquor+RPM+Cases> (Reporting the NDRC had imposed record fines under the AML of RMB 449 million against two liquor companies for resale price maintenance practices.).

¹⁰³ Ning et al., *supra* note 87.

¹⁰⁴ HARRIS, JR. ET AL., *supra* note 25, at 273.

¹⁰⁵ *Id.* at 275; Su et al., *supra* note 15, at 203 (These divisions are the Comprehensive Division, the Anti-Monopoly Enforcement Division, the Anti-Monopoly Legislative Affairs Division, the Anti-Unfair Competition Division, and the Case Supervision and Coordination Division.).

¹⁰⁶ Norton Rose Guide, *supra* note 7, at 9.

¹⁰⁷ HARRIS, JR. ET AL., *supra* note 25, at 274.

¹⁰⁸ Norton Rose Guide, *supra* note 9, at 21.

have been more active since it issued its own implementing regulations and guidelines in January 2011.¹⁰⁹ In an announcement in December 2012 by the Director General of the SAIC-AMAUCB, it appeared that the bureau was increasing its AML caseload.¹¹⁰

III. Inefficiencies stemming from the Two-tier, Tripartite Administrative Enforcement Structure

The AML's administrative enforcement system has been in force for almost five years. Although doubts arose with respect to the effectiveness of this structure, firms practicing antitrust law in China that have issued commentaries on the development and application of the AML are generally positive regarding the law's administrative enforcement.¹¹¹ True, enforcing the law through this system does deliver results, as indicated by the AMEAs enforcement actions, but this structure creates certain inefficiencies. Some of these inefficiencies impact the AMEAs ability to process cases, while other inefficiencies lead to confusion about the AML in the legal community, raising questions about the AMC's coordination role in the AML. The following section highlights three such structural inefficiencies, unapparent coordination among the AMEAs, under-resourced ministries, and the concurrent enforcement of pre-AML

¹⁰⁹ *Anti-monopoly: Agencies walk a fine line*, *supra* note 99; See also Susan Ning, Liu Jia & Kate Peng, *A General Picture of SAIC's Antitrust Enforcement*, CHINA LAW INSIGHT, <http://www.chinalawinsight.com/2012/07/articles/corporate/antitrust-competition/a-general-picture-of-saics-antitrust-enforcement/> (According to a statement by the Director-General of the SAIC in July 2012, the SAIC and its regional bureaus have launched investigations in a total of 14 antitrust cases, one of which resulted in imposing a fine of RMB 200,000 against the Concrete Committee of the Construction Materials and Construction Machinery Industry Association of Lianyungang City.).

¹¹⁰ Ning, *supra* note 109.

¹¹¹ Jones Day Commentary, *supra* note 88, at 1 (Jones Day noted that "China has made considerable progress in only a few short years."); See also *China's anti-monopoly regime dissected*, CHINA LAW & PRACTICE (Dec. 2012/Jan.2013),

<http://search.proquest.com.ezproxy.shu.edu/docview/1237147335/13C6F860FE04CEF5789/5?accountid=13793> (Citing McDermott Will & Emery lawyer that said China's enforcement authorities should be "praised for doing a reasonably good job so far, although transparency is clearly lacking.").

competition laws.¹¹² It should be noted that because of the AMEAs disclosure requirements, there is a limited sample of information available for review with respect to why the AMEAs have rendered certain antitrust decisions.

a. Unapparent coordination among the AMEAs

Article 9 of the AML includes “coordinating anti-monopoly administrative law enforcement work” as one of the AMC’s responsibilities.¹¹³ Although this does not specifically call for a uniform application of the law by all three AMEAs, it is this author’s opinion that a reasonable person would expect the law to be applied consistently among the AMEAs, or at least not result in conflicting applications by the AMEAs. Representatives of the AMEAs’ antitrust bureaus indicate that their AML departments do coordinate their enforcement activities, and will continue to do so in the future.¹¹⁴ However, as described below, this expectation does not seem to have materialized with respect to certain matters.

i. Different transparency requirements

As stated previously, although the AMEAs appear to be disclosing more information regarding their AML decisions, required disclosure practices differ from AMEA to AMEA. The MOFCOM-AMB, for example, is only required to publish its decision if it blocks a merger of imposes conditions on the merger, while the NDRC-DPS and the SAIC-AMAUCEB are not required to publish any of their AML decisions. If the AMEAs were to stop their current trend of disclosing their decisions, then the only disclosed decisions would be those pertaining to the AML’s merger control regime because only the MOFCOM-AMB is required to publish its

¹¹² This is not an exhaustive list of the mechanism’s inefficiencies. These are the inefficiencies this author discovered while reading journal articles and reports on the AML’s administrative enforcement structure.

¹¹³ PRC Anti-monopoly law, *supra* note 38, art. 9(1).

¹¹⁴ Deng et al., *supra* note 44.

decision under certain circumstances. Therefore, one result of dividing enforcement among three agencies that do not have the same transparency requirements may be that the public only learns how the AML is applied to one third of the conduct it prohibits.

