

# CHINA'S 2007 ANTI-MONOPOLY LAW: COMPETITION AND THE CHINESE PETROLEUM INDUSTRY

*Yong Huang, Shan Jiang, Diana Moss and Randy Stutz\**

**Synopsis:** The National People's Congress of the People's Republic of China passed the Anti-Monopoly Law (AML) in 2007. The law, which formally took effect in August 2008, provides a holistic framework for the regulation of competition. Its purpose is to prevent and restrain monopolistic conduct, protect fair competition in the market, enhance economic efficiency, safeguard the interests of consumers and the public interest, and promote the healthy development of China's socialist market economy.<sup>1</sup> The AML applies to anticompetitive economic conduct within the territory of the People's Republic of China. It also applies outside of China, where such conduct serves to eliminate or restrict competition within China's domestic market.<sup>2</sup>

Because China has restructured aspects of its regulatory regime pursuant to government regulatory reform initiatives, the AML is now applicable in areas formerly governed exclusively by China's regulatory agencies. Many of these areas were previously considered outside of the competition sphere. The finance and telecom sectors, for example, have come under the AML's purview, and calls for similar reform in China's energy sector are gaining momentum. This is particularly true in the oil industry, where non-public enterprises are eager to see the AML enforced in order to facilitate the breaking up of oil monopolies.

The AML prohibits monopolistic agreements and abuses of dominant market positions. It also establishes a scheme for reviewing mergers and acquisitions that applies to all enterprises permitted entry into an industry. In the petroleum industry, this includes the national oil companies, as well as domestic and foreign-funded, non-public enterprises. The AML does not apply to the monopoly status of established incumbents in the industry, but it may apply to

---

\* Huang Yong is professor and Ph.D instructor of the University of International Business and Economics (UIBE), Beijing, and Director of the Competition Law Center. He served as member of the Experts Board of both the Legislative Affairs Office of the State Council and the Law Committee of the National People's Congress (NPC) of the PRC during the legislative process leading to passage of the Anti-Monopoly Law. Jiang Shan is a Ph.D candidate at UIBE and Fulbright Visiting Fellow to Georgetown University Law Center (2009-2010). Diana Moss is an economist and Vice President and Senior Fellow with the American Antitrust Institute (AAI). Randy Stutz is an attorney and Research Fellow with AAI.

The Editors would like to thank Yazhou Wang, a second year law student at the University of Tulsa College of Law, for his assistance with the editing of this article.

1. Fanlongduan Fa [Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz. 517-23, art. 1 (China) [hereinafter *AML*]. "Monopolistic conduct" is defined as "(1) monopolistic agreements among business operators; (2) abuse of dominant market positions by business operators; and (3) concentration of business operators that eliminates or restricts competition or might be eliminating or restricting competition." *Id.* at art. 3.

2. *Id.* at art. 2.

incumbents that affirmatively act to maintain monopoly status or exercise market power to eliminate or restrict competition.

This article is a joint effort of U.S. and Chinese legal and economic scholars, including a member of the AML Drafting Group, to examine the likely effects of the AML on the Chinese energy sector in general, and the petroleum industry in particular. We also examine the significance of the AML in the future crafting of coherent and compatible energy and competition policy, a process which is underway, and already having an impact on China's overall policy system. We analyze the AML in conjunction with legislative intent, mindful of the complex institutional arrangements in China that are sure to shape the law's overall impact. In the course of our analysis, we examine a key piece of future legislation, the Energy Law, which is currently undergoing a similarly lengthy drafting process.

Specifically, we pose the controversial and still-unanswered question of whether the AML plays a meaningful role in China's regulated industries where, as in the petroleum industry, state-sponsored monopolies dominate the competitive landscape. We answer that it can and should. However, the AML must be properly read to apply to the fullest extent possible, much as U.S. antitrust law has been read to apply absent a "clear repugnancy" to government regulation.<sup>3</sup> Responsible Chinese authorities must also strike the correct balance in identifying areas where competition laws have room to function in China's regulated industries. Finally, certain accommodations will have to be made in future drafts of the Energy Law.

China has been moving from a command-and-control economy to a market-based system. This shift will only increase the importance of balancing competition policy and energy policy to prioritize increased industrial efficiency, but with the precondition that energy security and consumer benefits are achieved. The AML can be useful in moving China further in this direction. In the petroleum industry, going forward requires competition to be nurtured where domestic and foreign-funded non-public enterprises are permitted to operate.

I. The Evolution of Regulation and Competition Law in the Chinese Petroleum Sector .....	339
A. Industrial Structure.....	339
B. The "Regulation-Competition" Framework.....	342
II. AML Jurisdiction Over Regulated Industries .....	344
A. General Principles of the AML as Applied to the Regulated Industries.....	344
B. Jurisdiction of the AML Over the Regulated Industries: Interpreting Article 7.....	346
1. The 1st Clause: Protection of the Regulated Industries.....	348
2. The 2nd Clause: the Applicability of the AML in the Regulated Industries.....	349
III. The Scope and Impact of Petroleum Industry Regulation and Anti-Monopoly Enforcement .....	349
A. Regulation and Reform in the Petroleum Industry .....	350

---

3. See discussion *infra* Part II.A.

1.	The Scope of Entry Regulation .....	350
2.	The Scope of Price Control Regulation.....	351
3.	Reformed Sectors .....	352
B.	The Application of the AML and Its Impact on Industry-Specific Regulation.....	354
1.	The AML Enforcement Framework.....	354
2.	The Impact of AML Merger Review on Industry-Specific Regulation .....	355
3.	The Impact of AML Monopolistic Conduct Enforcement on Industry-Specific Regulation .....	357
IV.	Competition Policy and Energy Policy: Rational Positioning and Policy Formation.....	358
A.	Security vs. Efficiency: Rational Positioning of Chinese Energy Policy .....	359
1.	The Goals of Energy Security .....	359
2.	The Appeal of Industrial Efficiency.....	361
3.	Energy Security, Industrial Efficiency, and Consumer Surplus .....	362
B.	Advancing Law and Policy: Coordinating a Policy Formation Mechanism with a Legal Framework.....	363
1.	The Formation Mechanism of Energy Policy .....	363
2.	The Formation Mechanism of Competition Policy.....	364
3.	A Legal Framework That Coordinates Energy Policy and Competition Policy.....	366
V.	The Development of Non-Public and Foreign-Funded Petroleum Industries During the Post-AML Period .....	367
A.	Non-Public Enterprises .....	367
B.	Foreign-Funded Enterprises.....	368
VI.	Conclusion .....	369

#### I. THE EVOLUTION OF REGULATION AND COMPETITION LAW IN THE CHINESE PETROLEUM SECTOR

Since the establishment of the People's Republic of China (PRC) in 1949, the Chinese energy industry has developed gradually, as has the Chinese economy. Governance models for the industry have evolved over time from (1) a system of centralized management (1949-1982), to (2) a system marked by industrial division, or the creation of state-owned enterprises (1982-1998), to (3) the modern system marked by reorganization (1998-present). At the same time, the Chinese economy has moved from a command-and-control system toward a market-based system. Changes in industrial structure across different governance models are described below, as is the corresponding transition in the "regulation-competition" framework.

##### A. *Industrial Structure*

When the PRC was founded, the Chinese petroleum sector operated under a highly centralized management system, which was a natural outgrowth of China's planned economy modeled on the former Soviet Union. This period extended from 1949-1982. Early in the period, the government established the

Ministry of Fuel Industry to oversee all aspects of the coal, electricity, and petroleum sectors. A separate bureau within the Ministry retained oversight over oil exploration, development, and production. Over time, the government's management system for the petroleum industry came to be relatively integrated, from upstream research and development (R&D) through downstream refining.<sup>4</sup>

A number of reorganizations were implemented during the period of centralized management. In 1955, for example, the government replaced the current Ministry with the Ministry of Petroleum Industry, which adhered to the principle of government-controlled, regulated "planned purchase and supply."<sup>5</sup> However, exploration activities were moved to the Ministry of Geology, and from the late 1950s to the early 1970s, several large oil fields were developed in Daqing, Liaohe, Dagang, Huabei, and Shengli.<sup>6</sup> A second reorganization occurred in 1970, whereby the current Ministry was combined with several others to form the Ministry of Fuel and Chemical Industry. During this period, continued centralized management appeared effective at expanding productivity and industrial scale. However, expanding scale proved temporary because it was attributable primarily to the development of new oil fields and petroleum enterprises backed by strong government support, all against the backdrop of the strengthening planned economy. With the decline in development of oil fields and crude oil output, inefficiencies in the central management scheme became obvious.<sup>7</sup>

Economic development and increasing demand for oil accompanied market-oriented economic reforms in China in the late 1970s.<sup>8</sup> However, two problems became apparent: (1) the decline in crude oil output; and (2) inefficiencies caused by incentive problems associated with centralized management. In response, the government disbanded the current Ministry and re-formed the Ministry of Petroleum Industry in 1978, along with a separate Ministry of Chemical Industry, which coordinated refinery operations.<sup>9</sup> Further steps were taken in 1981, with the establishment of an annual crude oil production quota of 100 million tons. The quota was aimed at strengthening incentives, relieving financial pressure on state-owned enterprises (SOEs), reducing costs, and slowing the decline in production.<sup>10</sup> In the same year, the government brought oil refineries under unified management in order to increase production and satisfy domestic demand.

---

4. WANG DAN, ZHONGGUO SHIYOU CHANYE FAZHAN LUJING & GUAZHAN JINGZHENG YU GUIZHI, [DEVELOPMENT PATHWAY OF CHINESE PETROLEUM INDUSTRY: OLIGOPOLISTIC COMPETITION AND REGULATION] 63 (Chinese Social Sciences Press 2007). However, individual petroleum enterprises were placed under the jurisdictions of various other industrial ministries.

5. *Id.* at 64-65.

6. *Id.* at 64.

7. *Id.*

8. CENTRAL COMM. COMMUNIST PARTY OF CHINA, *The Third Plenary Session of the 11<sup>th</sup> Central Committee of the Communist Party of China*, reprinted in BEIJING REVIEW No. 52 (1978), available at [http://www.bjreview.com.cn/nation/txt/2009-05/26/content\\_197538.htm](http://www.bjreview.com.cn/nation/txt/2009-05/26/content_197538.htm).

9. NAT'L PEOPLE'S CONG., THE FIFTH NAT'L PEOPLE'S CONG. MEETING SUMMARIES, (Dec. 6, 2000), available at [http://www.npc.gov.cn/npc/dbdhhy/content\\_5596.htm](http://www.npc.gov.cn/npc/dbdhhy/content_5596.htm).

10. Oil produced or saved beyond the quota could be exported. Earnings on exports were used for prospecting, oil field construction, and technology reform.

The end of the centralized management period, and the beginning of the second phase of governance in the Chinese petroleum industry – the industrial division period – was triggered by a number of problems, primarily the financial burden that had not been effectively relieved by the quota system and the need to expand output to increase profitability. Difficulty in satisfying these national economic development objectives led the State Council, China's chief administrative authority, to take over all petroleum operations in 1982.<sup>11</sup> Ultimately, this action led to the creation of five SOEs under an oligopolistic market structure.<sup>12</sup> In the early 1980s, the government set up two SOE corporations: one to oversee exploration and development (E&D), China National Offshore Oil Corporation (CNOOC), with the rights to explore for and develop offshore petroleum with foreign-funded enterprises; and a second China Petro-Chemical Corporation (CPCC), which integrated the national oil refining and petro-chemical industries.<sup>13</sup>

In 1988, the government again replaced the current Ministry with the China National Petroleum Corporation (CNPC), a government-sponsored commercial enterprise created to not only compete in onshore E&D, but also to assume the regulatory oversight functions of the former Ministry. A newly formed Ministry of Energy had authority over the activities of both the national onshore and refining corporations, but no jurisdiction over the offshore corporation. Abolition of the Ministry of Energy only five years later, however, left the industry with no unified, state management authority. Oversight of oil development in the upstream market was divided between CNPC (onshore oversight) and CNOOC (offshore oversight). Downstream oversight of oil processing was generally under the purview of CPCC. Imports and exports were managed by the China National Chemicals Import & Export Corporation (SINOCHEM), an SOE established in 1950 to import and export oil, along with fertilizers, rubber, plastics, and chemicals. Prospecting was handled by SINOPEC Star Petroleum Co. Ltd., a wholly owned subsidiary of CPCC that effectively assumed the regulatory role of the former Ministry of Geology. An oligopolistic market structure evolved during the 1990s, as these five SOEs (CNOOC, CNPC, CPCC, SINOCHEM, and SINOPEC Star Petroleum Co. Ltd. (SINOPEC)) came to dominate the oil landscape.<sup>14</sup>

The third phase of governance in the Chinese petroleum industry - reorganization - began in 1998 when the State Council reorganized the three national corporations created in the 1980s (CNPC, CNOOC, and CPCC) in order to capitalize on their respective advantages, and to implement orderly competition. The State Council's action effectively divided the Chinese oil industry into three geographic segments monopolized by the state: the northern area (dominated by CNPC), the southern area (dominated by CPCC), and the offshore area (dominated by CNOOC). The oversight functions of all three enterprises were moved to the Ministry of Chemistry and its subsidiaries.<sup>15</sup>

---

11. WANG DAN, *supra* note 4, at 66.

12. *Id.* at 66-67.

