

The Impact of the World Trade Organisation on the Formulation of the Antimonopoly Law of the People's Republic of China

Zhaofeng Zhou (周照峰)

Submitted for the Degree of Doctor of Philosophy

School of Law

Faculty of Law, Business and Social Science

University of Glasgow

Abstract

China became a member of the World Trade Organisation (WTO) in December 2001. This historical event has impact on both China and the WTO. As an observer noted, 'The WTO will change China, but China will also change the WTO'.¹ This thesis is an example how the WTO will change China. It examines the WTO's impact on the formulation of China's first comprehensive competition law, the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007). The formulation of the Antimonopoly Law 2007 has generated unprecedented interest within and outside China due to the sheer size of the Chinese economy and trade.

Despite this significance, there is a lack of studies on the WTO's impact on the formulation of the Antimonopoly Law 2007. Against this background, this study examines whether, and if so, how the WTO could have had impact on its formulation, and to what extent the formulation of the Antimonopoly Law 2007 has reflected such impacts. To this end, it focuses on four aspects:

- a. consistency: the content of the Antimonopoly Law 2007 needs to be consistent with the WTO rules;
- b. obligation: the enactment of the Antimonopoly Law 2007 could help China implement its WTO commitments;
- c. enabling: WTO rules could have enhanced the case for China seeking to combat anticompetitive practices through the Antimonopoly Law 2007; and
- d. peer pressure: the formulation of the Antimonopoly Law 2007 could have been influenced by the peer review system—the Trade Policy Review Mechanism.

These four aspects are examined in Chapter Three, Chapter Four, Chapter Five and Chapter Six respectively. These four chapters constitute the main part of this thesis.

¹ Observation made by C. Christopher Parlin at the Georgetown University Law Center Course on WTO Law and Policy for MOFTEC Officials, 19-30 June 2000.

This thesis concludes by noting that (1) the WTO could have had impact on the formulation of the Antimonopoly Law 2007; (2) such impact could have been reflected through four aspects; (3) the formulation of the Antimonopoly Law 2007 has been influenced by the WTO.

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List of Abbreviations

Legal Text

AGP: Agreement on Government Procurement

Antimonopoly Law 2007: the Antimonopoly Law of the People's Republic of China

Bidding Law 1999: Bid-Inviting and Submitting Law of the People's Republic of China

Brussels Ministerial Text: Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods

BTA: Basic Telecommunications Agreement

Chinese Constitution 1982: Constitution of the People's Republic of China

Civil Procedure Law 1986: Civil Procedure Law of the People's Republic of China

Doha Declaration 2001: Doha 4th Ministerial Declaration

GATS: General Agreement on Trade in Services

GATT: General Agreement on Tariffs and Trade

General Principles of Civil Law 1986: the General Principles of the Civil Law of the People's Republic of China

Havana Charter: United Nations Conference on Trade and Development

Interim Provisions for Competition 1980: Interim Regulation for the Promotion and Protection of Competition in the Socialist Economy

Interpretation of Technology Contract 2004: Interpretation of the Supreme People's Court on Certain Issues of Application of Law in Cases Involving Technology Contract Disputes

July Package: the WTO General Council's post Cancun Decision in July 2004

LAUC 1993: Law against Unfair Competition of the People's Republic of China

Legislation Law 2000: Legislation Law of the People's Republic of China

Marrakesh Agreement: Marrakesh Agreement Establishing the World Trade Organisation

Price Law 1997: Price Law of the People's Republic of China

Protocol on China's Accession: Protocol on Accession of the People's Republic of China

Reference Paper: Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications

Regulation of Prices 1987: Regulation on the Administration of Prices of the People's Republic of China

Report of the Working Party on China's Accession: Report of the Working Party on the Accession of the People's Republic of China

TBT: the Agreement on Technical Barriers to Trade

TRIMS: The Trade-Related Investment Measures

TRIPS: Trade-Related Aspects of Intellectual Property Rights

UCFS: Understanding on Commitments in Financial Services

Telecommunications Regulation 2000: the Regulation of the People's Republic of China on Telecommunications

Others

APEC: Asia-Pacific Economic Cooperation

DG of the EC: European Commission's Director General of Competition

EC: European Community

EU: European Union

GDP: Gross Domestic Product

ICJ: International Court of Justice

JFTC: Japanese Fair Trade Committee

IMF: International Monetary Fund

IPR: Intellectual Property Right

ITO: International Trade Organisation

MEI: Ministry of Electronics Industry

MFN: Most-favoured-nation Principle

MII: Ministry of Information Industry

MPT: Ministry of Posts and Telecommunications

NDRC: National Development and Reform Commission

NPC: National People's Congress

OECD: Organisation for Economic Co-operation and Development

PNTR: Permanent Normal Trade Relations

SAIC: State Administration for Industry and Commerce

SETC: State Economic & Trade Commission

SOE: State-Owned Enterprise

SPC: Supreme People's Court

TPRB: Trade Policy Review Body

TPRM: Trade Policy Review Mechanism

UK: United Kingdom of Great Britain and Northern Ireland

UNCTAD: United Nations Conference on Trade and Development

US: United States

USTR: United States Trade Representative

WGTCPC: Working Group on the Interaction between Trade and Competition Policy

WTO: World Trade Organisation

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Canada-Foreign Investment Review Act (Canada - FIRA), GATT Panel Report, L/5504, adopted on 7 February 1984, BISD 30S/140

China—Value-Added Tax on Integrated Circuits, WT/DS309

China—Measures Affecting Imports of Automobile Parts, WT/DS339

China—Measures Affecting Imports of Automobile Parts, WT/DS340

China—Measures Affecting Imports of Automobile Parts, WT/DS342

China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, WT/DS358

China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments, WT/DS359

China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WT/DS362

China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, WT/DS363

European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos), Appellate Body Report, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243

EC-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III), Panel Report, WT/DS27/R, circulated 22 May 1997, DSR 1997:II, 943; Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591

European Economic Community- Regulation on Imports of Parts and Components (EEC-Parts and Components), GATT Panel Report, L/5155, adopted 16 May 1990, BISD 37S/132

Italian Discrimination against Imported Agricultural Machinery (Italy-Agricultural Machinery), GATT Panel Report, L/833, adopted 23 October 1958, BISD 7S/60

Japan-Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II), Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R adopted 1 November 1996, DSR 1996:1, 97

Japan- Measures Affecting Consumer Photographic Film and Paper (Japan-Film), Panel Report, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179

Mexico-Measures Affecting Telecommunications Services (Mexico-Telecoms), Panel Report, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537

United States—Tax Treatment for ‘Foreign Sales Corporations’—Recourse to Article 21.5 of the DSU by the European Communities (US-FSC), Appellate Body Report, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55

United States- Section 211 Omnibus Appropriations Act of 1998 (US-Section 211 Appropriations Act), Appellate Body Report, WT/DS176/AB/R, adopted on the 1st February 2002, DSR 2002:II, 589

United States- Sections 301-310 of the Trade Act of 1974 (US-Section 301 Trade Act), Panel Report, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815

United States- Section 337 of the Tariff Act of 1930 (US-Section 337 Tariff Act), GATT Panel Report, L/6439, adopted 7 November 1989, BISD 36S/345

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Coöperatieve Vereniging “Suiker Unie” UA and Others v. Commission [1975] E.C.R. 1163