This issue raises the question of the AMC's role in the coordinating enforcement activities among the AMEAs. Why are not all the AMEAs required to publish their decisions? More importantly, if the AMC is supposed to develop a competition mentality, requiring that these decisions be published would be in its best interest because these would provide the public with actual examples of both permitted and prohibited anticompetitive conduct. In turn, failing to publish these decisions may harm those parties that need to learn from the law's application the most: businesses, which need to understand why certain conduct is sanctioned so as to engage in legal competitive behavior, and lawyers, who need to advise their clients on business practices in China.

ii. Overlapping jurisdiction among the AMEAs

The MOFCOM-AMB's jurisdiction under the AML is well defined: it has jurisdiction to review the concentration of mergers and acquisitions.¹¹⁵ However, despite provisions and procedural rules by the NDRC-DPS and the SAIC-AMAUCEB, the jurisdictional dividing line between the other two AMEAs matters remains unclear.¹¹⁶ This is because an antitrust issue can involve both price and non-price related matters.¹¹⁷ In this scenario, which AMEA would undertake investigating the anti-monopoly issue? Would the two agencies split the investigation among them, or would one agency take on the entire matter, and if the latter, how would this be decided? More importantly, how will injured parties know with which ministry to file a

¹¹⁵ Norton Rose Group, *supra* note 9, at 28.

¹¹⁶ Zhang, *supra* note 8, at 641.

¹¹⁷ *Id.* (stating that a firm may have abused its dominant market position by tying and selling at an unfairly high price, triggering the jurisdiction of both agencies).

complaint if the issue at hand straddles both jurisdictions? Again, the AMC, which is expected to coordinate enforcement among the AMEAs, does not appear to have weighed in on this matter as articles and reports on this issue do not discuss the AMC's involvement in resolving this issue. Determining the answer to this question is not facilitated by the fact that these two AMEAs are not required to publish their decisions, which might provide some guidance if made available.

The impact on the legal community of failing to clearly define which competition activities are included under these two AMEAs, and whether there is in fact coordination among these ministries, became apparent in 2010, when a tying practice by a salt company was exposed. The NDRC-DPS investigated and made a decision on a tying practice by the Wuchang Salt Company in Hubei in November 2010.¹¹⁸ However, because tying does not readily appear to be related to pricing, since the seller is not using price but its dominant position in the market to entice consumers to purchase its product and a secondary product, one would have expected the SAIC-AMAUCB to take on the investigation.¹¹⁹ When the NDRC-DPS announced that it was imposing fines on the Wuchang Salt Company, the legal community's reaction indicated surprise that the NDRC-DPS even had jurisdiction over the matter.¹²⁰

¹¹⁸ Norton Rose Group, *supra* note 9, at 8; *See generally* Ernest Gellhorn & William E. Kovacic, *Antitrust Law and Economics in a nutshell*, 326 (West Publishing Co. 4th ed. 1994) (Describing a tying arrangement as one that occurs where the seller of a product conditions the sale of one product on the buyer's agreement to purchase a second product. Therefore the buyer can only purchase the tying product if he agrees to also purchase the tied product. The seller typically has market dominance in the tying product market, and is encouraging the sale of its products in the tied-product market.).

¹¹⁹ Norton Rose Group, *supra* note 9, at 8.

¹²⁰ Zhang, *supra* note 8, at 643 (Highlighting that the prohibited conduct was non-price related and therefore the NDRC-DPS did not have jurisdiction over the anticompetitive conduct, thus "raising doubts as to whether NDRC and SAIC will strictly adhere to their division of labor."); *See also* Susan Ning, Zheng Ziqing & Angie Ng, *What Constitutes Anticompetitive Tying in China? The Wuchang Salt Company Case*, ChinaLawInsight (Nov. 30, 2010), <http://www.chinalawinsight.com/2010/11/articles/corporate/antitrust-competition/what-constitutes-anticompetitive-tying-in-china-the-wuchang-salt-company-case/>.

The public's confusion regarding jurisdiction of the AMEAs arose again in 2009 when BHP Billiton and Rio Tinto announced a proposed joint venture.¹²¹ The legal community believed that the joint venture would have to be reviewed by at least one of the AMEAs.¹²² All three of the authorities wanted jurisdiction over the investigation because the AML was "proving to be one of China's most high-profile pieces of legislation."¹²³ However, there appeared to be a split among lawyers as to which AMEA would have jurisdiction over the review: one lawyer believed that the MOFCOM-AMB was the regulator that would investigate the deal, while a second lawyer believed that the other two AMEAs would be involved so as to "be seen to have had a say in this case."¹²⁴ The MOFCOM-AMB eventually launched the investigation into the joint venture.¹²⁵ However, the initial split in the legal community indicates that division of monopolistic conduct among these agencies was unclear.

As stated previously, both the NDRC-DPS and the SAIC-AMAUCEB have issued regulations and guidelines that are supposed to define the dividing line between their authority. However, given the legal community's reaction to the above investigations, these guidelines do

¹²¹ Anonymous, *BHP-Rio could provoke China regulatory tussle*, 28 Int'l Fin. L. Rev. 8, 8-9 (2008-2010), http://heinonline.org.ezproxy.shu.edu/HOL/Page?men_tab=srchresults&handle=hein.journals/intfinr28&id=612&size=2&collection=journals&terms=law|financial%20regulatory|review|International|Law|tussle|regulatory|BHP|Financial%20Regulatory|Financial|financial|could|Regulatory|Rio&termtype=phrase&set_as_cursor=0#612; *See also BHPRio and MOFCOM were in pre-consultation on JV*, (Dec. 23, 2009), <http://news.alibaba.com/article/detail/metalworking/100222976-1-bhp-rio-mofcom-were-pre-consultation-jv.html> (The joint venture would actually occur in Australia, but because of the turnover of the parties involved, the business transaction fell under the AML's merger review provisions. China was also concerned about the joint venture's possible impacts on the iron ore market in China.).

¹²² *BHP-Rio could provoke China regulatory tussle*, *supra* note 121, at 8-9 ("The competition review of the proposed joint venture between BHP Billiton and Rio Tinto could spark an internal tussle between Chinese regulators keen to assert their jurisdiction over the AML.").