13. *Id.*

14. *Id.*

15. *Id.* at 64.

*B. The "Regulation-Competition" Framework*

During the planned economy (i.e., the centralized management period), petroleum enterprises were nationalized under a quasi-military national oil development campaign.<sup>16</sup> Also, during the initial period of market-oriented economic reform in the late 1970s and early 1980s, the monopolistic market structure created under centralized management remained intact. Prices and output levels under the quota system were decided by the central government. However, prices increased in the early 1980s and a two-track pricing system emerged - planned prices for production within the quota and market prices for production in excess of the quota.

Although the economic reforms in the early 1980s led to administrative reorganizations that commingled regulatory and business functions within SOEs, the two-track pricing system<sup>17</sup> established during that time continued through the mid-1990s. Both the quota and two-track pricing system ended in 1994, and planned and market prices were consolidated for various types of oil. However, while prices were ostensibly determined by the market, the government nonetheless maintained significant control through the Price Law.<sup>18</sup>

With market forces beginning to impact prices throughout the Chinese economy, the government became increasingly aware of the importance of regulating competition. In 1980, for example, the State Council promulgated the "Temporary Provisions on the Initiation and Protection of Socialist Competition" (Temporary Provisions), which included ten articles designed to promote or maintain market competition, where applicable.<sup>19</sup> One article of the Temporary Provisions, for example, stipulated the breaking-up of regional blockades<sup>20</sup> and market segmentation to facilitate competition. The Temporary Provisions, however, did not apply to the petroleum industry.<sup>21</sup>

In the late 1980s, while additional SOEs were formed and assumed oversight responsibilities for the industry, there were several major

---

16. *Id.*

17. Two-track pricing refers to a system in which the same product is priced by the government within its planning agenda and priced according to the market beyond its planning agenda.

18. Article 3 of the Price Law provides that the State shall gradually improve the mechanism of price regulation mainly through market forces and macroeconomic control. Jia Ge Fa [Price Law] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998), art. 3 1997 Standing Comm. Nat'l People's Cong. GAZ. 92, art. 3 (1997) (China), available at [http://en.chinacourt.org/public/detail.php?id=99&k\\_title=price](http://en.chinacourt.org/public/detail.php?id=99&k_title=price) [hereinafter *Price Law*]. Under such a mechanism, pricing for most merchandise and services should be set by the market and made to accord with value, while the government should set or guide prices in only select instances. *Id.* Article 18 of the Price Law provides that the government shall set or guide prices (when necessary) for merchandise and services that: (1) are of great importance to developing the national economy and the people's livelihood; (2) face a shortage of resources; (3) are monopolistic in nature; (4) pertain to important public utilities; and (5) pertain to public welfare. *Id.* at art. 18.

19. Temporary Provisions on the Initiation and Protection of Socialist Competition (promulgated by the Standing Council, Oct. 17, 1980, effective Oct. 17, 1980) (China), reprinted in ADMIN. FOR ENERGY & COMMERCE OF PUTIAN, [http://www.pt.fjaic.gov.cn/law\\_show.asp?law\\_type=GSQY1219](http://www.pt.fjaic.gov.cn/law_show.asp?law_type=GSQY1219) [hereinafter *Temporary Provisions*].

20. "Regional blockades" refers to any behavior by a firm operating in a local market that blocks, interferes with or otherwise restricts entry by a firm outside that market. Regional blockades are a violation of law and regulations and thus harm competition.

21. *Temporary Provisions*, *supra* note 19.

developments in competition law. These included directives on mergers and regional blockades.<sup>22</sup> The new laws provided a framework for merger enforcement and addressing barriers to entry, respectively. Further, in 1993, the Standing Committee of the Eighth National People's Congress adopted the "Anti-Unfair Competition Law," Article 6 of which addressed monopolistic practices.<sup>23</sup> In the same year, another state agency responsible for industry and commerce issued a competition law (Certain Regulations on Prohibiting Anti-competitive Practices of Public Enterprises) elaborating on the principles set forth in Article 6.<sup>24</sup> While other competition laws followed, no laws universally applied to the oil industry, and while the first two laws applied nominally to the oil industry, they were rarely enforced. As such, the oil industry was effectively exempt from competition laws, and was monitored exclusively through regulation.<sup>25</sup>

The petroleum industry's effective exemption from the competition laws was punctuated in the late 1990s when the Chinese government granted the three national corporations monopoly status over almost all sectors of oil production, including extraction, refining, importation, wholesaling, and retail.<sup>26</sup> However, the oil markets gradually began opening up in 2001, when the benchmark price for crude oil, which had been pegged to Singapore prices since 1998, was pegged instead to the Asian, European, and Northern American markets. In 2006, the Ministry of Commerce promulgated various measures to establish a licensing system for the crude oil market aimed at further opening-up the oil markets and inducing competition.<sup>27</sup> Even so, the government continued to maintain final authority over pricing.

---

22. See also Temporary Measures on Enterprise Merger (promulgated by the Nat'l Comm'n for Institutional Reform, Feb. 19, 1989 effective Feb. 19, 1989), reprinted in ADMIN. FOR ENERGY & COMMERCE OF PUTIAN, [http://www.pt.fjaic.gov.cn/law\\_show.asp?law\\_type=GSQY1100](http://www.pt.fjaic.gov.cn/law_show.asp?law_type=GSQY1100); St. Council Notice on Breaking Local Market Blockades and Further Enlivening Commodity Circulation (promulgated by the St. Council, Nov. 10, 1990, effective Nov. 10, 1990) LAW Y.B. OF CHINA 312-13 (1990) (China), reprinted in INDUSTRY AND COMMERCE ADMIN. OF JIANGXI PROVINCE, <http://www.jxaic.gov.cn/zcfg/scjdgj/200711/13742.html> (last visited Dec. 30, 2009).

23. Article 6 provided that "a public utility enterprise or any other business operator occupying monopoly status according to law shall not restrict people to purchasing commodities from the business operators designated by him, thereby precluding other business operators from fair competition." Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) LAW Y.B. OF CHINA 319-21 (1994) (China), translated in CHINALAWINFO, <http://www.chinalawinfo.com>.

24. Certain Regulations on Prohibiting Anti-Competitive Practices of Public Enterprises (promulgated by the St. Admin. for Indus. & Commerce, Dec. 24, 1993, effective Dec. 24, 1993) (Lawinfochina) (China).

25. For example, according to data accumulated in the "Table of Classified Statistics of the Total Unfair Competition Cases Investigated by the Industry and Commerce System of Guangdong Province" (1993-2003), among seventeen kinds of unfair competition practices, cases concerning "public utility enterprises or any other business operator occupying monopoly status according to law restricting competition" accounted for 1.65% of the total number of enforcement actions. *Table of Classified Statistics of the Total Unfair Competition Cases Investigated by the Industry and Commerce System of Guangdong Province*, in PENG HAIBIN, GONGPING JINGZHENG ZHIDU XUANZE (CHOICE OF FAIR COMPETITION INST.) 315-317 (The Commercial Press 2006).

26. Notice No. 38: Notice on Screen and Rectify Small Refineries and Standardize the Circulation Order of Crude Oil and Fuel Oil (promulgated by the St. Council, 1999, effective 1999) (China), reprinted in ST. ADMIN. OF TAXATION, <http://www.chinatax.gov.cn/n480462/n480513/n480979/n554064/996341.html> (last visited Mar. 16, 2010) [hereinafter *Notice No. 38*].

27. These directives were "Measures for the Administration of the Refined Oil Market" and "Measures for the Administration of the Crude Oil Market." Measures for the Administration of the Refined Oil Market

During the period of reorganization beginning in the late 1990s, the government also crafted a series of new laws and regulations concerning competition, culminating in the passage of the AML in 2007.<sup>28</sup> Before the AML, regulations on pricing and regional blockades did not affect competition in the oil industry. However, the AML can be read to make competition law applicable to businesses involved in the production and development of wholesale and retail crude and refined oil for the first time, and it may impact concentration in the oil industry as well. In the next section, we examine the AML's jurisdiction over regulated industries.

## II. AML JURISDICTION OVER REGULATED INDUSTRIES

The AML was enacted “for the purpose of preventing and restraining monopolistic conduct, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and social public interest, [and] promoting the healthy development of [China's] socialist market economy.”<sup>29</sup> Insofar as the AML potentially impacts every Chinese industry, it is inseparable from national economic policy. National economic policy must therefore inform China's application of the AML, and an important policy question is whether the AML has a meaningful role to play in China's regulated industries. In this section, we analyze how the AML can positively impact the regulated industries in China. We conclude that the law should be applied in regulated industries to the fullest extent possible, or absent a “clear repugnancy” between regulation and the AML.

### A. *General Principles of the AML as Applied to the Regulated Industries*

Competition laws generally should be designed to assist a regulatory regime in achieving its economic goals, and to make or keep markets competitive by policing private conduct that is not effectively regulated. Assuming this premise, the helpfulness of Chinese competition laws in a given Chinese industry will depend on the degree to which the government has encouraged competition, and allowed private enterprises to participate. Where the government has established state-sponsored monopolies and discouraged competition and private industry participation, the utility of the competition laws is less obvious,<sup>30</sup> but may still be of some assistance.

In discussing the relationship between federal government regulation and the federal antitrust laws in the United States, Professor Herbert Hovenkamp has explained:

The traditional approach to antitrust in the regulated industries viewed regulation as a closed box, and a particular market as either inside or outside of the box. A market was either “regulated” or “unregulated.” Within this paradigm, the U.S. antitrust tribunal was generally called upon to determine the “pervasiveness”

---

(promulgated by the Ministry of Commerce, Dec. 4, 2006, effective Jan. 1, 2007) (Lawinfochina) (China); Measures for the Administration of the Crude Oil Market (promulgated by the Ministry of Commerce, Dec. 4, 2006, effective Jan. 1, 2007) (Lawinfochina) (China).

28. *AML*, *supra* note 1.

29. *Id.* at art 1.

30. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 716 (3d ed. 2005).



of the regulatory regime. If it was deemed to be pervasive, then all activities within that regime were presumptively exempt from antitrust scrutiny. This approach is built on a rather optimistic model of agency decision making. In an ideal regulatory regime, an agency considering a regulated firm's request would determine all relevant social and economic implications, including the impact on competition.<sup>31</sup>

"But the deregulation movement in the U.S. changed perceptions of both the nature and the domain of regulation."<sup>32</sup> Under current U.S. law, the essence of the inquiry into whether antitrust law applies in regulated industries is "whether the conduct being challenged was instigated by a public regulatory agency, or perhaps approved after a fairly full review of the merits; or whether the challenged restraint resulted from the essentially unsupervised conduct of a private firm."<sup>33</sup> Professor Hovenkamp further explains:

If the latter, then it should be regarded as "market" conduct and the antitrust laws should presumptively apply. If the private conduct being challenged was "neither compelled nor approved" by the regulatory body, then any claim of antitrust immunity is greatly weakened. In such cases, the U.S. court will generally deny the immunity unless application of the antitrust laws would create a "clear repugnancy" between the regulatory statute at issue and federal antitrust policy.<sup>34</sup>

The balance of deference to regulatory regimes in industries where the antitrust laws are deemed to still apply is a delicate one in almost all countries with market-oriented economies. Absent a statutory exemption from the antitrust laws or an appropriately implied immunity, antitrust and regulation therefore play dual roles. In the U.S. this duality has been explored recently by the Antitrust Modernization Commission (AMC), which recommended giving considerable deference to the antitrust laws. For example, the AMC stated:

When the government decides to adopt economic regulation, antitrust law should continue to apply to the maximum extent possible, consistent with that regulatory scheme. In particular, antitrust should apply wherever regulation relies on the presence of competition or the operation of market forces to achieve competitive goals.<sup>35</sup>

The AMC also noted that statutes that govern regulated industries should clearly state the intent of the legislative body to displace antitrust law (if at all).<sup>36</sup> Moreover, the AMC recommended that the courts should interpret "savings" clauses (an explicit statement that the antitrust laws still apply) in regulatory statutes to "give deference to the antitrust laws."<sup>37</sup> These findings have

31. *Id.* at 717-718.