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Magill TV Guide/ITP, BBC and RTE: Cases T-69-/89 etc RTE v Commission [1991] ECR II-485, [1991] 4 CMLR 586, upheld by the ECJ Cases 241/91 P etc RTE and ITP v Commission [1995] ECR I-734, [1995] 4 CMLR 718

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United States v. National Lead Co., 63 F. Supp. 513 (S.D.N.Y.1945)

United States v. Imperial Chemical Indus., 100 F. Supp. 504 (S.D.N.Y. 1951)

United States v. Topco Assoc. Inc., 405 U.S. 596, 610 (1972)

Verizon Communications Inc v. Law Offices of Curtis V Trinko, 540 US 398, 407 (2004)

Introduction¹

1 Purpose

This study aims to examine the impact of the World Trade Organisation (WTO) on the formulation of the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007).²

Competition law aims to prevent or remedy anticompetitive practices and protect competition.³ One of the first two pieces of competition legislation in the modern era⁴ is the American Sherman Act which was enacted in 1890.⁵ The American Supreme Court claimed: 'The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade'.⁶ Since World War II, most of the world's developed countries, particularly all members of the Organisation for Economic Co-operation and Development (OECD), and many developing and

¹ In this study, the titles of the Chinese articles, journals, newspapers, and books cited are translated into English along with their original Chinese ones and Pinyin, and quotes from these, are unofficially translated into English. So are the Chinese publishers. Not all pieces of the Chinese legislation mentioned in this study have official translations. In the case where there is no official translation, the translation is provided by the author. All Chinese names mentioned in this study are given in the Western order, the family name being last and first name being first. All websites quoted in this study were last visited on the 1st September 2007.

² The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

³ The objectives of competition law vary in different countries during different times as well. See, D. Valentine, 'US Competition Policy and Law: Learning from a Century of Antitrust Enforcement', in Y.-C. Chao, G. San, C. Lo and J. Ho, eds., *International and Comparative Competition Law and Policies*, The Hague: Kluwer Law International, (2001), 71, p. 72.

⁴ H. Harris argued that competition laws existed in many countries in ancient times. See, H. Harris, ed., *ABA Section of Antitrust Law, Competition Laws Outside of the United States*, (2001), pp. 6-7.

⁵ Canada has the oldest competition law in modern terms, which was adopted in 1889.

⁶ *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517, 2 L. d. 2d 545, 549 (1958).

transitional economies have enacted laws of one sort or another to control anticompetitive practices. In addition to these national competition laws, the European Union (EU) has its own competition rules effective in its twenty seven Member States.⁷

China's significance in the world economy and trade grows dramatically each year. So does the importance of its competition-related legislation. Before the adoption of the Antimonopoly Law 2007, China had several pieces of legislation dealing with some types of anticompetitive practices. These competition-related provisions were scattered in several laws, regulations and sector rules at national level.

China started to draft its first comprehensive competition law, the Antimonopoly Law, in the late 1980s. After nearly 20 years of formulation, the Antimonopoly Law 2007 was adopted by the Standing Committee of the 10th National People's Congress (NPC) on the 30th August 2007. Once it comes into force on the 1st August 2008, it will unite all the current competition-related legislation in China into one place and bring some coherence to the Chinese competition regime. It will provide a systematic legal basis for combating anticompetitive practices. The increasingly significant role played by China in the global economy and trade means that the Antimonopoly Law 2007 will inevitably have international reach. As one journalist claimed, adopting an antimonopoly law in China is 'another sign that China is reshaping the way that global business works, this time as a regulator'.⁸ Due to the significance of the Antimonopoly Law 2007, the process of formulating it has attracted unprecedented interest from academics, multinational companies, organisations, and other governments.

The WTO was founded on the 1st January 1995 by the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter the Marrakesh Agreement).⁹ It is the inheritance and development of the General Agreement on Tariffs and Trade (GATT) signed by 23 nations on the 30th October 1947. It is 'the

⁷ The EC consisted originally of six member states, and has grown through accession to the present level. Further states are in various stages of negotiations towards accession.

⁸ F. Kempe, 'China the Antitrust Power', *Wall Street Journal*, 3rd November 2005.

⁹ The Marrakesh Agreement is available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

only global international organization dealing with the rules of trade between nations'.¹⁰ It is considered 'the most ambitious and far-reaching international trade agreement ever concluded'.¹¹ Currently, there are 150 members in the WTO.¹² Due to the significant role played by the WTO in international trade, China joined the WTO on the 11th December 2001, after fifteen years of negotiations.¹³

One of the most important characteristics of the WTO is that it is a rule-oriented organisation. Under the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the Dispute Settlement Understanding), an affected WTO Member has a right to appeal to the Dispute Settlement Body against other WTO Members who fail to implement their commitments.¹⁴ Based on the ruling of a Panel or the Appellate Body, the Dispute Settlement Body can authorize the affected WTO Member to retaliate against the offending WTO Members. Thus, the WTO principles and rules are legally enforceable and binding through the dispute settlement system.¹⁵ Therefore, WTO Members must take into account the WTO principles and rules while making their trade-related policies.¹⁶ Bing Zhang argued:

Clearly, in the setting of the WTO, international law is intermingling and penetrating into the Members' domestic formal institutions and playing a

¹⁰ http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.

¹¹ P. Van den Bossche, *The Law and Policy of the World Trade Organisation: Text, Cases and Materials*, Cambridge: Cambridge University Press, (2005), p. 45.

¹² All members are listed at the WTO website.

¹³ For more details of the history of China's accession to the WTO, see Chapter One.

¹⁴ The text of the Dispute Settlement Understanding is available at http://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm.

¹⁵ P. Sauve, 'Assessing the General Agreement on Trade on Services', *Journal of World Trade*, vol. 29(4), 125, p. 141.

¹⁶ A concern of national sovereignty arises. C. Oman argued that a diminished national policy sovereignty was one of the results of globalization. See, C. Oman, *Globalization and Regionalisation: the Challenge for Developing Countries*, Paris: Development Center, OECD, (1994), pp. 33-34. Also see the discussion presented by G. Winham, 'The World Trade Organization: Institution-building in the Multilateral Trade System', *The World Economy*, vol. 21(3), (1998), 349.

much more important role in national policy-making processes than before.¹⁷

There are at least four aspects where the WTO could have impact on the development of its Members' domestic legislation:

- (ii) consistency: WTO Members' domestic legislation needs to be consistent with WTO rules;
- (iii) obligation: the adoption of domestic legislation could help WTO Members implement their WTO commitments;
- (iv) enabling: the WTO rules could enhance the case for WTO Members seeking to act in the way permitted by the WTO; and
- (v) peer pressure: the WTO peer review system, the Trade Policy Review Mechanism (TPRM), could contribute to the development of WTO Members' domestic legislation.

As a WTO Member, China is no exception. In other words, the WTO could, in theory, influence China's domestic legislation, particularly trade-related legislation. Based on this assumption, this study aims to explore the WTO's impact on the formulation of the Antimonopoly Law 2007. To this end, the key research questions examined in this study are:

- (1) whether the WTO could have had an influence on the formulation of the Antimonopoly Law 2007;
- (2) if so, how the WTO could have had an influence on the formulation of the Antimonopoly Law 2007; and
- (3) to what extent the formulation of the Antimonopoly Law 2007 has reflected the WTO's influences.