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*; *See also MOFCOM investigates BHP, Rio Tinto JV plan*, CSR-China (2010-05-10), <http://www.csr-china.net/templates/node/index.aspx?nodeid=ddd0b45c-b7c4-4947-b2e3-e20374708733&page=contentpage&contentid=ce66c993-8116-48be-86ba-b965edc4927c&l=en>, and *China Investigates Rio, BHP Iron Ore JV*, Business Watch-Morning Whistle (May 5, 9:16 AM), <http://businesswatch.21cbh.com/index.php?m=content&c=index&a=show&catid=9&id=175733>, and Julia Kollwe, *BHP Billiton and Rio Tinto scrap iron-ore venture*, The Guardian (Oct. 18, 2010 12:36 EDT), <http://www.guardian.co.uk/business/2010/oct/18/bhp-billiton-rio-tinto-venture-scrapped> (The proposal was canceled in late 2010.).

not seem to sufficiently address this issue. The AMC's apparent silence on these investigations also raises questions concerning its role in coordinating enforcement activities among the AMEAs. Therefore, this undefined jurisdiction, which is a product of the tripartite system, seems to create confusion in the legal sphere.

iii. Inconsistent application of the AML's leniency program

Leniency programs are designed to encourage entities involved in an agreement that violates antitrust law to disclose this information to the relevant authority, with the hope that the reporting entity will either not be fined for its conduct, or be imposed a reduced fine.¹²⁶ Pursuant to Article 46 of the AML, both the NDRC-DPS and the SAIC-AMAUCEB have leniency programs that are only applicable to anticompetitive conduct related to monopoly agreements, and not abuse of dominance.¹²⁷

Although established through the same article of the AML, there are inconsistencies between the application of these two programs as highlighted in the procedural regulations of each ministry.¹²⁸ First, it appears that the NDRC-DPS has discretion over whether or not to grant immunity, while the SAIC-AMAUCEB does not have this same discretion, it must grant leniency.¹²⁹ Both AMEAs grant complete leniency to the first entity to self-report and provide "important evidence" about an anticompetitive agreement.¹³⁰ However, under the NDRC-DPS's program, the second entity to self-report can receive "a reduction of at least 50% [of the fine],

¹²⁶ Xinzhu Zhang & Vanessa Yanhua Zhang, *New Wine into Old Wineskins: Recent Developments in China's Competition Policy Against Monopolistic/Collusive Agreements*, 41 *Review of Indus. Org.* 53, 59 (2012).

¹²⁷ Norton Rose Group, *supra* note 9, at 23.

¹²⁸ HARRIS, JR. ET AL., *supra* note 25, at 290-294.

¹²⁹ Jones Day Commentary, *China's New Leniency Procedure in Cartel Investigations* 1, 3 (Jan. 2011),

<http://www.jonesday.com/files/Publication/bbcb36d6-d2de-434a-ae96-68f0fe327dc1/Presentation/PublicationAttachment/c1fad76f-259b-41ad-9b79-6919f502c10d/China%20New%20Leniency%20Procedure.pdf>; *See also* HARRIS, JR. ET AL., *supra* note 25, at 293.

¹³⁰ Jones Day Commentary, *supra* note 129, at 3.

and all subsequent undertakings may receive a reduction of up to 50%.¹³¹ Furthermore, the NDRC-DPS's program does not apparently preclude granting leniency to the initiator of a monopoly agreement.¹³² On the other hand, the SAIC-AMAUCEB's leniency program does not provide graduated penalties for entities that report an antitrust violation following the initial disclosure, nor does it grant a monopoly agreement initiator any leniency.¹³³

These inconsistencies, coupled with the unclear jurisdiction of these two AMEAs, may discourage self-reporting by businesses involved in monopoly agreements. A business participating in an antitrust violation would only disclose its conduct if it could benefit from this leniency program, but the circumstances under which an entity would benefit from this program are not easy to determine. For example, if a monopoly-initiator wanted to disclose its antitrust conduct and benefit from the leniency program, it would want to frame the cartel's conduct as price-related, because it might benefit from the immunity provision within the NDRC-DPS's leniency program. This entity would most likely not want its activity framed as non-price related because it would risk falling under the jurisdiction of the SAIC-AMAUCEB, and as monopoly-initiator it would be ineligible for leniency. If this monopoly-initiator is unsure whether the NDRC-DPS will grant leniency, and knows that the SAIC-AMAUCEB will not grant leniency to a monopoly-initiator, the monopoly-imitator may choose not to disclose its conduct, despite the existence of a program that is supposed to encourage disclosure. Therefore, because the tripartite enforcement structure allows the AMEAs discretion in applying the AML's leniency program, this structure may actually discourage the use of a seemingly beneficial program. It does not seem that businesses are using the leniency program, which makes it difficult to determine

¹³¹ Norton Rose Group, *supra* note 9, at 23.