32. *Id.*

First . . . , [i]nvariably, agencies do not pass on every relevant issue . . . . Indeed, often [they] may not consider certain antitrust-related issues at all. Second, today we are more inclined to think of all markets as "regulated" to some degree. Antitrust is a form of "regulation" - that is, of sovereign intervention into the marketplace to force a solution different from the one that unrestrained private bargaining would produce.

33. *Id.*

34. *Id.*

35. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 338 (2007), available at [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf). The AMC was formed in 2002. See also Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857 (2002).

36. *Id.*

37. *Id.*

significant applicability to countries in the process of structuring or reforming their competition enforcement regimes. The case of the Chinese petroleum industry is no exception.<sup>38</sup>

As China confronts the relationship between the regulated industries and the AML, the government will have to resolve this duality in a manner that befits China's unique system of regulatory governance and legislation. We believe the government would do well to adopt the "clear repugnancy" rationale in determining what role the AML can and should play when confronting the essentially unsupervised conduct of state-sponsored monopolies and dominant firms in "lifeline" industries.<sup>39</sup> Such reasoning would allow the AML to be applied to the fullest extent possible in appropriate areas, taking a nuanced view of just what areas are "appropriate" in the post-reform period.<sup>40</sup>

*B. Jurisdiction of the AML Over the Regulated Industries: Interpreting Article 7*

The first clause of Article 7 of the AML provides:

[W]ith respect to the industries which are under the control of the State-owned economy and have a bearing on the lifeline of the national economy or national security and the industries which exercise monopoly over the production and sale of certain commodities according to law, the State protects the lawful business operations conducted by the business operators therein. The State shall protect the lawful business operations in these industries, and shall, in accordance with law, supervise and regulate their business operations and the prices of the commodities and services provided by them, in order to protect the consumers' interests and facilitate technological progress.<sup>41</sup>

However, the second clause continues,

[T]he undertakings mentioned in the preceding paragraph shall do business according to law, be honest, faithful and strictly self-disciplined, be accepting of state oversight, and they shall not harm the consumers' interests by taking advantage of their position of control or their monopoly in the production and sale of certain commodities.<sup>42</sup>

Insofar as Article 7 purports to preserve government regulation over certain dominant firms and their pricing, while also holding those firms accountable to the strictures of the AML, the language of the law seems equivocal.<sup>43</sup> The interpretation of this language is highly consequential, because dominant firms

---

38. *Id.* at 339.

39. "Lifeline" industries can be loosely defined as industries that are essential to the nation's economy, growth, security, and human well-being.

40. Indeed, careful examination of just what areas are appropriate for application of the antitrust laws, and at the same time, understanding the proper scope of "natural monopolies," have been precisely the means through which U.S. courts have come to a workable resolution of the duality of regulation and antitrust. *See generally, e.g., Gulf States Util. Co. v. FPC*, 411 U.S. 747 (1973) (holding that the Federal Power Act's "compatible with the public interest" standard requires the Federal Power Commission to consider anticompetitive aspects of a security issue, and stating, "Without a more definite indication of contrary legislative purpose, we shall not read out of [the Federal Power Act] the requirement that the Commission consider matters relating to both the broad purposes of the Act and the fundamental national economic policy expressed in the antitrust laws.").

41. *AML, supra* note 1, art. 7.

42. *Id.*

43. *Id.*

in the applicable regulated industries, such as banking, electricity, and telecommunications, and dominant firms established according to law or policy that enjoy a legal or de facto exclusive position, which exist in the petroleum and tobacco industries, have in fact monopolized many of the industries in which they operate. The potential applicability of the AML in these industries thus leads to several controversial questions, including not only whether the AML should apply, but how it can. During the legislative process, affected industrial supervision departments and dominant enterprises expressed serious concerns, and many lobbied for exemptions. After extensive efforts, the drafters of the AML compromised, opting not to explicitly declare whether business conduct in the regulated industries or among state-sponsored dominant firms was within or outside the scope of the law's jurisdiction, instead leaving the problem to be resolved in practice.

As might be expected, there are wide-ranging opinions as to the proper interpretation of the equivocal language in Article 7 of the AML.<sup>44</sup> Some have suggested that industry regulation and the AML cannot coexist, and thus fully regulated industries supervised by the government must be exempt. Others believe that because large and dominant enterprises are the primary concern of the AML, the law must be applied universally, even if it leads to the restructuring or partitioning of SOEs in industries traditionally controlled by the state or in lifeline industries. However, a third, more tempered approach is also possible in which the AML can be applied to the fullest extent possible, but with due deference to China's economic policies.

Competition regimes throughout the world have recognized that regulation and competition law are not mutually exclusive.<sup>45</sup> Rather, provided that the goals of regulation are not diminished, competition laws can work to fill in regulatory gaps and enhance a government's regulatory mission in a given industry. For example, if regulatory controls govern only an enterprise's entry into an industry, competition laws can aid in post-entry supervision.

Consider the AML in the context of enterprises that enjoy a legal or de facto exclusive status in China. Under Article 7, the AML may not challenge the exclusive status of a dominant firm in a regulated industry if obtained according to law or policy, or the pricing behavior of the dominant firm as regulated by the relevant agency, nor may enforcement of the AML attempt to alter derivative restrictions preventing other firms from entering a given market.<sup>46</sup> However, the AML can aid the government's regulatory mission by acting as a check on the

---

44. These opinions mainly have been expressed by commentators at various public conferences in China.

45. See generally, e.g., Ioannis N. Kessides, *Reforming Infrastructure: Privatization, Regulation, and Competition*, WORLD BANK POLICY RESEARCH REPORT xii, 4-5 (The World Bank and Oxford University Press 2004), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/06/16/000012009\\_20040616143838/Rendered/PDF/289850PAPER0reforming0infrastructure.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/06/16/000012009_20040616143838/Rendered/PDF/289850PAPER0reforming0infrastructure.pdf); see also Investment Climate Advisory Services, *Governance Frameworks and Tools for Effective Regulatory Reform: Regulatory Quality and Competition Policy* viii, in BETTER REGULATION FOR GROWTH Report No. 55639 (The World Bank Group 2010), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/07/13/000334955\\_20100713045004/Rendered/PDF/556390WP0Box031tion0Policy01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2010/07/13/000334955_20100713045004/Rendered/PDF/556390WP0Box031tion0Policy01PUBLIC1.pdf).

46. AML, *supra* note 1, art.7.

business practices of a dominant firm, especially with regard to potential abuses of a dominant position. This notion should afford comfort to proponents of the AML, who see a country with a weak market economy (and correspondingly weak legal system as it concerns market-oriented conduct) and are increasingly desirous of a competitive environment that respects consumer welfare. Compared to the traditionally thin competition protections in past systems centered on tight regulation, the AML, and Article 7 in particular, represents tremendous progress.<sup>47</sup>

#### 1. The 1st Clause: Protection of the Regulated Industries

The Sub-Committee of Legislative Affairs of the Standing Committee of the National People's Congress of the PRC has noted that the 1st clause of Article 7 protects dominant firms in lifeline industries because such industries revolve around infrastructure that is "not suitable for repeat construction and not suitable to be managed by multiple operators" (i.e., effectively the "natural monopoly" rationale).<sup>48</sup> It has also noted that Article 7 protects state-sponsored dominant firms because such firms have been established purposefully as monopolies pursuant to law.<sup>49</sup> Such protection may coexist with the AML, because the AML is only meant to function in the competitive, free market segments of China's economy, or more specifically, in the industries that are part of those segments. It is only in those industries that the AML can take full effect. In the fully regulated lifeline industries or where state-sponsored monopolies control, there may be little or no room for the AML to apply. Also, in partially regulated industries, the AML may have only a reduced effect.

The rationale behind Clause 1 of Article 7 lies in the state's belief that the efficiency generated by regulation is superior to the efficiency generated by competition in certain industries.<sup>50</sup> As economic reform advances in China and the country continues to transition from a command-and-control system to a market-based system, certain industries may transition from being fully regulated, to being partially regulated, to being governed primarily by market forces. At the same time, the scope of the law's application should gradually expand because the benefits of applying the AML in those industries will shift from minimal, to appreciable, to substantial.

It is unclear whether the Chinese petroleum industry is destined to move through this continuum. Traditionally, the petroleum industry has received the attention of both lawmakers and public policymakers, and it is fair to suggest that the regulation has been politically, rather than legally, motivated. The state has justified establishing the three major petroleum corporations out of policy

---

47. Huang Yong, *Getting to Know the AML of China*, COMPETITIONLAW (Nov. 28, 2007), <http://www.competitionlaw.cn/show.aspx?id=2547&cid=17> (last visited Dec. 30, 2009).

48. *AML*, *supra* note 1, art. 7.

49. Econ. Law Office of the Subcomm. of Legis. Affairs of the Standing Comm. of the Nat'l People's Cong., *Zhonghua Renmin Gongheguo Fanlongduan Fa: Tiaowen Shuoming, Lifa Liyou, Ji Xianguan Guiding* [Article Explanation, Legislative Rationale and the Relevant Stipulations of the AML] 34 (Beijing University Press 2007) [hereinafter *Economic Law Office Report*].

50. Wang Kangpeng, *Fanlongduan Fa Fan Le Shui: Fang Fanlongduan Fa Qicao Zhuanjiazhu Chengyuan Huangyong* [Whom Does the AML Oppose – An Interview with Prof. Huang Yong, An Expert from the AML Drafting Group], 19 *Zhongguo Shiyou Shihua* [China Petrochem] (2007).

considerations like national security and stability.<sup>51</sup> Clause 1 of Article 7 effectively provides that dominant firms established according to law and for the reason that they pertain to China's economic lifeline are not "monopolies" targeted by the AML.<sup>52</sup> For now, the state continues to implement full administrative regulation in the petroleum industry, along with the electricity, railway, and communications industries. Whether this practice is actually an interim phenomenon during the transition to a market-based economy remains to be seen.

## 2. The 2nd Clause: the Applicability of the AML to the Regulated Industries

Clause 2 of Article 7, as noted previously, purports to govern potential abuses by state-sponsored dominant firms and dominant firms in lifeline industries, and it does not expressly exempt them from the AML.<sup>53</sup> Indeed, Article 7 can be read to suggest that the AML applies to these categories of dominant firms to the fullest extent possible. While the state maintains the right to supervise and regulate the conduct, commodities, and services prices set by such firms, Clause 2 of Article 7 allows the AML to work toward ensuring that they abide by the law and, importantly, do not damage consumer welfare by taking advantage of their dominant or exclusive positions.<sup>54</sup> Specifically, this includes not artificially raising prices, unfairly refusing to deal, creating tying arrangements, or imposing other unreasonable restraints.<sup>55</sup>

In summary, Clause 1 and Clause 2 of Article 7 can and should be read to allow for a workable relationship between regulation and competition law in the fully regulated industries and among state-sponsored dominant firms, and for regulation and competition law to coexist to their mutual benefit. Article 7 must simply be read to apply to the fullest extent possible, absent a "clear repugnancy" to state regulation. In the next section, we turn to a detailed analysis of this relationship in the context of the petroleum industry.

### III. THE SCOPE AND IMPACT OF PETROLEUM INDUSTRY REGULATION AND ANTI-MONOPOLY ENFORCEMENT

The proper relationship between regulation and the Anti-Monopoly Law in the petroleum industry can be informed by the direction of the regulatory reform movement in the petroleum industry. China can strike the correct balance and identify areas where competition laws have room to function by considering which aspects of the industry are fully regulated. Taking into account how the post-reform, restructured regulatory bodies in the industry operate is an important piece of this calculus.

---

51. See generally Jin Zhang, *Government Centralisation and Corporatisation: CNPC & Sinopec from the 1950s to 1997*, in *CATCH-UP AND COMPETITIVENESS IN CHINA: THE CASE OF LARGE FIRMS IN THE OIL INDUSTRY* 71-100 (RoutledgeCurzon 2004).

52. *AML*, *supra* note 1, art. 7.

53. *Id.*

54. Shang Ming, *Zhonghua Renmin Gongheguo Fanlongduan Fa: Lijie yu Shiyong* [Understanding and Application of the Anti-monopoly Law of the People's Republic of China] 24 (The Law Press 2007).