These three questions are clearly linked. The answer to the second question depends on the answer to the first question, while the answer to the third question is based on the answer to the second question.

¹⁷ B. Zhang, 'Assessing the WTO Agreements on China's Telecommunications Regulatory Reform and Industrial Liberalization', (2000), p. 4, <http://www.tprc.org/abstracts00/assesswtopap.pdf>.

2 Structure and Scope

2.1 Structure

This study is structured in six chapters plus an introduction and a conclusion. Chapter One and Chapter Two aim to provide the necessary background and foundation on which this study is based. To this end, Chapter One examines some general issues surrounding the WTO, national competition law and China, such as the evolution of competition-related provisions under the GATT/WTO system, whether China's WTO commitments are binding on China and, if so, how China implements such commitments. Chapter Two examines the history and the status of competition-related legislation in China before the adoption of the Antimonopoly Law 2007, and the reasons and the history of adopting the Antimonopoly Law 2007.

Chapter Three to Six constitute the main part of this thesis. Together they explore whether, and if so, how the WTO could have had an influence on the formulation of the Antimonopoly Law 2007, and to what extent the formulation of this Law has reflected such influences. To this end, Chapter Three examines the influence of the WTO national treatment principle. Chapter Four examines the influence of Articles VIII and IX of the General Agreement on Trade in Services (GATS), and Section 1.1 of the Telecommunications Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications (the Reference Paper). Chapter Five examines the influence of Articles 8.2, 40 and 31(k) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS). Chapter Six examines the influence of the TPRM.

Finally, this thesis concludes that (1) the WTO could be seen to have had impact on the formulation of the Antimonopoly Law 2007; (2) the WTO could have had such impact through the WTO national treatment principles, Articles VIII, IX of the GATS, Section 1.1 of the Reference Paper, Articles 8.2, 40 and 31(k) of the TRIPS, and the TPRM; (3) such impact can be illustrated by examining the changes made to some provisions in the drafts and the Antimonopoly Law 2007 during the process of formulating the law.

2.2 Scope

2.2.1 Competition-Related WT Rules

In more than a half-century of evolution, the GATT/WTO regime includes numerous treaties.¹⁸ Although it is approximately fifteen pages long, the Marrakesh Agreement embraces four annexes which include altogether about 16,000 pages of text, schedule commitments, and other matters. Competition-related WTO principles and rules are scattered in these annexes without being integrated into a coherent body of competition rules. It is not possible for this study to examine all these principles and rules due to the limitation of space and time. Rather, it focuses on the WTO national treatment principle, Articles VIII, IX of the GATS, Section 1.1 of the Reference Paper, Articles 82, 40 and 31(k) of the TRIPS and the TPRM since they are the most relevant to a national competition law.

2.2.2 Competition Law

In general, competition law can be divided broadly into three areas of focus: restrictive agreements, abuses of dominance, and anticompetitive acquisitions and mergers.¹⁹ However, anticompetitive acquisitions and mergers are not

¹⁸ The results of the Uruguay Round of Multilateral Trade Negotiations is usually referred to as the WTO Agreements which comprises a large number of agreements of which the GATT is an integral part, referred to as GATT 1994. For explanations of the WTO Agreements, see J. Jackson, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations*, Cambridge: Cambridge University Press, (1999); the WTO Secretariat, *Guide to the Uruguay Round Agreements*, (1999) (As the official WTO explanation of the Uruguay Round treaties, this guide provides a detailed explanation of the legal significance of the agreements coming out the Uruguay Round of negotiations). In addition, R. Bhala provided a clear and thorough explanation of the GATT provisions, see, R. Bhala, *Modern GATT Law*, London: Sweet and Maxwell, (2005).

¹⁹ This category has been used by many academics as a framework of competition law analysis. See, e.g., A. Jones and B. Sufrin, *EC Competition Law: Text, Cases and Materials*, 3rd ed., Oxford: Oxford University Press, (2007).

directly covered by the current WTO agreements.²⁰ As Frédéric Jenny pointed out:

[W]hen trade policy makers address the issue of competition, they are less interested in international mergers because such mergers rarely create an international trade problem. They tend to focus more on international cartels because such cartels nearly always create a trade and competition problem.²¹

Mitsuo Matsushita also observed:

Mergers and acquisitions in the scope of the WTO should be put off for future consideration until such time comes when national markets will have been so globalised that they are integrated into one world market and the distinction between domestic policy and international trade policy will have been blurred so much that convergence of merger policy is essential to maintain the integrated world market... [I]tems such as the convergence of filing requirement in mergers and acquisitions is a very important issue. This should be dealt with in the appropriate forum. However, taking into account the objective of the WTO, one may say that this is outside its scope.²²

Even the failed proposals which aimed to include a competition agreement within the WTO framework did not include the issue of cross-border acquisitions and mergers.²³ Therefore, this study only focuses on anticompetitive agreements

²⁰ Despite the fact that the rules on investment could be relevant to anticompetitive mergers and acquisitions, there is no agreement on investment under the current WTO framework (though some current WTO Agreements mention investment issues).

²¹ F. Jenny, 'Competition, Trade and Development Before and After Cancun', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 2003*, New York: Juris Publishing Inc., (2004), 631, p. 641.

²² M. Matsushita, 'Reflections on Competition Policy/Law in the Framework of the WTO', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 1997*, New York: Juris Publishing, (1998), 31, pp. 34-38.

²³ However, some scholars do propose a uniform pre-merger review system within the WTO. For example, Eleanor M. Fox proposed a uniform international competition law for pre-merger review within the WTO as a supranational enforcement agency. See, E. Fox, 'Toward World Antitrust and Market Access', *American Journal of International Law*, vol. 91, (1997), 13. Andre Fiebig recommended an international pre-merger review within the WTO as a super-clearinghouse with authority to dictate which national competition regimes have sufficient nexus to a particular transaction so as to justify pre-merger notification filings. See, A. Fiebig, 'A Role

and abuses of dominance. In other words, the Chinese legislation on merger control is not examined in this thesis.

3 Literature Review

There are three research areas that are relevant to this study: the WTO rules which are relevant to competition issues, the WTO's impact on China, and the formulation of the Antimonopoly Law 2007. What follows is a brief review of all three areas.

3.1 Literature Review of Studies on Existing Competition-Related WTO Rules

The WTO set up the Working Group on the Interaction between Trade and Competition Policy (WGTCP) during the Singapore Ministerial Meeting in 1996.²⁴ Over more than seven years, the WGTCP provided several reports on such issues.²⁵ During the same period, many WTO Members, particularly the US and the EU also contributed to this debate. Indeed, they made about 250 study reports on such issues.²⁶ In addition, there are also rich literatures on these competition-related WTO rules in particular, and competition issues within the WTO in general carried out by organisations and academics.²⁷ In particular, the

for the WTO in International Merger Control', *Northwestern Journal of International Law & Business*, vol. 20, (2000), 233, pp. 247-251.

²⁴ The Singapore Ministerial Declaration, WT/MIN(96)/DEC, (1996), para. 20, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm.

²⁵ WGTCP, *Working Group on the Interaction between Trade and Competition Policy Annual Reports for 1997, 1998, 1999, 2000, 2001, 2002, and 2003*, WT/WGTCP/1, WT/WGTCP/2, WT/WGTCP/3, WT/WGTCP/4, WT/WGTCP/5, WT/WGTCP/6, and WT/WGTCP/7, respectively.