¹³² *Id.*

¹³³ *Id.* at 24; *See also* HARRIS, JR. ET AL., *supra* note 25, at 293.

whether they are adopting a “wait and see approach” as to the program’s application, or whether the program’s inconsistencies discourage disclosing violations of antitrust conduct.¹³⁴

b. Under-resources ministries

Dividing enforcement of the AML among three ministries means that these antitrust departments compete with other ministry departments for resources. It has been noted that the antitrust offices of each AMEA are under resourced.¹³⁵

Each AMEA likely engages in similar steps in its initial investigation on antitrust behavior, regardless of whether the conduct is price or non-price conduct, or related to a business transaction.¹³⁶ These steps include defining the relevant market involved, identifying the market’s consumers and substitutes of the good available to the consumers, and determining whether the entities involved have market power.¹³⁷ Assuming that each AMEA follows this process for its investigation then there is a duplication of these initial investigative steps across the three AMEAs. Although these offices are expected to expand to include more staff and better resources, this does not take away from the fact that this particular duplication, a result of the tripartite structure, exists and is a waste of resources.¹³⁸

Insufficiently resourced ministries also seem to affect how quickly the MOFCOM-AMB can process its caseload. This bureau recently announced that it would develop a fast-track review process in response to criticisms that it takes too long to review proposed mergers and

¹³⁴ *Anti-Competitive Conduct in China: A Dialogue with NDRC and SAIC Officials on Enforcement Under China’s Anti-Monopoly Law*, ANTITRUST LAW BLOG (Sept. 19, 2012), <http://www.antitrustlawblog.com/2012/09/articles/article/anticompetitive-conduct-in-china-a-dialogue-with-ndrc-and-saic-officials-on-enforcement-under-chinas-antimonopoly-law/>.

¹³⁵ Su et al., *supra* note 15, at 226-227; *See also Agencies walk a fine line*, *supra* note 99.

¹³⁶ Grobowski et al., *supra* note 70.

¹³⁷ *Id.*

¹³⁸ *China’s anti-monopoly law regime dissected*, *supra* note 111.

acquisitions.¹³⁹ Apparently this delay is due to lack of resources to process merger notifications more quickly.¹⁴⁰

Therefore, enforcing the AML through three under-resourced ministries has two important effects: first it leads to duplicative efforts, which may actually waste resources, and second, it may reduce an AMEA's caseload capacity at any given time.

c. Concurrent enforcement of pre-AML competition laws

This tripartite structure may also discourage application of the AML by the AMEAs themselves. It has been suggested that the NDRC and the SAIC, which have jurisdiction to enforce the Price Law and the AUCL respectively, may choose to enforce the laws with which they are more familiar over the AML.¹⁴¹ Using the NDRC-DPS as an example, it applied the Price Law and the AML in a cartel investigation among rice noodles producers in the Guangxi province, and in an investigation concerning meetings on price increases with respect to paperboard packaging.¹⁴² These ministries may choose to apply different laws for two reasons: first, because they are more familiar with this other law, and second, because the AMEAs would then not be "subject to the supervision" of the AMC under this other law.¹⁴³ This outcome may have two adverse effects on the development of the AML. First, it may provide a source of

¹³⁹ *Coming Soon: Fast Track Reviews*, CHINA LAW & PRACTICE (Jul/Aug 2012), <http://search.proquest.com.ezproxy.shu.edu/docview/1032762109/13C6FB4CC8833534AC/145?accountid=13793>.

¹⁴⁰ Jones Day Commentary, *Looking Back and Looking Forward After Three Years of Antitrust Enforcement in China* (Nov. 2011), <http://www.jonesday.com/files/Publication/831fba07-1a78-4d53-8964-a829e9491710/Presentation/PublicationAttachment/1e30663f-d78e-43a2-a5f8-aa51c302d89d/Looking%20Back.pdf>.

¹⁴¹ Zhang, *supra* note 8, at 641-642; *See also Price Law or Anti-monopoly Law: NDRC's antitrust enforcement* (Feb. 7, 2013), <http://www.internationallawoffice.com/newsletters/detail.aspx?g=2a6de41d-7092-4e5e-b9bb-ecd8f483e70f> (Stating the NDRC may exercise some discretion to "apply the more substantial law (the Price Law) when it conducts antitrust investigations on price-related cartels." The NDRC applied both the AML and the Price Law in its investigation into increasing prices by rice noodle manufacturers, and investigation into meeting concerning price held by companies that sell white packaging paperboard.).

¹⁴² *Id.*

¹⁴³ Zhang, *supra* note 8, at 642.

confusion for individuals attempting to predict how the AML will be applied, because they are not sure it will even be applied if the AMEA has the option to apply a separate law. Second if these ministries choose to apply laws in lieu of the AML because they are more familiar with these other laws, when will they begin to transition to using the AML? The drafting period, the adoption of the AML, and its potential to create a comprehensive competition law playing field could be rendered ineffective if two out of the three AMEAs choose not to enforce the law because they have sole jurisdiction over, and are more familiar with, a different competition law. Therefore, it is possible that by giving ministries the ability to concurrently enforce the laws that are similar but different to the AML, there may be a discouraged or reduced use of the AML. However, this deduction could be illusory as there may be many cases in which these two AMEAs applied the AML but did not publish their findings, and therefore the public is unaware that the AML is in fact being applied regularly. Also, these two bureaus are still becoming accustomed to applying the AML to competitive conduct in China.

It does not seem that the provisions enforced by the MOFCOM before the AML was enacted create the same confusion. This is likely because MOFCOM modified these provisions to align with those of the AML's merger control regime.¹⁴⁴ In July 2009, after the AML was enacted, the 2006 M&A Provisions (under MOFCOM's responsibility) were amended to conform to the merger regime of the AML.¹⁴⁵ This ensured that "foreign buyers would be subject to only one competition notification and review requirement, that under the AML."¹⁴⁶

IV. Institutional Reform Recommendation

¹⁴⁴ Chin, *supra* note 27, at 2-3.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

The purpose of this paper is to provide an institutional reform recommendation by identifying inefficiencies in the AML's administrative enforcement structure.¹⁴⁷ With the inefficiencies of this structure in mind, this section outlines a two-step institutional reform that would reduce these inefficiencies by empowering the AMC. The first step requires promoting the AML to a ministry, and the second step requires placing the three AMEAs under the promoted AMC. Because this suggestion is somewhat aspirational given China's political culture, this section also describes likely obstacles to this suggestion, and provides tools that may be used to overcome them.

a. Institutional Reform: Empowering the AMC

Enforcing the AML through one institution borrows an idea largely developed in the first group of literature, that the AML should be enforced through a single, independent, institution.¹⁴⁸ If the law could not be enforced through one institution when the law was passed in 2007, why could, and should, it be enforced through one institution today? Specifically, why should a new actor, the AMC, be given the role of enforcing an increasingly powerful law?