55. *Economic Law Office Report*, *supra* note 49, at 34-35.

## A. *Regulation and Reform in the Petroleum Industry*

### 1. The Scope of Entry Regulation

Regulation of the upstream petroleum market in China has historically been achieved by restricting entry. The Mineral Resources Law promulgated in 1986 (as amended in 1996) provides that, “the competent departments authorized by the State Council may conduct examination of and grant approval to mining of such specified minerals as oil, natural gas, and radioactive minerals, and issue mining licenses.”<sup>56</sup> Licensees may only be state-owned enterprises. To become licensed, an SOE has to apply for a drilling license with the Ministry of National Land and Resources. Unless the area that it wishes to exploit is reserved for other uses, the company will be licensed, and then it is up to the company to determine whether to develop the project independently or jointly with domestic or foreign oil companies.<sup>57</sup> Under this framework, only three SOEs have been licensed to exploit petro-gas on land or at sea: CNPC, SINOPEC, and CNOOC. Of the 184 million tons of crude oil produced nationally in 2006, 107 million tons were produced by CNPC, 40 million tons were produced by SINOPEC and the remaining 40 million tons were produced by CNOOC, according to statistics from the respective companies’ annual audit reports.<sup>58</sup>

In the downstream market for land-based petroleum, the State Council mandated consolidation of private firms within state-sponsored firms. In 1999 and 2001, respectively, the State Council and various coordinating administrative bodies within the State Council issued “Notice No. 38” and “Notice No. 72.” Notice No. 38 ordered the closing of small refineries not authorized by the State Council or listed in the 1998 State Allocation of Crude Oil Quota, and that the businesses of all surviving domestic refineries and wholesalers of gas, kerosene, and diesel be sold to CNPC or SINOPEC, whereupon they may be restructured via joint venture, joint stock agreement, acquisition, or transfer of title to property.<sup>59</sup> Notice No. 72 made CNPC and SINOPEC the nation’s exclusive wholesalers of fuel oil and granted them authority for crafting national fuel oil policy, subject to approval by the State Economic and Trade Commission.<sup>60</sup> It also foreclosed any company other than CNPC or SINOPEC from constructing or obtaining a license to operate a new gas station, and affirmatively required that all new gas stations be wholly owned or controlled by one of the two SOEs.<sup>61</sup>

---

56. Mineral Resources Law (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 19, 1986, effective Oct. 1, 1986, amended Aug. 29, 1996), reprinted in CHINAMINING.ORG, <http://www.chinamining.org/Policies/2006-07-18/1153186312d3.html>, translated in Chinalawinfo (China).

57. Where a state-sponsored company wishes to develop jointly with a foreign company, the foreign company may only co-develop via output-sharing; it may not take an equity stake.

58. Wang Yanmei, *Shiyou Gongye Guanli Tizhi Gaige yu Shichang Jizhi Jianli [Reforming Petroleum Industry Regulatory Framework and Establishing Market Mechanism]*, 2 GUOJI SHIYOU JINGJI [INT’L PETROLEUM ECONOMY] 5 (2008).

59. *Notice No. 38*, supra note 26.

60. *Notice No. 72: Notice on Further Screen and Rectify Small Refineries and Standardize the Circulation Order of Crude Oil* (promulgated by the St. Econ. & Trade Comm’n, 2001) (Lawinfochina) (China).

61. *Id.*

The notices had a predictable effect, which was to substantially eliminate privately-owned fuel oil wholesalers and drastically reduce the number of private retailers in China. In 1999, private firms owned 87.6% of 88,000 gas stations in the country, a 60% share of the fuel retail market.<sup>62</sup> By mid 2003, however, private firms owned 50% of only 80,000 gas stations, a 40% share of the fuel retail market.<sup>63</sup> In addition, as of 2006, CNPC and SINOPEC produced 88.6% of the nation's refined oil, and controlled 88.6% of its gas, kerosene, and diesel.<sup>64</sup> Thus, CNPC and SINOPEC came to dominate both wholesale and retail distribution of land-based petroleum.

Put simply, the issuance of Notice No. 38 and Notice No. 72 conferred monopoly power to CNPC and SINOPEC with respect to onshore drilling, refining and retailing.<sup>65</sup> These state-sponsored monopolies will likely not be partitioned in the foreseeable future, nor will they face meaningful competition in the supply market, as the government's most recent draft of the Energy Law (Draft Energy Law) maintains licensing restrictions on oil drilling, and requires prior approval from specified authorities to engage in oil production.<sup>66</sup> Experts from government, industry, and academia have been crafting the Draft Energy Law since early 2006, and the National Development and Reform Commission made a version available for public comment in December 2007. A final draft is expected to be submitted to the State Council for approval in late 2010, though no official deadline has been set.

## 2. The Scope of Price Control Regulation

In 1998 and 2001, concurrent with ongoing regulatory restructuring, China's central government initiated several reforms targeting petroleum prices. As a result of the 1998 reforms, which eliminated the two-track pricing system under the previous regime, the primary price of crude oil was set monthly, based on the crude oil price in the Singapore market for the previous month plus premiums.<sup>67</sup> The monthly median price for fuel was set according to the free-on-board (FOB) price in Singapore for the previous month, plus freight, insurance, tariffs, and retail profits in the same month.<sup>68</sup> The wholesale price was set as the

---

62. Yang Rong, *Ln Shiyou Chanye de Guizhi yu Gaige [On the Regulation and Reform of the Petroleum Industry]*, 5 JINGJI PINGLUN [ECONOMIC REVIEW] 116 (2002).

63. *Id.*

64. Wang Yanmei, *supra* note 58.

65. Yang Rong, *supra* note 62.

66. *See generally*, Energy Law (Draft for Comment) (Nat'l Energy Leading Group, Dec. 3, 2007), available at [http://news.xinhuanet.com/society/2007-12/04/content\\_7196929.htm](http://news.xinhuanet.com/society/2007-12/04/content_7196929.htm) [hereinafter *Draft Energy Law*]. Article 34 of the Draft Energy Law provides that the State Council's energy authority shall, upon consultation with relevant authorities, set national energy plans and policy with respect to entry conditions involving energy development. *Id.* at art. 34. Enterprises applying to mine petroleum, natural gas and nuclear minerals and coal resources in national zoning mines, if they meet the conditions, may obtain drilling or mining licenses upon a grant of approval from no lower than provincial level energy authorities. *Id.* Entrants seeking to develop water and oceanic resources can also secure approval from the delegated representatives of no lower than provincial level energy authorities. *Id.* Article 42 requires the State Council's energy authority to set entry conditions in energy development in accordance with the law. *Id.* at art. 42.

67. The Reform Scheme on the Price of Crude Oil and Fuel (promulgated by the Nat'l Planning and Dev. Comm'n, June 3, 1996), available at <http://qzprice.gov.cn/ZHCE-1/gjfg/1998/1998-8.htm>.

68. *Id.*

median price minus 5.5%.<sup>69</sup> The new pricing provisions amounted to administrative guidance only, and they were not inflexible. CNPC and SINOPEC were permitted to increase or decrease the formula price by up to 5%.<sup>70</sup>

Shortly thereafter, as a result of the 2001 reforms, the government began pegging oil prices to an international average of the Asian, European, and North American markets, rather than solely to the Singapore market.<sup>71</sup> In addition, CNPC and SINOPEC were permitted up to an 8% deviation from the median price.<sup>72</sup>

Article 11 of the Draft Energy Law provides that, in the future, “the State shall establish an energy pricing system based on energy preservation and environmental protection principles, a system that reasonably reflects the cost, scarcity and market supply/demand, using price as the leverage to adjust exploitation activities.”<sup>73</sup> Article 55 further provides:

[A]s for the pricing of an energy transmission network that is naturally monopolized, and the pricing of energy products or services that will directly affect the lifeline of the national economy or national security and people’s lives, we shall implement government-set price or government-guided price, and gradually implement incentive-based price regulation in order to save cost and improve efficiency. For all other energy products and services, their prices shall be set by the market.<sup>74</sup>

Thus, for the time being, the central government likely will maintain control over petroleum pricing, even though the price is at least nominally set by the market. This does not bode well for the proposed transition from command-and-control to market forces discussed above, or for the applicability of the AML to the petroleum industry with respect to price restraints.

### 3. Reformed Sectors

In 2005, the State Council somewhat reversed course on its restructuring policies by promulgating the Several Opinions With Respect to Encouraging and Guiding the Development of the Non-Publicly-Owned Economy (Provision 36), which allowed private companies to invest capital in the petroleum, railway, and aviation sectors, officially sanctioning what was already then an ongoing

---

69. *Id.*

70. *Id.*

71. Notice of the State Dev. Planning Commission on Consummating Measures on Petroleum Prices and Adjusting Prices of Product Petroleum (promulgated by the Nat’l Planning and Dev. Planning Comm’n, Oct. 15, 2001, effective Oct. 17, 2001), *translated in* Lawinfochina (China). The State Development Planning Commission was a precursor to the National Development and Reform Commission (NDRC), which, since 2003, has existed as a macroeconomic management agency under the State Council. After the 2001 reforms, Chinese oil prices did not directly mirror the international average price, but rather would change only to the extent that the international average price changed by a fixed minimum amount. *Id.* In addition, a formula was introduced whereby domestic oil prices would increase less than the international average price when the international average price climbed above a certain level, so that domestic refineries would absorb part of the loss, and domestic prices would decrease more than the international average price when the international average price dropped below a certain level, so as to compensate the refineries. *Id.* Finally, in no instance would adjustments to gas and diesel prices exceed adjustments to crude oil prices in China. *Id.*

72. *Id.*

73. *Draft Energy Law*, *supra* note 66, art. 11.

74. *Id.* at art. 55.



practice in the petro-chemical industry.<sup>75</sup> In late 2006, and early 2007, respectively, the Ministry of Commerce issued Measures for the Administration of the Refined Oil Market and Measures for the Administration of the Crude Oil Market.<sup>76</sup> Article 3 of Measures for the Administration of the Refined Oil Market implemented a revised regime for obtaining wholesale and retail fuel oil licenses.<sup>77</sup> At the same time, Article 5 of Measures for the Administration of the Crude Oil Market specifically allowed qualified non-SOEs to apply to provincial commerce departments for licenses to sell and store crude oil, subject to approval by the Ministry of Commerce.<sup>78</sup> The Ministry also granted CNOOC permission to enter the downstream market through its two (offshore) subsidiaries.<sup>79</sup> This opening of the fuel oil and crude oil retail markets to offshore, private, and foreign capital was aimed at promoting competition in the petro-chemical industry.<sup>80</sup>

Measures for the Administration of the Crude Oil Market seems to be having its desired effect, at least in the downstream wholesale market. Domestic private firms have begun to emerge, and foreign firms have penetrated the market through joint ventures. In addition, as a byproduct of private firms entering the fray, the state-owned petroleum firms have begun integrating vertically and further competing horizontally. According to statistics published by the Ministry of Commerce, as many as 2,504 fuel oil wholesalers were operating in China as of February 2007, and more have been licensed since (a significant development just six years after Notice No. 72 had substantially eliminated private wholesalers).<sup>81</sup> Included among licensees were several Sino-foreign joint ventures made up of private wholesalers and refineries owned by regional governments not affiliated with the state-owned "big three." Thus, a diversified wholesale market is currently taking shape.

However, the retail market has not improved. Although 56.3% of gas stations were privately owned as of the end of November 2006, state-owned gas stations accounted for 70% of sales.<sup>82</sup> More importantly, because CNPC and SINOPEC jointly monopolize the production and distribution of fuel oil, they

---

75. In 2004, private firms in the Zhejiang and Jiangsu Provinces had produced half the polyester output of the entire nation. When the retail business of fuel oil became officially open to foreign investment, more than 100 private petroleum firms jointly established a Chamber of Petroleum within the All China Federation of Industry and Commerce. See also *Brief Introduction*, CHINA CHAMBER OF COMMERCE FOR PETROLEUM INDUSTRY, [http://www.cccpi.org/oldsite/En\\_about.asp?ArticleID=676](http://www.cccpi.org/oldsite/En_about.asp?ArticleID=676).

76. Measures for the Administration of the Refined Oil Market (promulgated by the Ministry of Commerce, Dec. 4, 2006, effective Jan. 1, 2007), translated in Xinhuanet.com, [http://news.xinhuanet.com/fortune/2006-12/07/content\\_5447124.htm](http://news.xinhuanet.com/fortune/2006-12/07/content_5447124.htm), Chinalawinfo, at art. 5 (China).