²⁶ All these contributions are documented as WT/WGTCP/W/* in the WTO and available at www.wto.org.

²⁷ See, e.g., OECD, *Competition Elements in International Instruments*, Background Document for a Joint Roundtable of the Trade and Competition Law and Policy Committees held on 15 April 1994, Paris: OECD, COM/DAFFE/CLP/TD(94)35, (1994); OECD, *The Note of Discussions held at the Joint Roundtable of the Trade and Competition Law and Policy Committees held on 15 April 1994*, Paris: OECD, COM/DAFFE/CLP/TD(94)76, (1994); E.-U. Petersmann, *Competition Policy Aspects of the Uruguay Round: Achievements and Prospects*, Paris: OECD, (1994); B.

paper titled 'Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements' gave an excellent analysis of the competition elements of the existing WTO agreements.²⁸ James H. Mathis and Misuo Matsushita reviewed the relevance and possible application of the WTO core principles to closer multilateral cooperation on competition.²⁹ Furthermore, Claus-Dieter Ehlermann and Lothar Ehring explored the extent to which the existing WTO dispute settlement system would be suitable in resolving competition related cases.³⁰ There are also extensive studies on the interaction between WTO principles and competition policy.³¹

Hoekman and P. Mavroidis, 'Competition, Competition Policy and the GATT', *The World Economy*, vol. 17, (1994), 121; E. Fox, 'Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade', *Pacific Rim Law & Policy Journal*, vol. 4(2), (1995), 1; E.-U. Petersmann, 'International Competition Rules for Governments and for Private Business', *Journal of World Trade*, vol. 30(3), (1996), 5; B. Hoekman, *Trade and Competition Policy in the WTO System*, Discussion Paper 1501, London: Centre for Economic Policy Research, (1996), <http://ideas.repec.org/p/cpr/ceprdp/1501.html>; M. Matsushita, (1998), note 22, 31; OECD, *Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreement*, Paris: OECD, COM/TD/DAFFE/CLP(98)26/FINAL, (1998); OECD, 'Competition Elements in International Trade Agreements', in OECD, *Trade and Competition: Policies for Tomorrow*, Paris: OECD, (1999); P. Marsden, *A Competition Policy for the WTO*, Oxford: Cameron May, (2003); M. Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy', *Washington University Global Study and Law Review*, vol. 3, (2004), 363; and A. Bhattacharjea, 'The Case for A Multilateral Agreement on Competition Policy: A Developing Country Perspective', *Journal of International Economic Law*, vol. 9, (2006), 293, pp. 295- 299.

²⁸ OECD, (1998), note 27.

²⁹ See, J. Mathis, 'WTO Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws and Implications for A Competition Policy Framework', Geneva and New York: the United Nations, UNCTAD/DITC/CLP/2003/2, (2003); also see, M. Matsushita, (2004), note 27, 363.

³⁰ C.-D. Ehlermann and L. Ehring, 'WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience', *Fordham International Law Journal*, vol. 26, (2002), 1505.

³¹ See, e.g., WGTCP, *Communication from the European Community and its Member States*, WT/WGTCP/W/115, (1999); WGTCP, *Communication from Switzerland*, WT/WGTCP/W/117, (1999); WGTCP, *Communication from Japan*, WT/WGTCP/W/119, (1999); WGTCP, *Communication from Japan*, WT/WGTCP/W/120, (1999); WGTCP, *Communication from the United States*, WT/WGTCP/W/131, (1999); and E.-U. Petersmann, 'WTO Core Principles and Trade/Competition', in B. Hawk, (2004), note 21, 669.

To date, these studies focus on two issues broadly: (1) whether the existing competition-related WTO provisions are sufficient to deal with trade-related anticompetitive practices; and (2) if not, how to regulate trade-related anticompetitive practices at the international level. However, no studies have explored the impact of the WTO principles and rules on WTO Members' domestic competition laws.

3.2 Literature Review of Studies on the WTO's Impact on China

China's accession to the WTO is a milestone in the process of its economic reform. As Karen Halverson argued, 'Perhaps in no other country has WTO accession had such a profound impact on economic, legal, and political change as in China'.³² Thus, the impact of China's WTO membership on its economic, legal and political system obviously has become an important research topic in recent years. There are thousands of articles in regard to the WTO's impact on China published in China's academic journals.³³ There are also many articles published in the academic journals outside of China. For example, Karen Halverson provided a comprehensive analysis of the unparalleled influence of the WTO on China's economic, legal, and political system.³⁴ In addition, there are also numerous books examining the WTO's impact on China. For example, *China and the World Trading System - Entering the New Millennium*, analysed the key issues relating to the impact of China's WTO membership.³⁵ Ching Cheong and Ching Hung Yee examined, from the economic aspect, China's WTO commitments and the WTO's

³² K. Halverson, 'China's WTO Accession: Economic, Legal, and Political Implications', *Boston College International & Comparative Law Review*, vol. 27, (2004), 319, p. 322.

³³ According to D. Liu's research, over 2,300 articles regarding the WTO impact on China had been published in China's academic journals by 2002. See, D. Liu, *WTO and State Sovereignty [WTO 与国家主权, WTO yu Guojia Zhuquan]*, Beijing: People's Publisher [人民出版社, Renmin Chubanshe], (2003).

³⁴ See, K. Halverson, (2004), note 32, 319.

³⁵ D. Cass, B. Williams and G. Barker, eds., *China and the World Trading System: Entering the New Millennium*, Cambridge: Cambridge University Press, (2003).

impact on China.³⁶ Supachai Panitchpakdi and Mark L. Clifford examined both the WTO's impact on China and China's impact on the WTO.³⁷ The unprecedented amount of studies regarding the WTO's influences on China demonstrates the significant impact of China's WTO membership on the development of China's economic, cultural and legal system.

3.3 Literature Review of Studies on the Formulation of the Antimonopoly Law 2007

China is the second-largest economy in the world after the US measured on a purchasing power parity basis and the third biggest trading power after the EU and the US.³⁸ It attracts more foreign capital than any other developing country. Chinese companies have also increased their activities in overseas markets. Due to these facts, the formulation of China's first comprehensive competition law has generated unprecedented analysis from academics, companies, professional associations, foreign governments, governmental organisations, and non-governmental organisations. As H. Stephen Harris pointed out, 'Though many jurisdictions have adopted competition laws in recent decades, none of these laws has engendered the level of interest sparked by China's proposed Anti-Monopoly Law'.³⁹ China's Antimonopoly Law is 'the most hotly-debated and closely-followed legislation' in China.⁴⁰ Its drafts have generated numerous comments both inside and outside of China. Hundreds of articles in regard to the drafts and the formulation of the Antimonopoly Law 2007 have been published in China's academic journals. And the number of such articles has been increasing rapidly in recent years. Most of these articles are comparative studies. In

³⁶ C. Ching and H.-Y. Ching, *Handbook on China's WTO Accession and Its Impacts*, London: World Scientific, (2003).

³⁷ S. Panitchpakdi and M. Clifford, *China and the WTO: Changing China, Changing World Trade*, New York: John Wiley & Sons (Asia) Pte Ltd., (2002).

³⁸ *The World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#Econ>.