China's competition law landscape has significantly changed since the AML was enacted in 2008. First, unlike in 2008, there now exists four experienced AML bodies, the AMC, that is tasked with developing a competition culture for China's socialist market economy, and the three antitrust departments of the AMEAs. All four bodies have almost five years of work experience with the AML. If in 2008 the AML's jurisdiction was divided among the three ministries that had previously enforced China's competition law because they had the most familiarity in working with a competition law, it is not implausible to consider reallocating this jurisdiction to

¹⁴⁷ Branigan, *supra* note 11.

¹⁴⁸ See generally Owen et al., *supra* note 33, at 261, and Su et al., *supra* note 15, at 231.

a government body whose responsibility is to promote a domestic competition culture. Additionally, the AML is supposed to be China's "economic constitution."¹⁴⁹ As such, its importance should be reflected in China's bureaucratic structure, and not buried in the hierarchy of existing ministries as it is currently, thereby reducing its effectiveness.¹⁵⁰

In order for the AMC to take the lead in antitrust development and enforce the AML, it needs to be promoted to a higher government position than the one it currently holds. Its current form does not enable it to enforce the law. Nor does its current form indicate that it is leading antitrust development in China, even though it was recently promoted to a formal institution, because most of its work occurs through meetings with its members.¹⁵¹ Using the promotion of the National Environmental Protection Agency (NEPA) to the State Environmental Protection Administration in March 1998 as an example, perhaps by promoting the AMC to a ministry, the central government will signal that antitrust is one of its priorities, and that there is a body which will take the lead in this area. Prior to 1998 NEPA was a sub-ministry.¹⁵² This promotion apparently revealed that "the central government has given priority to environmental

¹⁴⁹ Xian-Chu, *supra* note 1 at 1469.

¹⁵⁰ Jones Day Commentary, *supra* note 88, at 5; *See also* Ying Huang, *China's Antitrust Law Enforcement After the 18th Party Congress*, CPI ANTITRUST CHRONICLE (2)1, 5 (Feb. 2013) <http://www.stepto.com/assets/attachments/4506.pdf>; *See also* *China's anti-monopoly regime dissected*, *supra* note 111.

¹⁵¹ Xian-Chu, *supra* note 1, at 1479.

¹⁵² The AMC does not currently appear to have the same functions as the three AMEAs at the domestic and international level. First, the AMC was only recently promoted to a formal institution. Second, the AMC does not appear to accompany the AMEAs to their discussions with foreign antitrust institutions, nor does it sign memorandums of understanding with these foreign bodies. *See* Veronica Lockyer, *Antitrust allies*, CHINA LAW & PRACTICE (Sep. 2011). <http://search.proquest.com.ezproxy.shu.edu/docview/897016848/13C6F860FE04CEF5789/4?accountid=13793>, (The United States Federal Trade Commission and the Department of Justice signed a memorandum of understanding on antitrust and anti-monopoly cooperation with the three AMEAs on July 27, 2011. The AMC did not appear to be present at the meeting.), *and* *Competition: Commission signs EU cooperation agreement with China*, European Commission Press Release (Sept. 20, 2012), Europa.eu/rapid/press-release_IP-12-993_en.htm (On September 20, 2012, the NDRC and the SAIC signed a memorandum of understanding with the European Commission to increase cooperation between the European Commission and China's three AMEAs.).

protection.”¹⁵³ In a similar fashion, promoting the AMC to a ministry may indicate that antitrust enforcement is a new priority for China’s government.

After promoting the AMC to a ministry, it would have to be restructured because it currently is a commission consisting of representatives from existing ministries.¹⁵⁴ It does not appear to have the necessary tools, such as offices or officers to carry out investigations, to enforce the AML. Therefore, the second step of this reform requires removing the three AMEAs from under the umbrellas of the MOFCOM, the NDRC, and the SAIC, and placing them under the promoted AMC. The latter would then enforce the AML through the AMEAs, which have institutional knowledge of antitrust law enforcement given their experience under the abovementioned ministries. Additionally, a commissioner, or minister, and supporting staff would need to be designated and assigned to this empowered AMC.

There is precedent for reorganizing government departments in such a fashion in China’s bureaucratic history. For instance MOFCOM was formed after the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) and the State Economic and Trade Commission (SETC) were merged in March 2003.¹⁵⁵ The new ministry allowed responsibility for foreign and domestic trade to be housed under one body by combining MOFTEC with parts of SETC and the State Development Planning Commission (SDPC) in order to “streamline bureaucratic approval requirements.”¹⁵⁶ As of late 2007, the majority of departments in MOFCOM had been

¹⁵³ Yang Xi, *SEPA gets stronger*, (Mar. 10, 2008), www.china.org.cn/environment/news/2008-03/10/content_12143406.htm; See also Jimmy Zhao & Leonard Ortolano, *The Chinese government’s role in implementing multilateral environmental agreements: The case of the Montreal protocol*, 175 *The China Quarterly* 708, 711 n8 (2003), and *The State Environmental Protection Administration (SEPA) Description*, http://www.chinacp.org.cn/eng/cporg/cporg_sepa.html, (accessed on March 24, 2013).