77. *Id.*

78. Measures for the Administration of the Crude Oil Market (promulgated by the Ministry of Commerce, Dec. 4, 2006, effective Jan. 1, 2007), reprinted in PEOPLE'S DAILY ONLINE, <http://finance.people.com.cn/GB/1037/5135826.html>, translated in Chinalawinfo, at art. 5 (China).

79. Ministry of Commerce Notice No. 49 (promulgated by the Ministry of Commerce, May 23, 2007), <http://smfws.mofcom.gov.cn/aarticle/feihuiyuan/meitcf/200705/20070504701074.html> (last visited Dec. 28, 2009).

80. Zhang Fan, *Zhengque Renshi Woguo Shiyouye de Jingzheng yu Longduan [Understanding Monopoly and Competition in Our Country's Petroleum Industry]*, 4 ZHONGGUO SHIYOU QIYE [CHINESE PETROLEUM ENTERPRISE] (2006), available at <http://www.competitionlaw.cn/show.aspx?id=1222&cid=6>.

81. Wang Yanmei, *supra* note 58.

82. *Id.*

control the supply, a fact that helped their combined sales of fuel oil reach 189 million tons in 2006.<sup>83</sup>

The monopoly positions of CNPC and SINOPEC do not appear to be in jeopardy. While Article 50 of the Draft Energy Law provides that “the State encourages all types of capital to engage in the energy supply business and promotes fair and orderly competition in the supply market,” Article 51 provides that, “the market entry conditions and procedures of crude oil and fuel oil shall be co-developed by the commerce authority and energy authority under the State Council according to the law, unless otherwise provided by other laws and regulations.”<sup>84</sup> Thus it seems likely that the government will continue its current policy of restricting entry in the energy supply market, including the petroleum supply market, at least in the short term.

In summary, the government seems intent on continuing to control petroleum prices and restricting entry in the petroleum supply market. However, reform has opened up room for competition in the downstream wholesale markets for both fuel oil and crude oil, and to some extent in the retail market for crude oil. An examination of the AML enforcement framework and the law’s impact on dominant petroleum firms will aid in understanding how the AML can have an impact in these latter areas where it has more room to operate.

## B. *The Application of the AML and Its Impact on Industry-Specific Regulation*

### 1. The AML Enforcement Framework

Broad responsibility for enforcing the AML is divided among three agencies, all of which are supervised by the State Council AMC. Price-related monopolistic activities are under the enforcement purview of the Price Supervision Department of the National Development and Reform Commission (NDRC).<sup>85</sup> Non-price monopolistic restraints are handled by the State Administration for Industry and Commerce (SAIC).<sup>86</sup> Merger review is the responsibility of the Ministry of Commerce.<sup>87</sup>

---

83. *Id.*

84. *Draft Energy Law*, *supra* note 66.

85. Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the National Development and Reform Commission (promulgated by the Gen. Office of the St. Council, July 28, 2008, effective July 28, 2008) (Lawinfochina), *reprinted in* NDRC.gov.cn, <http://zfxgk.ndrc.gov.cn/PublicItemView.aspx?ItemID={2050a9f4-cd8e-41de-836e-e2ea2a9950d5}> (China) [hereinafter *Notice on NDRC Mandate*]. The Price Supervision Department is tasked with drafting relevant regulations and measures, supervising price examination, administering field investigation, and sanctioning illegal activities occurring in the pricing of products, services and state administrative fees. *Id.*

86. Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the State Administration for Industry and Commerce (promulgated by the Gen. Office of the St. Council, July 28, 2008, effective July 28, 2008) (Lawinfochina), *reprinted in* SAIC.gov.cn, [http://www.saic.gov.cn/zwxq/zwdt/zyfb/t20080725\\_43236.htm](http://www.saic.gov.cn/zwxq/zwdt/zyfb/t20080725_43236.htm) (China). Among other things, the SAIC is responsible for policing monopolistic agreements, abuse of dominance, and abuse of administrative power to the exclusion or restriction of competition (excluding price-related monopolistic activities). *Id.*

87. Notice of the General Office of the State Council on Issuing the Provisions on the Main Functions, Internal Bodies and Staffing of the Ministry of Commerce (promulgated by the Gen. Office of the St. Council, July 28, 2008, effective July 28, 2008) (Lawinfochina), *reprinted in* MofCom.gov.cn, <http://www.mofcom.gov.cn/aarticle/ae/ai/200808/20080805739577.html> (China). Specifically, the Ministry of Commerce shall “review business concentration, guide domestic undertakings in answering anti-monopoly

Because the AML does not provide a clear framework for enforcement in regulated sectors, agency overlap and conflict is inevitable. Both industry-specific regulators and AML enforcement agencies have grounds to claim jurisdiction in certain areas, and they may disagree as to which body's authority should control. Ideally the AML enforcement agencies would have uninhibited access to the regulatory means necessary for protecting competition, but the notion that industry-specific regulators can play important roles and assist the AML enforcement agencies, particularly by providing professional and technological expertise, is not without merit. We believe the precise manner in which these jurisdictional conflicts are resolved is less critical than ensuring that all affected regulators demonstrate fidelity to the legislative spirit of the AML and its core principle, which is that competition law protects competition rather than competitors. For industry-specific regulators accustomed to guarding the interests of SOEs, this may require a careful shift in perspective when applying the AML.

## 2. The Impact of AML Merger Review on Industry-Specific Regulation

Clause 1 of Article 7 of the AML preserves existing regulatory structures in monopolistic industries.<sup>88</sup> In other words, the AML does not make unlawful monopolies created by or pursuant to regulatory fiat, nor does it interfere with incumbent natural monopolies in any industry that were achieved through competition on the merits. Rather, the AML challenges only monopolistic practices whereby a dominant firm uses its monopolistic status to unlawfully impede effective competition.<sup>89</sup> At present, none of the "big three" petrochemical firms has monopoly status or a significant enough market share to violate the AML. Even if one did, the AML would not apply because each firm has been granted its competitive advantages by the state. However, AML enforcement could be triggered in the event of abusive behavior by one of the "big three," or by anticompetitive mergers in the petroleum sector that meet the declaration threshold<sup>90</sup> under the AML.

---

legal challenges abroad, and conduct bilateral and multilateral communication and cooperation with respect to competition policy." *Id.*

88. AML, *supra* note 1, art. 7.

89. This approach is conceptually similar to that of the Sherman Act. *See also*, American Tobacco Co. v. United States, 328 U.S. 781, 786 (1946); United States v. Grinnell Corp., 384 U.S. 563, 570-571 (1966). ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.")

90. On August 3, 2008, the State Council made effective the Provisions of the State Council on the Standard for the Declaration of Concentration of Business Operators, under which pre-merger notification to the Ministry of Commerce is required when a proposed merger meets either of the following requirements as calculated within the preceding accounting year:

(1) The turnover in the aggregate achieved by all the business operators participating in the proposed concentration exceeds RMB ten billion world-wide; and at least two of these business operators each has reached a turnover of more than RMB 400 million within mainland China; or (2) the turnover in the aggregate achieved by all the business operators participating in the proposed concentration exceeds RMB two billion within mainland China; and at least two of these business operators each has reached a turnover of more than RMB 400 million within mainland China.

Bill H. Zhang, *China's Concentration Declaration Threshold Under Anti-trust Law and Its Impact on Foreign M&A Transactions*, HG.ORG (Dec. 22, 2009), <http://www.hg.org/hgcommon/article.asp?id=7822> (citing

Merger enforcement under the AML is therefore potentially important, and it is also one of the areas that may become hamstrung by regulatory overlap. Article 43 of the Draft Energy Law provides that energy enterprises seeking to merge may not proceed prior to notifying the State Council's energy authority if the merger meets the State Council's to-be-determined notification threshold.<sup>91</sup> If the proposed merger meets the threshold, the State Council's energy authority is to assess the transaction according to law and the State Council's regulations. Of course, under the AML, the Ministry of Commerce also has authority to review mergers in accordance with the AML's notification threshold and prescriptions. If Article 43 remains in its current form in the final draft of the Energy Law, merger review in China may be fraught with difficulties. In the petroleum industry, it may be unclear whether one government agency, the other, or both, have jurisdiction, and if the answer is both, the merging parties may be unclear as to who they must notify first. This should be clarified in future drafts of the Energy Law.

Multi-agency review has proved challenging in other jurisdictions, including Europe and the U.S. In many cases, for example, mergers in regulated industries (e.g., electricity, telecommunications, and transportation) are subject to review by the competition authority and the sector regulator. Unless multi-agency review is well coordinated, a host of substantive and procedural issues can frustrate the process and obscure needed transparency for market participants. In the U.S., for example, there are a number of examples whereby statutory standards, methods of data collection, economic analysis, and remedies differ.<sup>92</sup> Dual regulatory and antitrust review has, in the U.S. at least, lead to recommendations that the antitrust authority take the lead on competition analysis, that the agencies consult on the effects of regulation on competition, and that legislators periodically review the need for regulatory merger review.<sup>93</sup>

Apart from inter-agency overlap, difficulties associated with intra-agency diffusions of regulatory responsibility can interfere, and such difficulties should be identified and resolved in the course of implementing the AML.

---

Provisions of the State Council on the Standard for the Declaration of Concentration of Business Operators (promulgated by the St. Council, Aug. 1, 2008, effective Aug. 1, 2008), STATE COUNCIL ORDER NO. 529, *translated in Chinalawinfo* (China)). A previous draft of the Provisions of the State Council on the Standard for the Declaration of Concentration of Business Operators reportedly would have relied on market share criteria for determining whether a pre-merger notification obligation was triggered, but market share criteria were reportedly dropped from the provisions after complaints as to their subjectivity, complexity and other perceived difficulties. *Id.*

91. *Draft Energy Law*, *supra* note 66, art. 43.

92. Regulators often enforce a "public interest" standard, which can include the effect of a merger on competition but also other objectives, such as safety and reliability, and effect on rates. The focus of antitrust, on the other hand, is solely on the effect of a merger on competition. Data and analysis in a regulatory proceeding is also more likely to be public than in the confidential investigations carried out by antitrust enforcers. *See, e.g.,* Diana L. Moss, *Antitrust Versus Regulatory Merger Review: The Case of Electricity*, 32 REV. OF INDUS. ORG. 241 (2008).

93. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 342 (2007), *available at* [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf).

### 3. The Impact of AML Monopolistic Conduct Enforcement on Industry-Specific Regulation

In addition to preserving the monopoly status of state-sponsored dominant firms, Clause 1 of Article 7 of the AML also preserves the state's right to oversee and control the lawful business operations and pricing activities of such firms.<sup>94</sup> As discussed above, the government continues to control pricing in the Chinese petroleum market, even though prices are nominally set by the market. As a result, any AML strictures on pricing activity likely are inapplicable to the petroleum industry.

However, with respect to non-price restraints in reformed areas, the AML enforcement agencies can exercise jurisdiction if the law is properly read to apply to the fullest extent possible. Recall that Clause 2 of Article 7 provides that dominant firms may not harm consumers by abusing a dominant position, and specifically may not unfairly refuse to deal, create tying arrangements, or impose other unreasonable restraints. Reading Clause 1 and Clause 2 together, the AML should work to prevent dominant firms in the energy industry from engaging in non-price restraints that have anticompetitive effects. Where natural monopolies dominate sectors and distort competition through coercion, discrimination, or refusal to grant access to essential facilities, conduct that abounds in certain sectors of the energy industry, particularly in the operation of energy transmission networks, such firms should not be exempted from the AML. Indeed, the importance of antitrust enforcement in regulated industries is at the basis of savings clauses in key U.S. regulatory statutes that govern, for example, the electricity and telecommunications industries. Essential facility issues are particularly important in these industries (and elsewhere) and the doctrine continues to be applied by the lower courts in the U.S.<sup>95</sup> Application of the U.S. essential facility doctrine, or a similar legal construct, might go a long way toward ensuring fair access to network facilities in China.<sup>96</sup>

---

94. AML, *supra* note 1, art. 7.

95. The essential facilities doctrine was a key element in the landmark U.S. Supreme Court case *Otter Tail Power Co. v. United States*. See generally, *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973). The doctrine would establish antitrust liability upon the proof of four elements: (1) control of the essential facility by a monopolist; (2) a competitor's inability to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility. *Id.* See generally, *Verizon v. Trinko*, 540 U.S. 398 (2004) (requiring that no regulatory agency has power to compel access); see also Norman Hawker, *The Essential Facility Doctrine: A Brief Overview*, in I NETWORK ACCESS, REGULATION AND ANTITRUST 3, 35 (Routledge 2005).