³⁹ H. Harris, 'The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China', *Chicago Journal of International Law*, vol. 7, (2006), 169, p. 169.

⁴⁰ Y. Jung and Q. Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?', *Northwestern Journal of International Law & Business*, vol. 24, (2003), 107, p. 109.

general, they introduce other competition regimes and analyze how an antimonopoly law could be drafted in China based on the experience of these competition regimes.

There are also dozens of articles in this area published in the academic journals outside of China.⁴¹ In particular, the International Bar Association and the American Bar Association have provided article-by-article comments and recommendations on several drafts of China's Antimonopoly Law.⁴² Youngjin Jung

⁴¹ See, e.g., B. Song, 'Competition Policy in a Transitional Economy: The Case of China', *Stanford Journal of International Law*, vol. 31, (1995), 387; S. Snell, 'The Development of Competition Policy in the People's Republic of China', *New York University Journal of International Law and Politics*, vol. 28, (1995), 575; M. Williams, 'Competition Law Developments in China', *Journal of Business Law*, May 2001, 273; X. Wang, 'The Prospect of Antimonopoly Legislation in China', *Washington University Global Studies Law Review*, vol. 1, (2002), 201; Y. Jung and Q. Hao, (2003), note 40, 107; X. Wang, 'Issues Surrounding the Drafting of China's Antimonopoly Law', *Washington University Global Studies Law Review*, vol. 3, (2004), 285; L. Chen, 'The Current State and Problems of Antimonopoly Legislation in the People's Republic of China', *Washington University Global Studies Law Review*, vol. 3, (2004), 307; B. Owen, S. Sun, and W. Zheng, 'Antitrust in China: The Problem of Incentive Compatibility', *Journal of Competition Law and Economics*, vol. 1(1), (2005), 123; M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge: Cambridge University Press, (2005); M. Furse, 'Competition Law Choice in China', *World Competition*, vol. 30(2), (2007), 323.

⁴² See, e.g., the International Bar Association's Antitrust Committee, *Comments on the Draft Anti-Monopoly Law of The People's Republic of China (PRC) (Draft of 27 July 2005)*, 23rd August 2005, <http://www.ibanet.org/images/downloads/IBA%20Submission.pdf>; the American Bar Association's Sections of Antitrust Law and International Law, *Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China*, July 2003, www.abanet.org/antitrust/comments/2003/jointsubmission.pdf; the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law, *Joint Submission of the American Bar Association's Sections of Antitrust Law, intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China*, 19th May 2005, http://www.abanet.org/intlaw/committees/business_regulation/antitrust/chinacommentantimonopoly.pdf; American Bar Association, *Proposed Revisions to Selected Articles of The April 8, 2005 Revised Draft of The Anti-Monopoly Law of the People's Republic of China, In Supplementation of the Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law, On the Proposed Law, dated May 19, 2005, Submitted to Mr. Wu Zhengguo of MOFCOM*, (2005), http://www.abanet.org/intlaw/committees/business_regulation/antitrust/jointcomments05supplement.pdf.

and Qian Hao published an excellent article based on two drafts of China's Antimonopoly Law.⁴³ Their article analyzed the basic features of an antimonopoly law in China by comparing different competition regimes worldwide and their relevance to China's idiosyncrasies in the forthcoming Antimonopoly Law. It also promoted a better understanding of China's emerging competition regime by providing illustrative comments. In addition, it highlighted the far-reaching innovations in the drafts of China's Antimonopoly Law which were prompted by the extraordinary challenges that China had to face. It concluded that an antimonopoly law in China could 'incidentally provide "a third way" of framing competition law that provides a tremendous example particularly for developing countries in which legal and administrative monopolies are rampant'.⁴⁴ An article by Kevin X. Li and Ming Du provided an analysis on the issue of whether China needed a competition law.⁴⁵ Through comparing EU and UK competition law, it argued that the existing competition-related legislation in China was far from sufficient to combat anticompetitive practices because China's economy had transferred from a centrally planned model to a free market model. Thus, it concluded that it was necessary for China to adopt a comprehensive competition law.

3.4 Literature Review of Studies on the WTO's Impact on the Formulation of the Antimonopoly Law 2007

Despite the existence of a wealth of material on issues of competition and the WTO, and the WTO's impacts on China, there are very few studies touching upon the issue of the WTO's impacts on the formulation of the Antimonopoly Law 2007. The lack of studies on this topic does not imply that it is not important. On the contrary, it is a very significant topic. Several conditions contribute to the lack of studies on this topic. First, both the WTO and competition legislation are new areas for both Chinese academics and the Chinese government. A decade ago, no Chinese universities taught competition law, while the teaching of WTO law was only at an early stage. Even now, it is still hard to find expertise in these two

⁴³ See, Y. Jung and Q. Hao, (2003), note 40, 107.

⁴⁴ *Id.*, 107, pp. 169-170.

⁴⁵ K. Li and M. Du, 'Does China Need Competition Law', *Journal of Business Law*, March 2007, 182.

areas, particularly in competition law. There are even fewer Chinese scholars who have expertise in both areas. Therefore, not many Chinese scholars are able to carry out the study on the WTO's impacts on the formulation of the Antimonopoly Law 2007. In the case of foreign academics, some are not interested in this topic, while others are simply unable to pursue this topic due to language barriers⁴⁶ and the interdisciplinary nature of this topic

One of the few articles which touch on the issue of the WTO's influences on the formulation of China's Antimonopoly Law is entitled 'Entering WTO and the Legislation of China's Antimonopoly Law' by Professor Xiaoye Wang, who is a leading competition law expert from the Chinese Academy of Social Sciences and one of the designers of the drafts of China's Antimonopoly Law.⁴⁷ It argued that China urgently needed a competition law because the WTO would hasten the process of China's economic reform. Thus, it focused on the economic aspect of the WTO's impacts on the formulation of China's Antimonopoly Law. However, it did not provide a systematic study on the WTO's impact on the formulation of China's Antimonopoly Law, from a legal point of view.

A second article is entitled '*Legislate China Antimonopoly Law according to WTO Rules*' by Chaopeng Chen.⁴⁸ It touched upon some legal issues in regard to the WTO's impacts on the formulation of a Chinese antimonopoly law. First, it argued that the enactment of a competition law could be helpful for China to implement some of its WTO commitments. Second, it pointed out that China's first competition law had to be consistent with WTO rules, such as the WTO non-discrimination principle. However, it did not comprehensively examine the legal impacts of the WTO on the formulation of a Chinese antimonopoly law because it has about 3,700 Chinese characters.

⁴⁶ Sometimes, translation of Chinese research papers and legislation is not reliable.

⁴⁷ X. Wang, 'Enter WTO and the Legislation of China's Antimonopoly Law' [入世与中国反垄断法的制定, *Rushi Yu Zhongguo Fanlongduan Fa de Zhiding*], *Journal of Law* [法学杂志, *Faxue Zazhi*], No. 2, (2003).

⁴⁸ C. Chen, 'Legislate China Antimonopoly Law according to WTO Rules' [根据 WTO 规则制定中国反垄断法, *Genju WTO Guize Zhiding Zhongguo Fanlongdua Fa*], *China WTO Tribune* [WTO 经济导刊], vol. 22(2), (2005), 111.