¹⁵⁴ Ning et al., *supra* note 72.

¹⁵⁵ Wang Yong, *China in the WTO: A Chinese View*, *China Business Review*, 42, 47 (Sept.-Oct. 2006).

¹⁵⁶ *Ministry of Commerce (MOFCOM)*, The US-China Business Council, https://www.uschina.org/public/china/bb2007/govstructure_part5/4.html (last updated Oct. 30, 2007).

transferred “intact’ from MOFTEC, while a handful were from the SETC and SDPC.¹⁵⁷ Another and more recent example of reorganizing agencies under a government entity occurred with respect to China’s maritime agencies.¹⁵⁸ In March 2013 the National People’s Congress approved a plan to house four of China’s five maritime agencies under the State Oceanic Administration, in an attempt to improve coordination and reduce waste of resources among the agencies.¹⁵⁹

Lastly, to allocate enforcement authority to the AMC legislatively, the State Council could delegate this authority pursuant to Article 9, “The State Council will set up the Anti-Monopoly Commission (“AMC”), which is responsible for organizing, [...], and other functions specified by the State Council.”¹⁶⁰ Alternatively, although redundant, the State Council could designate the AMC as the sole AMEA, thus allowing the AMC to enforce the law pursuant to Article 10, “The Anti-monopoly Enforcement Authority designated by the State Council to undertake the responsibilities of the AML enforcement [...] is responsible for the enforcement of the Anti-Monopoly Law.”¹⁶¹

b. Benefits of this institutional reform

Promoting the AMC in this fashion may reduce some of the enforcement system’s current inefficiencies. This reform may provide a clearer direction of the AML’s future, remove current duplicative efforts among the antitrust bureaus, remove the need to coordinate antitrust

¹⁵⁷ *Id.*

¹⁵⁸ *Dragons unite*, THE ECONOMIST, (Mar. 16, 2013), <http://www.economist.com/news/china/21573607-protect-its-maritime-interests-china-setting-up-civilian-coastguard-dragons-unite> (Stating that five agencies have maritime law-enforcement abilities in China. They are poorly coordinated and their overlapping functions are “considered a waste of resources.” With the current maritime disputes, China wants a stronger agency that can provide a unified front of its maritime interests. Therefore, four agencies will be brought under the State Oceanic Administration, overseen by the Ministry of Land and Resources.).

¹⁵⁹ *Id.*

¹⁶⁰ PRC Anti-monopoly law, *supra* note 38, art. 9.

¹⁶¹ *Id.* art. 10.

enforcement among three institutions, and encourage the adoption of one leniency program and requirement to publish decisions on antitrust matters.

Currently, the tripartite structure may reflect a mixed message about the government's views on the future of antitrust law in China: it wants to promote a competition culture through the AMC, but enforce the law responsible for regulating competitive behavior through three separate ministries that have different priorities with respect to China's economic development. By shifting enforcement of the AML to the AMC, a clearer direction of the AML may emerge because the body responsible for promoting a competition culture, the AMC, would also be responsible for enforcing the law that regulates competition behavior.

As stated previously, the current system delegates antitrust matters among the ministries based on competition jurisdiction that existed prior to the AML. These ministries are understaffed and under-resourced, and may be engaging in duplicative efforts with respect to AML investigations. By placing these departments under the AMC, which would only handle antitrust matters, these offices would no longer have to compete with other ministry departments for resources. Consequently, the duplicative efforts that existed before may disappear, reducing waste of resources. Additionally, the empowered AMC, being only one ministry with one priority, may be able to increase the number of antitrust cases reviewed under the AML.

Placing these three bureaus under the AMC may have additional positive spillover effects, such as encouraging a uniform application of the AML's leniency program, or requiring transparency with respect to AML decisions. However, these spillover effects may depend on whether the ministry practices disappear when the departments are moved to the AMC. If the ministry labels are removed when these offices are unified under the promoted AMC, the inconsistent leniency programs and publishing requirements may also be removed. A different

practice regarding administrative practice may be encouraged, such as the implementation of one leniency program, and the requirement to publish decisions of all antitrust matters.

An additional advantage to enforcing the AML through the AMC is that it would remove the uncertainty created by having multiple competition laws enforceable by numerous AMEAs. Because the NDRC and the SAIC can enforce the Price Law and AUCL respectively, they may choose not to enforce the AML in a particular antitrust matter.¹⁶² The advantage of enforcing the AML through a ministry-level AMC is that the possibility of applying a law other than the AML to antitrust matters would not exist. Furthermore, enforcing the AML through the AMC would erase the current question of overlapping jurisdiction concern. If the promoted AMC has sole jurisdiction over the AML, then the risk of a second ministry investigating antitrust conduct would be removed. This does not mean that other ministries would not assist the AMC, nor that other competition laws would be repealed. This restructuring would only signal that once the AMC investigates anticompetitive conduct, only its offices would do so within the confines of the AML, not other ministries.

One might argue that a structural reform empowering the AMC is not necessary to remove improve the AML's administrative enforcement. One suggestion has been to improve the AMC's coordination activities among the AMEAs.¹⁶³ The suggestion proffered in this paper is made in light of the fact that currently the AMC does not appear sufficiently powerful to coordinate enforcement activities, which may be a result of its current structure, which includes a number of representatives from the MOFCOM, the NDRC, and the SAIC. Given the bureaucratic competition in China, which is addressed in the next section, the current structure of the AMC itself may discourage coordination among the AMEAs because ministries do not want

¹⁶² Zhang, *supra* note 8, at 642.