96. Several pieces of draft legislation in China would recognize the potential anticompetitive harms associated with essential facilities to varying degrees. Compare Regulation Concerning Prohibition of Abuse of Dominant Market Position (Draft for Comment) (St. Admin. of Indust. and Commerce, Apr. 27, 2009) at art. 8, available at [http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427\\_37769.html](http://www.saic.gov.cn/zwgk/zyfb/qt/fld/200904/t20090427_37769.html).

"If other operators cannot carry out operational activities without having access to the pipelines and networks or other necessary facilities possessed by the business operator that enjoys a dominant market position, the business operator which enjoys a dominant market position shall not refuse the use by other business operators of such pipelines and networks or other necessary facilities under reasonable conditions." Draft Energy Law, *supra* note 66, art. 53 ("State Council energy authority shall, coordinated with other relevant agencies and according to the law, exert professional supervision of the fair access to, universal service and consumer protection of pipelines and networks of electricity, petroleum and gas."). *Id.*

Article 123 of the Draft Energy Law provides that participants in the energy industry acting in areas of the industry that affect national security and the core national economy must commit to assuming corresponding public responsibility, and they may not harm national interests or the public interest by abusing a dominant position.<sup>97</sup> The Article further provides that the State Council's energy authority and other relevant agencies shall regulate energy industry participants involved in the aforesaid activities.<sup>98</sup> This provision, which features language similar to Article 7 of the AML, seems to carve competition protection out of the AML and insert it into the Energy Law. Article 132 and Article 133 also provide for penalizing abusive behavior<sup>99</sup> and unlawful concentration.<sup>100</sup>

However, we believe the designated AML enforcement agency (the SAIC) is better equipped to address non-price restraints. The above referenced provisions should therefore be struck from the Draft Energy Law.<sup>101</sup> On the other hand, the Draft Energy Law adequately and properly provides for the government to set or guide pricing, in keeping with Clause 1 of Article 7's preservation of the state's right to control pricing activities of dominant firms in lifeline industries.<sup>102</sup> Taken together, the AML and the Energy Law, properly enforced, can help ensure that energy security is tailored to the market's allocation of resources and the state's macro control over prices.<sup>103</sup>

#### IV. COMPETITION POLICY AND ENERGY POLICY: RATIONAL POSITIONING AND POLICY FORMATION

With the Draft Energy Law and the future of Chinese energy policy in an indeterminate state, an added degree of uncertainty now exists between the role of regulatory controls and competition laws in the petroleum industry. China

97. *Draft Energy Law*, *supra* note 66, art. 123.

98. *Id.*

99. *Id.* at art. 132.

[I]f energy undertaking abuses its dominance to exclude or restrict competition, the energy authority shall issue cease-and-desist order, impose a fine of 1% to 10% of its turnover of the previous year, and confiscate all illegal revenues gained; if serious enough, or not corrected within the time frame specified, the energy authority may order disposition of equity, assets, or mandate lowering of market share in the relevant market.

100. *Id.* at art. 133.

[I]f energy undertaking implement concentration in the violation of this law, provincial level or above energy authorities may impose a fine from RMB one million to five million, and may order cease-and-desist order, or order disposition of equity, assets, transfer of business and or other appropriate measures to return to the status prior to concentration.

101. See also HUANG YONG, *Fanlongduan Fa Chutai Falv Dingwei yu Falv Xietiao Jueding Chengbai* [With the AML's Promulgation, Its Success or Failure Depends upon Positioning and Coordination], LEGAL DAILY (Dec. 30, 2009), [http://www.npc.gov.cn/npc/xinwen/rddl/fzjs/2007-09/03/content\\_371388.htm](http://www.npc.gov.cn/npc/xinwen/rddl/fzjs/2007-09/03/content_371388.htm) (China). Paragraph 2 of article 29 of the Electricity Law provides, "if customer disputes the termination of supply, he or she may complain to the electricity regulatory authority; the authority shall process according to the law." *Id.* Obviously, if an electricity undertaking abuses its dominance by refusing to deal, this is classic monopolization and should be regulated by the AML. *Id.*

102. *Draft Energy Law*, *supra* note 66. The law establishes a market-oriented price finding mechanism, mandating "market adjustment price for energy products and services that meet the market competition conditions."

103. Ye Rongsi, *Woguo Nengyuan Anquan de Falv Baozhang* [Legal Protection of Our National Energy Security], 1 ZHGUO FAZHAN GUANCHA [CHINA DEVELOPMENT REVIEW] (2008).

should look toward resolving this uncertainty with an integrated view of both competition policy and energy policy, in order to avoid or resolve potential legal conflicts and overlap.

If the AML is to be applied to the fullest extent possible, but with due deference for a Chinese energy policy still taking shape, it is critical to understand the criteria for determining energy policy. Two such criteria should be energy security and industrial efficiency. We believe energy security, in the petroleum context, encompasses China's ability to stabilize supply of raw petroleum at a reasonable price, such that petroleum can be had and afforded under any circumstances, and in sufficient amounts to allow for sustainable development of the national economy. We believe industrial efficiency encompasses China's efforts to optimize the productive efficiency and allocative efficiency of its energy-related industries, with the former to be achieved by effectively exploiting all economies of scale and existing technology and cutting all superfluous costs, and the latter to be achieved by allocating resources to those who value them most financially.

#### A. *Security vs. Efficiency: Rational Positioning of Chinese Energy Policy*

##### 1. The Goals of Energy Security

In any country, energy security is related to political security, economic security, sovereign security (i.e., national security), and environmental safety.<sup>104</sup> In service of most of these goals, but particularly national security and economic security, most countries recognize that energy and electricity supply must be kept free from internal and external menace.<sup>105</sup> For most of the industrially developed countries that rely on imports to secure their energy needs, this means securing a long-term and continuous import flow of energy on acceptable economic terms.<sup>106</sup> Of course, imports must also be available in quantities sufficient to sustain the development of a nation's economy and promote social progress in a given country.

In addition to protecting supply, however, energy security should also contemplate the use of energy production and utilization methods that comport with standards for environmental protection. Although many with contrary political views might disagree with this premise, the dangers of pollution do touch upon energy security in at least one important sense: environmentally hazardous energy practices that put the health of the country at risk will be

---

104. Xiao Guoxing, *Lun "Nengyuan Fa" de Lixing Jiqi Falv Luoji [On the Reason and Legal Logic of Energy Law]*, 7 ZHONGZHOU XUEKAN [ACADEMIC JOURNAL OF ZHONGZHOU] (2007); see, e.g., *Statement of Policy on Treatment of Previously Public Documents*, 97 F.E.R.C. ¶ 61,030 (2001) (after the September 11, 2001 terrorist attacks, the U.S. Federal Energy Regulatory Commission (FERC) will no longer make certain documents detailing specifications of energy facilities publicly available through traditional means); Order No. 630, 18 C.F.R. §§ 375, 388 (2003) (detailing restrictions on access to critical energy infrastructure information necessitated by terrorist attacks).

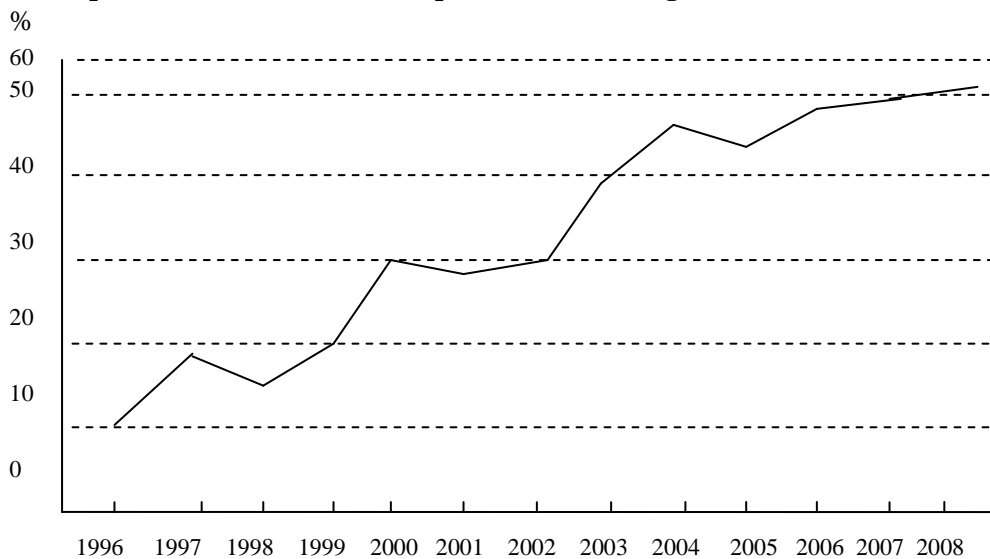
105. RI ZINING, *GUOJI NENGYUAN ZHENGZHI YU WAIJIAO [INTERNATIONAL ENERGY POLITICS AND DIPLOMACY]* 45 (East China Normal University Press 2005) (China).

106. RI ZINING, *E LUOSI DE NENGYUAN WAIJIAO [THE ENERGY DIPLOMACY OF RUSSIA]* 31 (People's Press 2006) (China).

unstable and unsustainable.<sup>107</sup> Still, the authors recognize that supply security and its corollary, reasonable energy prices, form the core content of energy security.

The focus of China's own energy security policy has shifted over the years from (1) an emphasis on self-sufficiency from 1949-1992; to (2) an emphasis on obtaining supply from 1993-2002; to (3) a renewed emphasis on broadening domestic supply but coupled with a new emphasis on improving efficiency, from 2003 to the present.<sup>108</sup> Concurrent with the first such shift, in 1993, China became a net importer of petroleum. From 1993 to 2003, while the Chinese economy as a whole maintained a yearly growth rate of 7-8%, China's volume growth in petroleum production was below 2%.<sup>109</sup> In 1994, the degree of China's dependence on imported petroleum began rising steadily.<sup>110</sup> As constraints on China's oil supply caused by reliance on the international energy market have grown increasingly severe, so too have the risks that petroleum supply shortfalls pose to China's energy security, and with energy security risks come serious political and economic risks. Thus, petroleum supply is not merely a commercial issue, but also a strategic security issue.<sup>111</sup>

#### Upward Trend in China's Dependence on Foreign Petroleum<sup>112</sup>



107. HUANG ZHENGZHONG, *ZHONGGUO NENGYUAN FAXUE* [CHINA ENERGY LAW] 76 (Law Press 2009) (China).

108. YANG ZEWEL, *ZHONGGUO NENGYUAN ANQUAN FALV BAOZHANG YANJIU* [ON LEGAL SAFEGUARD OF CHINA'S ENERGY SECURITY] 14-18 (CUPL Press 2009) (China).

109. *Id.*

110. *Id.*

111. WANG DAN, *supra* note 4, at 133-134.

112. Cui Rongguo, *First Three Quarters of 2008, the Situation of Trade in Mineral Products*, RESOURCE NETWORK (Oct. 23, 2008), translated in LRN.CN, [http://www.lrn.cn/zjt/academicPaper/200810/t20081023\\_288155.htm](http://www.lrn.cn/zjt/academicPaper/200810/t20081023_288155.htm) (China).



Fluctuations in international petroleum prices can substantially influence China's economic development. Rising petroleum prices can lead to the deterioration of any country's trade balance when that country relies on imports as a primary source of raw petroleum. As petroleum prices rise, product prices rise, pressure from inflation increases, and currencies weaken, all of which impacts economic growth.<sup>113</sup> Because China is in the middle-to-late stages of industrialization, energy intensity – demand for petroleum and gas resources – is likely to reach new heights in the immediate and long term. Like other industrialized or industrializing nations dependent on imports and maintaining insufficient reserves, China stands to be victimized by wide-ranging fluctuations and soaring global petroleum prices.<sup>114</sup>

## 2. The Appeal of Industrial Efficiency

Energy security and a stable energy supply are only part of the story. Because non-renewable energy will account for the bulk of its energy supply for the foreseeable future, China must also improve industrial efficiency as it works toward achieving sustainable renewable and alternative energy.<sup>115</sup> While industrial efficiency helps stabilize energy supply, it also leads to environmental protection, sustainable economic and social development, technological innovation and advancement, fair competition, and the optimization of energy infrastructure.<sup>116</sup>

Current levels of Chinese industrial efficiency are best considered in the context of the nation's reliance on SOEs. Since its adoption of economic policy reforms, China has taken a "backward and forward" approach to its SOEs as it transitions to a market-based economy. It has moved forward as SOEs have exited certain industries while private enterprises have been encouraged to develop rapidly and compete, and backward as it has worked to strengthen the already dominant positions of SOEs in strategic industries pertaining to national economic lifelines, while restricting private enterprises. China has always considered the energy industry to be a strategic, lifeline industry that impacts national security. However, the outlook for industrial efficiency in the energy industry is somewhat pessimistic.