Professor Xianlin Wang, who is arguably a leading scholar in this area in China, has published a book entitled *WTO Competition Policy and China Antimonopoly Legislation*.⁴⁹ This book is based on his previous paper ‘Two Issues on the Formulation of China’s Antimonopoly Law against the Background of China’s Accession to the WTO’.⁵⁰ It examined the effect of the WTO competition policy on China’s competition legislation. However, the links between the WTO and China’s Antimonopoly Law were poorly examined in this book. In fact, they were only occasionally mentioned. Moreover, there are few explanations as to why and how these links exist. Thus, it seems that this book examined two separate issues instead of one: the competition policy under the WTO and China’s Antimonopoly Law.

To date, therefore, there are no comprehensive and thorough studies on the issues of whether, and if so, how the WTO could have influenced the formulation of the Antimonopoly Law 2007, and to what extent the formulation of the Antimonopoly Law 2007 has reflected such influences. The absence of literature in this area leaves a great deal of room for innovative work. Against this background, this study aims to fill the gap left by other scholars and examines these key questions.

4 Research Methodology

This study focuses on analysing both primary and secondary sources in regard to the impact of the WTO on the formulation of the Antimonopoly Law 2007. In doing so, four different types of research methods—explanatory, descriptive, comparative and prescriptive analyses are used. In particular, comparative analysis is used widely in this thesis to explore the changes of different drafts of China’s Antimonopoly Law. Explanatory and descriptive analyses are used to

⁴⁹ X. Wang, *WTO Competition Policy and China Antimonopoly Legislation* [WTO 竞争政策与中国反垄断立法, *WTO Jingzheng Zhengce Yu Zhongguo Fanlongduan Lifa*], Beijing: Peking University Press, (2005).

⁵⁰ X. Wang, ‘Two Issues on the Formulation of China’s Antimonopoly Law Against the Background of China’s Accession to the WTO’ [“入世”背景下制定我国反垄断法的两个问题, *Rushi Beijing Xia Zhiding Woguo Fanlongduan Fa de Liangge Wenti*], <http://www.law-star.com/pshowtxt?keywords=&dbn=lwk&fn=lwk017s202.txt&upd=1>.

examine the WTO rules by which the formulation of the Antimonopoly Law 2007 has been influenced.

The primary sources in this study mainly comprise of a number of pieces of Chinese competition-related legislation, the drafts of China's Antimonopoly Law, the Antimonopoly Law 2007, the WTO agreements, cases, the annual reports of the Trade Policy Review Body, and the documents regarding China's first trade policy review. It has to be accepted that some pieces of Chinese competition-related legislation are not available in English. During the process of the formulation of China's Antimonopoly Law, numerous drafts were circulated and commented on. The drafts examined in this thesis are⁵¹: the 1999 Draft,⁵² the February 2002 Draft,⁵³ the April 2002 Draft,⁵⁴ the October 2002 Draft,⁵⁵ the 2004 Submitted Draft,⁵⁶ the April 2005 Draft,⁵⁷ the July 2005 Draft,⁵⁸ the November 2005 Draft,⁵⁹ the June 2006 Draft,⁶⁰ the June 2007 Draft,⁶¹ and the Antimonopoly Law 2007. Comparing other primary sources, these drafts and the Antimonopoly

⁵¹ More about these drafts, see Chapter Two.

⁵² This draft is only circulated in a limited scope. An outline of this draft can be seen from M. Williams, (2005), note 41, pp. 177-191; and X. Wang, (2002), note 41, 201, pp. 224-225.

⁵³ This draft is only circulated in a limited scope. An English edition is on the author's file.

⁵⁴ This draft is only circulated in a limited scope. There is a discussion article based on this draft, see, Y. Jung and Q. Hao, (2003), note 40, 107.

⁵⁵ This draft is only circulated in a limited scope. There is a discussion article based on this draft, see, Y. Jung and Q. Hao, (2003), note 40, 107.

⁵⁶ An English edition is available at <http://www.ibanet.org/images/downloads/Questionnaire%20-%20final.pdf>.

⁵⁷ An English edition is available at <http://www.ibanet.org/images/downloads/China%20Antimonopoly%20Law%20April%208%202005%20Draft%20-%20English-v1.pdf>.

⁵⁸ An English edition is available at <http://www.ibanet.org/images/downloads/Draft%20of%2027%20July%202005.pdf>.

⁵⁹ This draft is only circulated in a limited scope. An English edition of this draft is on the author's file. For an overview of this draft, see H. Harris, (2006), note 39, 169.

⁶⁰ An English edition is available at <http://www.buyusa.gov/asianow/270.pdf>.

⁶¹ This draft is not available to public. However, the differences between this draft and the June 2006 Draft are highlighted on the NPC website. See, <http://www.npc.gov.cn/zgrdw/flzt/index.jsp?lmid=15&dm=1520&pdmc=ch>.

Law 2007 are particularly significant in this thesis because analysing the changes in different drafts and the Antimonopoly Law 2007 is one of the major methods used to illustrate how and to what extent the WTO influenced the formulation of the Antimonopoly Law 2007. The WTO agreements are available in English at the WTO website.

The cases used in this study are mainly from China, the EU, the GATT/WTO, the UK, and the US. It has to be borne in mind that cases are treated differently in these regimes. Cases are considered as sources of law in the UK and the US, while they are not considered as sources of law in China. In practice, Chinese judges do not cite previous cases in their judgements. In the EU whose legal system has the characters of both civil law system and common law system, cases are also arguably considered as sources of law. In the GATT/WTO, cases are not considered as source of law, though Panels and the Appellate Body do cite previous findings.

In addition, some annual trade policy review reports by the Trade Policy Review Body are cited in this study, particularly in Chapter Six. These annual reports are available on the WTO Website. The documents regarding China's first WTO trade policy review, such as the Secretariat Report, which are also used particularly in Chapter Six, are also available on the WTO website.

Secondary sources include comments from academics, governments and organisations regarding the drafts of China's Antimonopoly Law. As mentioned, each draft of the Antimonopoly Law 2007 has generated numerous comments. Some of them are available in English, while others are only available in Chinese. Some of them are available on the websites of some professional associations, such as the American Bar Association, and governmental organisations, such as the OECD.

5 Defining Terms

It is not only significant but also necessary for the purpose of this study to define some terms that is used.

5.1 Competition Law

There are two definitions of competition law depending on the scope: broad definition and narrow definition.⁶² The broad definition means that competition laws are the laws which seek to promote competition by prohibiting both anticompetitive practices and unfair competition practices, while the narrow definition refers to the legislation that prohibit anticompetitive practices only.

The differences between unfair competition practices and anticompetitive practices are huge, despite both of them being aimed at protecting market competition and consumer welfare. According to a study by the OECD, unfair competition refers to ‘the sort of fraudulent behaviour or misappropriation of property rights’.⁶³ Unfair competition practices normally include commercial bribery, misleading advertising, deception (by ‘passing off’ and other means), defamation of competitors, and misuse of trade secrets. Thus, combating unfair competition focuses on ‘protecting enterprises from such dishonest practices by their competitors’.⁶⁴

A few countries adopt the broad definition of competition law. Germany and China are in this group. In Germany, *Wettbewerbsrecht* (competition law) refers to both unfair competition and anticompetitive practices, while *Kartellrecht* (cartel law) refers to all types of anticompetitive practices rather than cartels only.⁶⁵ In China, the term ‘competition law’ refers to both unfair competition and anticompetitive practices. For example, *Competition Law*, which is one of

⁶² See, e.g., X. Wang and P. Wang, ‘Research and Proposals on the Regulating Scope of China’s Antimonopoly Law’ [中国反垄断法调整范围的思考与建议, *Zhongguo Fanlongduan Fa De Tiaozheng Fanwei De Sikao Yu Jianyi*], *Law Science Magazine* [法学杂志, *Faxue Zazhi*], No. 1, 2005, 31, p. 31.