¹⁶³ Eleanor M. Fox, *An Anti-Monopoly Law for China – Scaling the Walls of Government Restraints*, 75 Antitrust L. J. 174, 194 (2008-2009).

to share jurisdiction over the AML. One might also argue that most enforcement inefficiencies stem mainly from the NDRC-DPS and the SAIC-AMAUCB. Therefore, one might suggest that only these two bureaus should be merged into one bureau that would enforce the AML in conjunction with the MOFCOM-AMB. The difficulty with this proposition is that a decision would still have to be made as to which ministry would oversee the merged department. Would the MOFCOM, the SAIC, or the NDRC have responsibility for this department? This might lead to a situation similar to that before the AML was enacted where ministries refused to cede their jurisdiction to an existing ministry. Therefore, although this is an alternative, it may create implementation problems similar to those that arose in 2007.

Lastly, this reform streamlines the AML's administrative enforcement structure. It would not only reduce current inefficiencies, but would also be a place of reference for the legal and business community on anti-monopoly matters. Complaints, investigations, referrals, would all go to this new AMC. Regulations, guidelines, and provisions about the law, would all be issued through this empowered AMC. This streamlined result aligns with two of the priorities announced by China's new premier, Li Keqiang.¹⁶⁴ In March 2013 the country's new leaders stated their goal to reduce government excess at the ministerial level and the possibility of doing so by consolidating a number of bureaus under one administration.¹⁶⁵

Therefore, restructuring the current institutional structure so that the AML is enforced through an empowered AMC would improve enforcement efficiency for three reasons: it would remove duplicative investigations and jurisdictional concerns, increase resources available for antitrust review, encourage transparency, and provide better reflection of the AML's position in China.

¹⁶⁴ Branigan, *supra* note 11.

¹⁶⁵ *China scraps railways ministry in streamlining drive*, *supra* note 11.

c. Possible hurdles in implementing this institutional reform

i. Administrative hurdles

Government restructuring is an expensive endeavor, and China's government has changed its organization multiple times over the years.¹⁶⁶ Unlike China's maritime agencies which appear uncoordinated at a time when foreign policy requires a unified maritime policy, AML enforcement exists, delivers results, and is adapting to some of the legal community's needs. However, it can be made more efficient for lawyers to navigate. Therefore, unlike other areas of government interest, antitrust enforcement may not be as high a priority on the government's list of priorities, and therefore may not require restructuring today.

Also, if this reform is adopted, additional structural changes may have to occur. The State Council would have to determine whether the AMC as a ministry should have local and provincial branches, and if so, be allowed to delegate investigative and enforcement authority to these branches, similar to the current application of the AML by the SAIC-AMAUCEB and the NDRC-DPS. Alternatively, the ministry-level AMC could pursue the same direction as the MOFCOM-AMB, and only enforce the AML through a centralized bureau. Additionally, the new AMC would have to determine its internal structure once the AMEAs are placed under its supervision. It might be best to have one department handle preliminary investigations into all antitrust matters, and create another three departments that would examine price related conduct, non-price related conduct, and proposed business transactions. These particular issues highlight that the institutional reform does not stop after the two steps highlighted above. Further

¹⁶⁶ Kenneth Lieberthal, *Chapter 6, The Organization of Political Power and its Consequences: The View from the Outside*, in *Governing China: From Revolution Through Reform* 177 (2003) (indicating that very few "organs below the level of the premier have avoided mergers, divisions, or other major organizational changes since 1954").

considerations and steps must be taken into account, all of which would not necessary if the enforcement structure remains unchanged.

ii. Resistance from the current AMEAs and the State Council

There is considerable bureaucratic competition among the ministries in China that creates the need for entities “to assert jurisdiction over the same issue,” partly in order to achieve recognition from other government officials and partly because of China’s political culture.¹⁶⁷ In light of the AML’s legislative history and AMEAs resistance to cede enforcement to one institution in 2007, the current AMEAs will most likely resist any decision that allows the institutional reform suggested above to proceed. Informing the MOFCOM, the NDRC, and the SAIC that their jurisdiction over the AML will be removed and allocated to an empowered AMC in which they will not have the same representation will likely lead to these ministries resisting to agree to this reform. Therefore certain bargaining chips, outlined below, would have to be provided to these ministries in an attempt to persuade them to cede their AML responsibilities to the AMC.

First, it would be important to highlight that the AMC is only taking the lead on AML enforcement to simplify enforcement and development of the law; and that it would still require assistance from the AMEAs in developing China’s competition policy. The AMC could indicate to these ministries that it would still require their input to ensure that competition law develops in line with the economic development of the country (the responsibility of the NDRC) and the administration of consumer protection (one of the SAIC’s responsibilities).¹⁶⁸

¹⁶⁷ SUSAN V. LAWRENCE & MICHAEL F. MARTIN, UNDERSTANDING CHINA’S POLITICAL SYSTEM, Congressional Research Service 23 (May 10, 2012), <http://www.fas.org/sgp/crs/row/R41007.pdf>.

¹⁶⁸ Su et al., *supra* note 15, at 203.