For example, by international standards, the threshold rate for annual oil output from countries achieving economies of scale is 2.5 million tons. Based on the Statistical Annals of CNPC and SINOPEC, only 56% of Chinese oil processors meet this criterion.<sup>117</sup> Various other measures of industrial efficiency in Chinese refining are also below international standards. For example, the capacity utilization rate for domestic and overseas refineries is about 93% in the U.S., 92% in the UK, about 88% in Japan, but only about 67% in China.<sup>118</sup>

Furthermore, current data demonstrates that highly concentrated industries, such as oil and gas and power generation, attract the most foreign investment,

---

113. YANG ZHONGQIANG, DANGDAI ZHONGGUO SHIYOU ANQUAN YANJIU [STUDY ON PETROLEUM SECURITY OF CONTEMPORARY CHINA] 82 (Party School of the Central Committee of CPC Press 2006) (China).

114. *Id.* at 83.

115. HUANG ZHENGZHONG, *supra* note 107.

116. *Id.*

117. WANG DAN, *supra* note 4, at 34.

118. *Id.*

which in turn fosters the most rapid growth.<sup>119</sup> Yet private companies in China face operating restrictions in these same industries. As Shi Dan, the Director of the Center for Energy Economics at the China Academy of Social Science, has noted, heightened concentration in a heavily regulated market does not enhance the competitiveness of SOEs, yet those same market conditions can afford significant competitive advantages to foreign-funded private enterprises and provide a platform for growth.<sup>120</sup>

For example, in Chinese coal mining, where concentration is very low, growth in foreign direct investment (FDI) between 1998 and 2003 increased by a factor of about 2.5. In petroleum and gas exploitation, FDI increased by a factor of 761, and in petroleum processing by a factor of about 47.<sup>121</sup> These industries exhibit high levels of concentration.

Other metrics punctuate the relationship between market concentration and efficiency. In the highly concentrated petroleum and gas industries, for example, economic returns and labor productivity of foreign-funded private enterprises are far higher than those of foreign-funded private enterprises in the coal industry, which has very low levels of concentration. Meanwhile, the gap in economic returns between foreign-funded private enterprises and SOEs in all industries with higher levels of concentration is greater than it is in industries with lower levels of concentration.<sup>122</sup>

A look at the proportion of total profits relative to that of output for foreign-funded enterprises and SOEs is also revealing. In 2002, for example, ninety-three foreign-funded private enterprises made up 13% of the total number of enterprises operating in the petroleum processing and petroleum product industries, yet they claimed almost 45% of total profits in those industries.<sup>123</sup>

Naturally, this pattern raises questions about the relationship between industrial efficiency and industrial structure. While in depth economic analysis would undoubtedly reveal more, the foregoing statistics at least give some indication that state-sponsored monopolies in the petroleum industry did not achieve a high level of efficiency relative to foreign-funded private enterprises. And the higher profit margins in the industry were earned not by the SOEs, which “should” have been more efficient (if Chinese energy policy objectives were met), but rather by the foreign-funded private enterprises.

### 3. Energy Security, Industrial Efficiency, and Consumer Surplus

Xiao Guoxing, a law professor at the East China University of Science and Technology and a member of the Expert Consulting Workgroup for the Energy Law Drafting Group, has argued that in order to realize a sustainable supply of energy, both energy security (i.e., satisfaction of demand for energy at reasonable prices) and industrial efficiency in the energy sector must be

---

119. *Id.*

120. SHI DAN ET AL., ZHONGGUO NENGYUAN GONGYE SHICHANGHUA GAIGE YANJIU BAOGAO [RESEARCH REPORT ON THE MARKETIZATION AND REFORM OF THE CHINESE ENERGY INDUSTRY] 59 (Economic Management Press 2006) (China).

121. *Id.* at 58.

122. *Id.* at 59.

123. *Id.*

secured.<sup>124</sup> Another scholar holds that the objective of government regulation should be to maximize the sum of national petroleum security, industrial efficiency, and consumer surplus.<sup>125</sup> Each of these three objectives can be viewed separately but also as part of one integrated goal, because they are inextricably related.

For example, energy security is a necessary condition for industrial efficiency and, by the same token, achieving industrial efficiency guarantees energy security. Also, without some focus on consumer surplus as part of energy policy, both energy security and industrial efficiency will likely suffer. A rational positioning of China's energy policy, therefore, will recognize the interrelationship between energy security, industrial efficiency, and consumer surplus. Arguably, industrial efficiency should be the central goal of modern energy law since it is a precondition to both energy security and consumer benefits.<sup>126</sup> Policies geared toward improving industrial efficiency, however, will require adjustments to the industrial structure within the context of energy security goals. By embracing this understanding of integrated energy policy criteria, policymakers can draft energy policy that fuses neatly with competition policy, at least when the latter is not in tension with the former.

#### *B. Advancing Law and Policy: Coordinating a Policy Formation Mechanism with a Legal Framework*

Competition policy and energy policy intersect in the development of industrial efficiency. Consumer welfare is the goal of competition law and policy, and insofar as consumer surplus is the best internal measurement of industrial efficiency, consumer welfare is also a goal of energy policy. Competition policy and energy policy must be coordinated in pursuit of this shared goal. However, we must also recognize that policy formation has its own logic.<sup>127</sup> A policy decision-making mechanism must be capable of being established under the law before it can be implemented. In this section, we explore policy formation mechanisms and prospects for coordinating energy policy and competition policy.

##### 1. The Formation Mechanism of Energy Policy

In China, energy policy formation requires coordinated decision-making among recognized authorities, chaired by the State Council. In 2008, in order to strengthen decision-making and coordinate energy strategy throughout the energy industry, national institutional reform led to the creation of the National Energy Committee, a high-level deliberative and coordinating authority responsible for studying and drafting national energy development strategy and examining significant issues in energy security and energy development.

---

124. HUANG ZHENGZHONG, *supra* note 107.

125. WANG DAN, *supra* note 4, at 195.

126. HUANG ZHENGZHONG, *supra* note 107.

127. The process of governmental decision making is a complicated structure-function system. Although the basic frameworks among countries appear similar, the differences can be remarkable due to the restraints imposed by domestic political institutions and international eco-political institutions. For further illustration, see also SHENG BING, *ZHONGGUO DUIWAI MAOYI ZHENGCE DE ZHENGZHI JINGJI FENXI [THE ECONOMIC ANALYSIS OF CHINA'S FOREIGN TRADE POLICY]* 138 (People's Press of Shanghai 2002) (China).

Furthermore, the government shifted certain responsibilities from the Office of National Energy Committee to the National Energy Administration, which is tasked with drafting, organizing, and implementing an energy industry plan, and industrial policy and standards, along with developing new energy and promoting energy conservation. To address the concerns of all interested parties, foster macro-control, and promote the close combination of energy administration and economic and social development and planning, the National Energy Administration was placed under the control of the NDRC.<sup>128</sup>

Except for the function of energy policy legislation being allocated to the National Energy Administration, various other administrative functions are being spread among a dozen other authorities, including the NDRC, the Ministry of Commerce, the Ministry of Land and Resources, the China Electricity Regulatory Committee, and the General Administration of Safe Production Supervision. The scope of energy administration allocated among each of these authorities constitutes an important and substantial component of energy policy formation.

## 2. The Formation Mechanism of Competition Policy

Article 9 of the AML provides that the Anti-Monopoly Committee will be responsible for studying and drafting competition policy.<sup>129</sup> Article 9 further provides that, with its authority to organize, coordinate, and guide unified, national anti-monopoly work, the Anti-Monopoly Committee should comprehensively analyze economic development and market structures in China, and draft competition policy accordingly, so it may be used as a basis for implementing the AML.<sup>130</sup> Under both the AML and the Working Rules of the Anti-Monopoly Committee, the three AML enforcement agencies – the NDRC, the Ministry of Commerce, and the SAIC – are directly responsible for implementing the law.<sup>131</sup> These three enforcement agencies will take the lead,

128. Hua Jianming, *Guanyu Guowuyuan Jigou Gaige Fang'an de Shuoming [The Illustration on the Institutional Reform Agenda of State Council]*, NAT'L PEOPLE'S CONG. (Jan. 9, 2010), <http://npc.people.com.cn/GB/28320/116286/116599/6986069.html>. According to the human resources restructuring plan, the National Energy Administration's responsibilities:

Include specifically drafting energy development strategy, plan and policy and putting forward relatively systematic reform proposals; carrying out administration on petroleum, gas, coal, electric power and other energy; managing the nation's petroleum reserves; putting forward policies and measures to develop new energy and energy-saving in the energy industry; [and] carrying out international cooperation in energy.

*National Energy Board "Three Fixed" Scheme Prepared By the Division Approved the Establishment of Nine 12*, THE CENT, PEOPLE'S GOV'T. (July 29, 2008), [http://www.gov.cn/gzdt/2008-07/29/content\\_1058473.htm](http://www.gov.cn/gzdt/2008-07/29/content_1058473.htm) (last visited Jan. 9, 2010).

In terms of energy policy, its main responsibilities include:

Studying and putting forward proposals for energy development strategy, drafting energy development plan and industrial policy, and organizing the implementation; working out the drafts of laws, regulations and rules, pushing forward energy systematic reform, drafting relative reform plans, and coordinating in significant issues in the process of energy development and reform. *Id.*

129. *AML*, *supra* note 1, art. 9.

130. *ECONOMIC LAW OFFICE REPORT*, *supra* note 49, at 44.

131. *Id.*

while working together with the other eleven departments of the central administrative government to legislate competition policy.<sup>132</sup>

Under the current framework, the mechanism for implementing competition policy is complicated and vague, because no single, independent authority has implementation responsibility. Furthermore, the three authorities that do have implementation responsibility, the Ministry of Commerce, the NDRC, and the SAIC, are robust administrative departments that cover a wide swath of issues. The Ministry of Commerce, in addition to having merger review authority under the AML, is responsible for formulating strategies and policies, and drafting laws and regulations governing domestic and foreign trade, specifically with regard to commercial distribution, import and export commodities, domestic and international economic cooperation, and foreign aid and investment, including China's relationship with the World Trade Organization and special administrative considerations associated with Hong Kong, Macao, and Taiwan.<sup>133</sup> The NDRC, apart from supervising price-related monopolistic restraints under the AML, has broad administrative and planning control over the Chinese economy, with twenty six separate departments, bureaus, and offices.<sup>134</sup> The SAIC, which presides over non-price monopolistic restraints under the AML, is also generally responsible for the supervision of markets and related law enforcement in the fields of enterprise registration, consumer protection, and intellectual property protection.<sup>135</sup>

Each agency will have to find and devote adequate resources to AML enforcement. They must also work to ensure that competition policy is given meaningful attention and due weight in the event of competing or divergent interests arising within each agency's broad regulatory mandate. Balanced against their responsibilities for other policies, the agencies likely will view competition policy as a relatively low priority in the short term. Exactly how much attention competition policy will receive in the long term remains an open question.

Finally, as noted above, eleven other departments of the central administrative government have a hand in legislating competition policy, each of which will send representatives to help fill out the roster of the Anti-Monopoly Committee. Representatives will be included from the Ministry of Supervision, the Ministry of Finance, the Ministry of Transportation, the State-owned Assets Supervision and Administration Commission (SASAC), the Ministry of Industry and Information Technology, the State Intellectual Property Office, the Legal Office of the State Council, the China Banking Regulatory Committee, the China Securities Regulatory Committee, the China Insurance Regulatory Committee,

---

132. Notice of the General Office of the State Council on the Main Functions and Members of the Anti-monopoly Commission of the State Council (promulgated by the Gen. Off. of the St. Council, July 28, 2008, effective July 28, 2008) (Chinalawinfo) (China).

133. *Mandate of the Ministry of Commerce*, MINISTRY OF COMMERCE, <http://english.mofcom.gov.cn/mission.shtml> (last visited Oct. 14, 2010).

134. *Main Functions of the NDRC*, NAT'L DEV. AND REFORM COMM'N, <http://en.ndrc.gov.cn/mfndrc/default.htm> (last visited Oct. 14, 2010).