⁶³ OECD, *The Role of Competition Law and Policy*, Paris: OECD, CCNM/CHINA(2001)15, (2001), p. 28. There is a short discussion of unfair competition in the EU and its Member States, see, B. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom*, 2nd ed., London, Sydney, Portland and Oregon: Cavendish Publishing Limited, (2001), pp. 26-27.

⁶⁴ See, OECD, (2001), note 63, p. 29.

⁶⁵ David J. Gerber, *Law and Competition in Twentieth Century Europe*, Oxford: Oxford University Press, (1998), p. 4.

the leading textbooks on competition law for postgraduate law students in China, includes both unfair competition and anticompetitive practices.⁶⁶ The only textbook of Chinese competition law in English⁶⁷ also adopts the broad definition and includes both unfair competition and anticompetitive practices.⁶⁸

However, the major competition regimes adopt the narrow definition of competition law. Many countries, such as South Korea, have separate legislation in regard to unfair competition practices and anticompetitive practices. When it is used in these countries, the term ‘competition law’ refers to anticompetitive practices only. Even in countries with a single legislative act including both unfair competition and anticompetitive practices, such as Australia, Hungary, and Russia, the term ‘competition law’ only refers to anticompetitive practices. In one of its studies, the OECD clearly points out that ‘it is important to understand that bans of unfair trade practices or unfair competition are not generally referred to as being a part of “competition law”’.⁶⁹ This study adopts the narrow concept of competition law. In this study, therefore, the term ‘competition law’ does not include unfair competition legislation.

5.2 Nomenclature

The names of competition law (narrow definition) are not universal,⁷⁰ despite the

⁶⁶ X. Wang, *Competition Law* [竞争法学, *Jingzheng Faxue*], Beijing: Social and Document [社科文献, *Sheke Wenxian*], (2007). This book is divided into three parts. The first part is a general introduction. The second part deals with the prohibition of unfair competition. And the third part deals with anticompetitive practices.

⁶⁷ C. Jin and W. Luo, *Competition Law in China*, New York: William S. Hein & Co., (2002). Currently it is the only book providing a thorough and comprehensive discussion on Chinese competition law in English, although there are several books in English which explored Chinese competition law, such as Mark Williams discussed China’s competition law in M. Williams, (2005), note 41 and M. Dabbah and P. Lasok, eds., *Merger Control Worldwide*, Cambridge: Cambridge University Press, (2005), (which has one chapter discussing China’s merger control).

⁶⁸ It refers to anticompetitive practices as ‘antitrust’ because the authors used to study in the US.

⁶⁹ See, OECD, (2001), note 63, p. 29.

⁷⁰ Most competition regimes use ‘competition law or act’ as the title for their competition legislation. See, e.g., X. Kong, *The Principles of Anti-monopoly Law* [反垄断法原理, *Fanlongduan Fa*

fact that most of the competition regimes aim to preserve competition and free markets against anticompetitive practices and use much the same means. The name of competition legislation generally reflects the emphasis of the nation's objectives. For instance, competition legislation in the US is called antitrust law although not all anticompetitive practices that subject to the US antitrust laws involve illegal trusts. The reason why competition legislation is called antitrust law in the US is that the US had to deal with widespread trusts when it enacted its first competition legislation, the Sherman Act, in 1890. From the illustration of its name, someone might think that China's Antimonopoly Law only prohibits monopolistic practices. However, it also prohibits anticompetitive agreements and anticompetitive mergers.

5.3 Competition Policy

The terms competition *policy* and competition *law* are different, although they are often used synonymously.⁷¹ Competition *policy* can be defined as 'spanning the broader set of measures and instruments that may be pursued by governments to enhance the contestability of markets',⁷² while competition *law* can refer to 'the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position (including attempts to create a dominant position through merger)'.⁷³ From this point of view, therefore, competition policy is broader than competition law and 'will therefore encompass within it a system of competition law'.⁷⁴ Except competition law, competition policy can also include actions to

Yuanli], Beijing: China Legal Publishing [中国法制出版社, *Zhongguo Fazhi Chubanshe*], (2001), pp. 2-7.

⁷¹ A. Jones and B. Sufrin, (2007), note 19, p. 2; also see, B. Hoekman and P. Mavroidis, *Economic Development, Competition Policy, and the World Trade Organisation*, Policy Research Working Paper, No. 2917, Washington, D.C.: World Bank, (2002), p. 4.

⁷² B. Hoekman and P. Mavroidis, (2002), note 71, p. 4; also see, B. Hoekman and P. Holmes, *Competition Policy, Developing Countries, and the World Trade Organisation*, Policy Research Working Paper, No. 2211, Washington, D.C.: World Bank, (1999), p. 3.

⁷³ B. Hoekman and P. Holmes, (1999), note 72, p. 2; also see, B. Hoekman and P. Mavroidis, (2002), note 71, p. 4.

⁷⁴ A. Jones and B. Sufrin, (2007), note 19, p. 2; also see, B. Hoekman and P. Holmes, (1999), note 72, p. 3.

privatize state-owned enterprises, deregulate activities, reduce licensing requirements for new investment or entry, cut firm-specific subsidy programmes, and trade liberalization.⁷⁵

5.4 Exceptions and Exemptions

An exemption refers to a provision within a domestic competition law that provides non-application of substantive or procedural standards that would otherwise apply. Sometimes, the term of ‘exemption’ is distinguished from the term of ‘exception’.⁷⁶ Exemptions are considered to be broader in scope than exceptions that tend to be ‘determined on a case-by-case basis’.⁷⁷ In this study, however, these two terms are interchangeable since they both have similar impacts on international trade and competition.

5.5 China

Politically, China includes Mainland China (communist China), Hong Kong Special Administrative Region (hereinafter Hong Kong), Macau Special Administrative Region (hereinafter Macau) and, arguably, Taiwan Province. Article 31 of the Constitution of the People’s Republic of China (hereinafter the Chinese Constitution 1982) provides: ‘The state may establish Special Administrative Regions when necessary’.⁷⁸ Hong Kong and Macau have their own political,

⁷⁵ B. Hoekman and P. Holmes, (1999), note 72, p. 3; also see, B. Hoekman and P. Mavroidis, (2002), note 71, p. 4.

⁷⁶ See, e.g., S. Khemani, *Application of Competition Law: Exemptions and Exceptions*, Geneva and New York: United Nations, UNCTAD/DITC/CLP/Misc.25, (2002), pp. 1-2.

⁷⁷ *Id.*, p. 2.