Second, these ministries would have to be reassured that their prior AML involvement in competition would remain intact. The MOFCOM, for example, could still retain jurisdiction over reviewing those mergers that do not fall under the AML's characteristics for merger notification requirements.¹⁶⁹ Additionally, the NDRC and the SAIC could retain jurisdiction over the Price Law and AUCL respectively, since they are supposed to be applied in a different context than the AML. However, despite these suggestions that would allow these three ministries to continue playing a role in the development of China's "economic constitution," it must be acknowledged that this institutional reform suggestion would remove the largest component through which these entities exert their influence: enforcement of the AML.¹⁷⁰ As such, it may be very difficult to persuade these ministries to cede their responsibilities in a timely manner.

The State Council also has a voice in empowering the AMC because pursuant to Article 9 of the AML, the State Council is responsible for establishing the AMC.¹⁷¹ Because the State Council may wish to control the development of China's antitrust legislation, and because it must develop the country's socialist market economy, it may view empowering the AMC as a step away from this economic policy. Although this empowered AMC would still be subordinate to the State Council, ministries can still influence policy goals.¹⁷² As such, the State Council may be reluctant to place the AML, which seems to be an increasingly important law in China, in the hands of one single ministry that will have one goal, to develop China's economic competition policy. It is this author's opinion that the current structure allows ministries

¹⁶⁹ It might be difficult to find these types of mergers because the AML thresholds are low to begin with, already encompassing most small mergers. However, perhaps it is a possibility, and there are in fact many mergers that fall under these thresholds, they are just not made known to the public.

¹⁷⁰ Xian-Chu, *supra* note 1, at 1469.

¹⁷¹ PRC Anti-monopoly Law, *supra* note 38, art. 9.

¹⁷² Lawrence et al., *supra* note 167, at 23.

involved in China's economic development to influence the development of the AML so that China's competition policy conforms to its market economy. As such, the State Council may not wish to empower the AMC because in doing so China's economic competition policy may develop in a different direction, away from the country's market economy policy.

Furthermore, this recommendation is only a structural recommendation. It does not address the relationship between the AML and state-owned enterprises or administrative monopolies in China, which itself may require a different and deeper reform. Along the same vein, this suggestion still places AML enforcement under the State Council. Therefore AML enforcement would still be subject to the oversight of the State Council, which still does not allow for a truly independent antitrust enforcement structure.

V. Conclusion

The AML has grown to become an important piece of legislation since it became effective on August 1, 2008. It has grown from a document that generated debate as to its effectiveness, to a law with a power that causes companies operating in China and negotiating mergers and acquisitions outside of China to rethink their business strategies.¹⁷³

The AML's current administrative enforcement structure was established so that the law would be promulgated quickly and without much change to the existing government structure, which in 2007 did not include an experienced entity devoted only to competition development in China's socialist market economy. Although this structure was possibly necessary in 2007 so that the AML law would be enacted, it is not without its disadvantages. First, it creates uncertainty because China's bureaucratic competitiveness does not seem to encourage

¹⁷³ Susan Ning and Hazel Yin, *China's anti-monopoly law: retrospect and prospect on fourth anniversary*, LEXOLOGY (Aug. 1, 2012), <http://www.lexology.com/library/detail.aspx?g=a987eb78-d79b-46c0-a024-d61f687e947b>.

coordination, and the AMC does not seem to require coordination on certain aspects of the law, such as decision publication or application of the leniency program. Second, it forces the AMEAs' antitrust departments responsible for enforcing China's "economic constitution" to compete with other ministry departments for resources. Lastly, it may discourage the application of the AML to anticompetitive matters because the NDRC and the SAIC may apply previous competition laws instead of the AML to anticompetitive behavior.

In light of China's "streamlining drive," this paper seeks to identify inefficiencies in the AML's administrative enforcement structure to demonstrate that this particular area is ripe for reform.¹⁷⁴ Moreover, this paper outlines a two-part institutional reform that may reduce these inefficiencies. By promoting the AMC to a ministerial-level, the government would signal the AML's importance in China's economic policy. By reallocating the AMEAs' antitrust bureaus to a ministry-level AMC, this new body could use the institutional knowledge gained by the AMEAs while they were housed under the MOFCOM, the NDRC, and the SAIC, to enforce the AML.

These recommendations will have their own challenges. Government restructuring is an expensive endeavor, and it will be difficult to convince the AMEAs to cede their jurisdiction under the AML to an empowered AMC. They did not want to do this during the AML's drafting period, and there is little indication that they would agree to this proposition now because of the importance the AML is likely to take in the China's future.¹⁷⁵ Despite offering certain incentives that allow these ministries to maintain a say in China's antitrust development, because of the strong competitiveness that exists among China's ministries it is unlikely that these three

¹⁷⁴ *China scraps railways ministry in streamlining drive, supra* note 11.

¹⁷⁵ *BHP-Rio could provoke China regulatory tussle, supra* note 111.

ministries will accept these bargaining chips because they do not make up for the fact that these ministries would no longer enforce the AML.¹⁷⁶

It should also be noted that reform of the AML's administrative enforcement structure is likely not on the government's agenda because the current enforcement structure does deliver results: mergers have been blocked or conditioned, and firms have been found violating provisions of the AML. Lastly, the AML is still in its infancy, and developments are still occurring under this system, as demonstrated by the AMEAs decision to disclose their case load earlier this year. Therefore a structural reform might not be necessary; the AMEAs may just need time to mature.

To conclude, although the current enforcement structure delivers results, it may be difficult for the public, lawyers and businesses in particular, to navigate because it is divided among three ministries that seem to have three different enforcement practices. The inefficiencies examined in this paper, and the suggested institutional reform, only serve to highlight that the AML's administrative enforcement structure is an area that the Chinese government may wish to consider in its overall plan to streamline the country's government structure.

¹⁷⁶ Lawrence et al., *supra* note 167, at 23.