135. *Mission*, ST. ADMIN. FOR INDUSTRY & COMMERCE, <http://www.saic.gov.cn/english/aboutus/Mission/> (last visited Oct. 14, 2010).

and the China Electricity Regulatory Committee.<sup>136</sup> Each of these central departments and their respective members on the Anti-Monopoly Committee may have an impact on competition policy to a certain degree, though competition policy functions have not been allocated among any of them. The authors' experience suggests there is little doubt though, that these departments will at least influence competition policy based on policies and interests that are within their scope of functions.

In general, broader national objectives should play a long-term and final guiding role in the shaping of Chinese competition policy. Together with the influences of systematic restrictions, interest groups, and international considerations, the concrete decision-making mechanism for competition policy will be formed. With respect to systematic restrictions, we may clearly see that the formation of competition policy has already been influenced by the decision-making objectives of many ministries and the appeals of the industries behind them.

### 3. A Legal Framework That Coordinates Energy Policy and Competition Policy

Because the formation of energy policy and competition policy is a complicated systematic project which involves many departments and industries, coordination will occur through an informal communication mechanism under the current framework. Strategy development for the petroleum and gas industry and significant principles and policies will be decided by the State Council. The National Energy Committee is merely "a discussing and coordinating agency,"<sup>137</sup> but a lot of concrete work will fall to the National Energy Administration.<sup>137</sup> Coordination of energy policy and competition policy thus will not be carried out under a clear legal framework, but rather through informal working groups.

If the final version of the Draft Energy Law holds to its current form, a specific chapter will be incorporated regarding upgrades to energy strategy and planning, as well as the scope of the Energy Law's authority. For now, the recognized authority for energy policy is identified only as the "competent department for energy in the State Council."<sup>138</sup> That resources will be allocated by the market is provided as a general legal principle in General Principles, and this should provide some guidance.<sup>139</sup> However, because the Energy Law is still moving through the legislative process, its concrete, systematic arrangements have yet to be erected. Interested parties should be watching carefully to determine the means through which administration will be separated from supervision.<sup>140</sup>

---

136. Notice of the General Office of the State Council on the Main Functions and Members of the Anti-monopoly Commission of the State Council (promulgated by the Gen. Off. of the St. Council, July 28, 2008, effective July 28, 2008) (Lawinfochina), *reprinted in* Lawinfochina, [http://www.lawinfochina.com/law/displayModeTwo.asp?id=7190&keyword=\(China\)](http://www.lawinfochina.com/law/displayModeTwo.asp?id=7190&keyword=(China)).

137. Guowuyuan Guanyu Yishi Jigou Shezhi de Tongzhi [State Council Notice on the Establishment of Discussing and Coordinating Agencies] (promulgated by the St. Council), *reprinted in* [http://www.gov.cn/zwqk/2008-04/24/content\\_953488.htm](http://www.gov.cn/zwqk/2008-04/24/content_953488.htm) (last visited Jan. 9, 2010) (China).

138. *Draft Energy Law*, *supra* note 66.

139. *Id.*

140. *See also id.* at art. 19 ("The State Council could set up State Energy Market Supervision Agency. The State Energy Market Supervision Agency, under the operation guidance of Energy Management Authority

We expect to see administration separated from supervision in a two-tiered coordination mechanism. At the policy level, the National Energy Administration will coordinate with the Anti-Monopoly Committee. Specifically, the National Energy Administration and Anti-Monopoly Committee should coordinate in formulating and releasing anti-monopoly guidelines, completing competition assessments and investigations, and in setting the pace of regulation and competition reform in the energy sector overall.

At the implementation level, the Energy Supervision Authority will coordinate with the three AML implementation authorities. The Energy Supervision Authority should work with the Ministry of Commerce to form an institutional mechanism for dealing with concentration in the energy sector when it reaches the declaration threshold as set by the State Council. At the same time, the Energy Supervision Authority should work with the NDRC and the SAIC to reach formal or informal arrangements concerning abuse of dominance and monopolistic agreements.

If this coordination framework operates systematically, the interests of all ministries, industries, and related enterprises may be addressed through a single channel and considered in a balanced manner under clear procedural guidelines. More importantly, a fair competition mechanism, cognizant of the competition culture called for by the AML, can be achieved, and policies and laws can be implemented accordingly. This would allow petroleum-industry reform to develop gradually.

#### V. THE DEVELOPMENT OF NON-PUBLIC AND FOREIGN-FUNDED PETROLEUM INDUSTRIES DURING THE POST-AML PERIOD

For energy security, industrial efficiency, and consumer surplus to be achieved, competition throughout the energy industry is essential. In this section, we analyze prospective competition in the oil industry post-AML. In particular, we examine competitive dynamics among the non-public (i.e., domestic, private) enterprises and the foreign-funded private oil enterprises.

##### A. *Non-Public Enterprises*

In 1998, the State Council ordered that small, non-public refineries be consolidated within CNPC or SINOPEC, and mandated that only SOEs could obtain licenses to open new gas stations, continuing its tradition of regulating the upstream oil industry by restricting entry.<sup>141</sup> Many successful, well-run, non-public enterprises suddenly ceased to exist. At the same time, CNPC and SINOPEC entered into intensive head-to-head competition over new gas stations, to both SOEs' disadvantage. Each company was forced to commit capital toward promoting its marketing abilities, commodity and service quality, and ultimately reducing costs.<sup>142</sup>

---

of State Council, supervise the operation of energy market, market transaction, universal service, consumer protection etc, according to law.”).

141. WANG DAN, *supra* note 4, at 167-168.

142. *Id.*

Existing non-public enterprises in the upstream market have been severely disadvantaged by their inability to obtain independent access to an oil source after Notice No. 72. Statistically, only 100 non-public refined oil wholesale enterprises were surviving in the market in 2008, down from 660.<sup>143</sup> At the same time in the downstream market, one-third of 4,500 non-public retail gas stations had closed and more than 100,000 of 1 million non-public enterprise employees had lost their jobs.<sup>144</sup>

Meanwhile, potential non-public entrants in the industry also face glaring challenges. Although the market is nominally open, barriers to entry have become substantial under the current regulatory system. Many incentive programs are not available to those who need them, and many non-public investors cannot satisfy the heightened standards for capital strength, technological expertise, experience, and more. The AML is arguably doing more to protect both existing and potential non-public enterprises than the regulatory system: if the dominant SOEs engage in abusive conduct, or form monopolistic agreements, non-public enterprises now have a right of action. Although these improvements are marginal, if nurtured they might eventually power a necessary, gradual reform process.

#### *B. Foreign-Funded Enterprises*

The central government opted to allow foreign-funded enterprises into the Chinese oil industry because of the assistance they can provide in broadening the refined oil market channel, owing to their powerful financial resources and rich management experience. Upon entering the market, foreign-funded enterprises have mainly sought to cooperate with CNPC and SINOPEC, because this is their only means of directly accessing wholesale fuel oil after Notice No. 72. Because partnering with Chinese non-public enterprises would leave them at the mercy of CNPC and SINOPEC with respect to trading rights, foreign-funded enterprises have primarily viewed non-public enterprises as rivals and potential merger or acquisition targets.

Long term, the foreign-funded enterprises seek to establish a marketing network linking the Chinese domestic market to the world market. The issuance of Provision 36, Measures for the Administration of the Refined Oil Market, and Measures for the Administration of the Crude Oil Market have empowered foreign-funded enterprises to pursue these goals, but not without limitations.<sup>145</sup> In the upstream market for oil production, a foreign-funded enterprise may only co-develop via output sharing with an SOE, and it may not take an equity stake in the operation. Thus, foreign-funded enterprises must cooperate with CNPC and SINOPEC.

Since the reorganization of the oil industry in 1998, the proportion of foreign funds to domestic funds in the total paid-in capital collected by various

---

143. Sun Ruizhuo, *Monopolistic Glass Door Forces Private Oil Enterprises into a Difficult Position*, XINHUA NEWS, [http://new.xinhuanet.com/theory/2008-08/3/content\\_8888670.htm](http://new.xinhuanet.com/theory/2008-08/3/content_8888670.htm) (last visited Jan. 2, 2010).

144. *Id.*

145. Measures for the Administration of the Refined Oil Market (promulgated by the Ministry of Commerce, Dec. 4, 2006, effective Jan. 1, 2007) (Lawinfochina) (China); Measures for the Administration of the Crude Oil Market (promulgated by the Ministry of Commerce, Dec. 4, 2006, effective Jan. 1, 2007) (Lawinfochina) (China).



oil-industry departments has increased, but not exorbitantly. This is likely due to the entry restrictions placed on foreign-funded enterprises in the upstream market of the oil and natural gas industry, discussed above. The restrictions limit foreign-funded enterprises in risk prospecting and the development of petroleum and natural gas, permeable gas, new oil fields, new technology and applications for sour crude extraction, and new technology and applications for oil prospecting and development. But foreign-funded enterprises have been granted largely unfettered access to the downstream market for crude oil wholesale, retail and logistic distribution, subject to one restriction in the downstream market that prevents foreign businesses from operating a franchise of over thirty chain stores.<sup>146</sup>

While entry conditions and prices set by foreign-funded enterprises have traditionally been governed exclusively by regulation, such enterprises are now within the jurisdiction of the AML. If they fail to comply with the AML by abusing a dominant market position or reaching a monopoly agreement with a Chinese SOE, victims of the damage to competition have a cause of action. In addition, Article 31 of the AML ensures that foreign-funded enterprises receive extra scrutiny in the merger and acquisition context.<sup>147</sup> According to the provision, if a foreign investor merges with a domestic enterprise, and state security is involved, state provisions concerning national security are triggered in addition to the relevant AML provisions, and special examination of the transaction in the national security context will follow.<sup>148</sup> Through the legislation enacted to empower foreign-funded enterprises in the petroleum industry, coupled with these AML strictures to prevent abuses, we see the promise of cooperative energy policy and competition policy in the movement away from the inefficiency of SOEs to a more open market, one where competition is protected.

## VI. CONCLUSION

China's adoption of the AML is the country's most significant step to date in fully embracing competition in the course of transitioning from a command-and-control economy to a market-based system. While the government has moved only gradually in reducing its reliance on comparatively inefficient SOEs, the AML offers more than any previous legislative regime to encourage the growth of non-public and foreign-funded enterprises in the energy industry and allow diversified, competitive markets to take shape. However, the mere presence of the law is not enough; the AML must be interpreted and implemented with fidelity to its core principles, and future legislation and policy must be drafted to accommodate its purpose.

First, the AML must be read to apply to the fullest extent possible. Among state-sponsored dominant firms and dominant firms in lifeline industries, this means the three AML implementation authorities must work to ensure that the

---

146. SHI DAN, *supra* note 120, at 383.

147. AML, *supra* note 1, art. 31.

148. *Id.* Where a foreign investor participates in the concentration of undertakings by merging and acquiring a domestic enterprise or by any other means, which involves national security, the matter shall be subject to review on national security as is required by the relevant State regulations, in addition to the review on the concentration of undertakings in accordance with the provisions of this law.

law acts as a check on such firms to ensure they do not harm consumers by abusing their dominant positions. In the energy industry generally, this means the AML should prevent natural monopolies from distorting competition through coercion, discrimination, or refusal to grant access to essential facilities, conduct that abounds in the operation of Chinese energy transmission networks, where application of a construct like the U.S. essential facilities doctrine would be well served. In the petroleum industry specifically, where the government in the short term seems intent on continuing to control prices and to restrict entry in the supply market, this means the AML should work to prevent non-price restraints that have anticompetitive effects in the downstream wholesale and retail markets.

Second, future energy law and energy policy must be crafted to accord with competition law and competition policy. This means the government should embrace industrial efficiency as the operative goal of modern energy policy, but with recognition that energy security and consumer benefits are necessary preconditions to industrial efficiency. It also means that future drafts of the Energy Law should not carve competition protections out of the AML, and that conflicts and overlaps among the two laws with respect to notification procedures, declaration thresholds and overall authority for the review of mergers and acquisitions should be clarified and resolved.

Although the AML has been in effect since August 2008, much of the law's meaning and true impact remains to be seen. Equivocal language in the statute will be interpreted by enforcers and courts, and the level of attention consumers and competitors can expect the three AML implementation authorities to devote to competition, as compared to the remainder of their broad regulatory mandates, will become clearer. The nature, structure, and effectiveness of the legal framework for coordinating energy policy and competition policy, likely to emerge through informal working groups, likewise will become evident. Finally, the culture and attitudes toward competition of the representatives of the eleven departments of the central administrative government that will make up the Anti-monopoly Commission will reveal themselves. All of these developments promise to define the coming years as some of China's most important for the future of Chinese competition and energy law and policy.