⁷⁸ The Constitution of the People’s Republic of China [《中华人民共和国宪法》; *Zhonghua Renmin Gongheguo Xianfa*] is the highest law within the Chinese legal system. The current version was adopted by the NPC on the 4th December 1982 with amendments in 1988, 1993, 1999, and 2004. Three previous state constitutions—those of 1954, 1975, and 1978—were superseded in turn. The Chinese Constitution 1982 has five sections: the preamble, general principles, the fundamental rights and duties of citizens, the structure of the state, and the national flag and emblems of state. For explanations of the Chinese Constitution 1982, see, J. Chen, *Chinese Law: Towards an Understanding of Chinese Law, Its Nature and Development*, The Hague: Kluwer Law International, (1999), pp. 67-69.

economic and legal systems distinct from Mainland China. Their legal rights are defined by the Basic Law of Hong Kong and the Basic Law of Macau respectively. These Basic Laws are Constitutions for Hong Kong and Macau. Article 1 of the Basic Law of Hong Kong provides that Hong Kong 'shall exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power'. The Basic Law of Macau is similar to Hong Kong's Basic Law. The final interpretation of the Basic Laws belongs to the NPC and its Standing Committee. In regard to competition legislation, both Hong Kong and Macau have the power to enact their own competition law. In theory, their competition regimes are separated from the competition regime in Mainland China.⁷⁹ The case of Taiwan is complicated. Mainland China regards Taiwan as an integral part of China. The Chinese Constitution 1982 provides: 'Taiwan is part of the sacred territory of the People's Republic of China'.⁸⁰ However, it has a separate competition regime. In this thesis, therefore, 'China's competition regime' only refers to the competition regime in Mainland China. For the purpose of the WTO, China, Hong Kong, Macao and Taiwan are treated as separate members. They have their own representatives in the WTO. Due to these reasons, China only refers to Mainland China in this study.

6 China's Legal System, Hierarchy of Chinese Law and the Chinese Law-Making Process⁸¹

Before examining the WTO's impact on the formulation of the Antimonopoly Law 2007, it is necessary to explain the Chinese legal system, hierarchy of Chinese law and the law-making process in China.

⁷⁹ Currently Macau does not have a competition law.

⁸⁰ See preamble to the Chinese Constitution 1982.

⁸¹ For a basic understanding of the laws and institutions in China, see, E. Chua, 'The Laws of the People's Republic of China: An Introduction for International Investors', *Chicago Journal of International Law*, vol. 7, (2005), 133.

6.1 China's Legal System

The Chinese legal system is similar to the civil law systems of Japan, France and Germany.⁸² The primary sources of law in China are written legislation. Cases cannot be cited as legal sources in Chinese courts. The judgements are normally very short (about one page in most cases). They are not available in English.

6.2 Hierarchy of Chinese Law⁸³

The Legislation Law of the People's Republic of China (hereinafter the Legislation Law 2000) lays down the general rules of the hierarchy of Chinese law.⁸⁴ Under the Legislation Law 2000, legislation can be divided into at least seven different categories: the Chinese Constitution 1982, national law, administrative regulation, local decree, autonomous decree and special decree, administrative and local rule. The Chinese Constitution 1982 has the highest legal authority.⁸⁵ National law is enacted by the NPC or its Standing Committee. It can be divided into two sub-categories: basic laws and others. There is no clear definition what laws can be basic laws. The Legislation Law 2000 does not clearly provide that basic laws are higher than other national laws. In practice, however, basic laws are generally considered more important than other national laws. Administrative rules are issued by the 'various ministries, commissions, the People's Bank of China, the Auditing Agency, and a body directly under the State Council exercising a regulatory function'.⁸⁶ Local Decrees, Autonomous Decrees and Special Decrees, and administrative rules are enacted by the People's Congress of a province, an autonomous region, or a

⁸² For China's legal system, see, D. Chow, *The Legal System of the People's Republic of China in A Nutshell*, St. Paul, MN: West Group, (2003); also, C. Hsu, ed., *Understanding China's Legal System*, New York: New York University Press, (2003).

⁸³ See, Chart Introduction-1: The Hierarchy of Chinese Legal System.

⁸⁴ See, Chapter Five Scope of Application and Filing of the Legislation Law of People's Republic of China which was adopted by the 3rd Session of the 9th NPC in 2000. An English translation is available at http://www.novexcn.com/legislat_law_00.html.

⁸⁵ The Legislation Law 2000, Art. 78.

⁸⁶ *Id.*, Art. 71.

municipality directly under the central government.⁸⁷ Local rules are enacted by the local governments at province level. The hierarchy of these laws, regulations and rules is as follows: national law has higher legal authority than administrative regulations, local decrees and administrative or local rules. Administrative regulations have higher legal authority than local decrees and administrative or local rules'.⁸⁸ Administrative rules and local rules have the same legal authority and are implemented within their respective scope of authority.⁸⁹ But the autonomous decrees that are issued by autonomous regions and special decrees that are issued by special economic zones can vary from national laws due to some historic reasons.⁹⁰ There is no clear definition of decisions and orders of the State Council in the Legislation Law 2000.⁹¹ But it does provide administrative rules have to be consistent with 'decisions and orders of the State Council'.⁹² From this view, decisions and orders by the State Council are higher in China's legal hierarchy than administrative rules.

6.3 Law-Making Process in China

The legislative body of highest authority is the NPC, which consists of approximately 3000 deputies who only meet for ten days every March. The NPC Standing Committee consisting of 150 members is elected by the deputies of the NPC and is responsible to it.⁹³ Only deputies of the NPC can serve on the NPC Standing Committee. The members of the NPC Standing Committee are full time and regularly meet for about ten days every two months. A small subcommittee handles day-to-day matters. A number of bodies, such as the State Council, the Central Military Committee, the Supreme People's Court (SPC), the Supreme

⁸⁷ *Id.*, Art. 63.

⁸⁸ *Id.*, Art. 79.

⁸⁹ *Id.*, Art. 82.

⁹⁰ *Id.*, Art. 81.

⁹¹ The State Council is the highest executive organ of the People's Republic of China. For the functions and organizations of the State Council, see, <http://english.gov.cn/links/statecouncil.htm>.

⁹² The Legislation Law 2000, Art. 71.

⁹³ The Chinese Constitution 1982, Arts. 65, 66, and 68.

People's Procuratorate, have the power to introduce a bill.⁹⁴ However, most laws are drafted by ministries and submitted by the State Council. This was the case for the submission of the Antimonopoly Law 2007.

Section 2 (about the legislative process of the NPC) and Section 3 (about the legislative process of the NPC Standing Committee) of Chapter II of the Legislation Law 2000 stipulate the national law-making process.⁹⁵ As mentioned above, national law can be divided into two sub-categories: basic laws and others. The basic laws can only be enacted and amended by the NPC.⁹⁶ When the NPC is not in session, its Standing Committee can amend and supplement basic laws 'provided that any amendment or supplement may not contravene the basic principles of such national law'.⁹⁷ However, the NPC Standing Committee has no power to enact basic laws. The law, other than basic laws, can be enacted and amended by the NPC Standing Committee.⁹⁸ The Legislation Law 2000 provides neither a list of what national laws can be basic laws nor a clear definition of the concepts of basic laws and other laws. A bill is normally deliberated three times before it is enacted, although it is possible that a bill is enacted after only being deliberated once.

The Antimonopoly Law 2007 was adopted by the 10th NPC Standing Committee on the 30th August 2007, after it was deliberated three times. Under Sections 2 and 3 of the Legislation Law 2000, therefore, it is not a basic law but a normal national law.

⁹⁴ The Legislation Law 2000, Arts. 12 and 24.

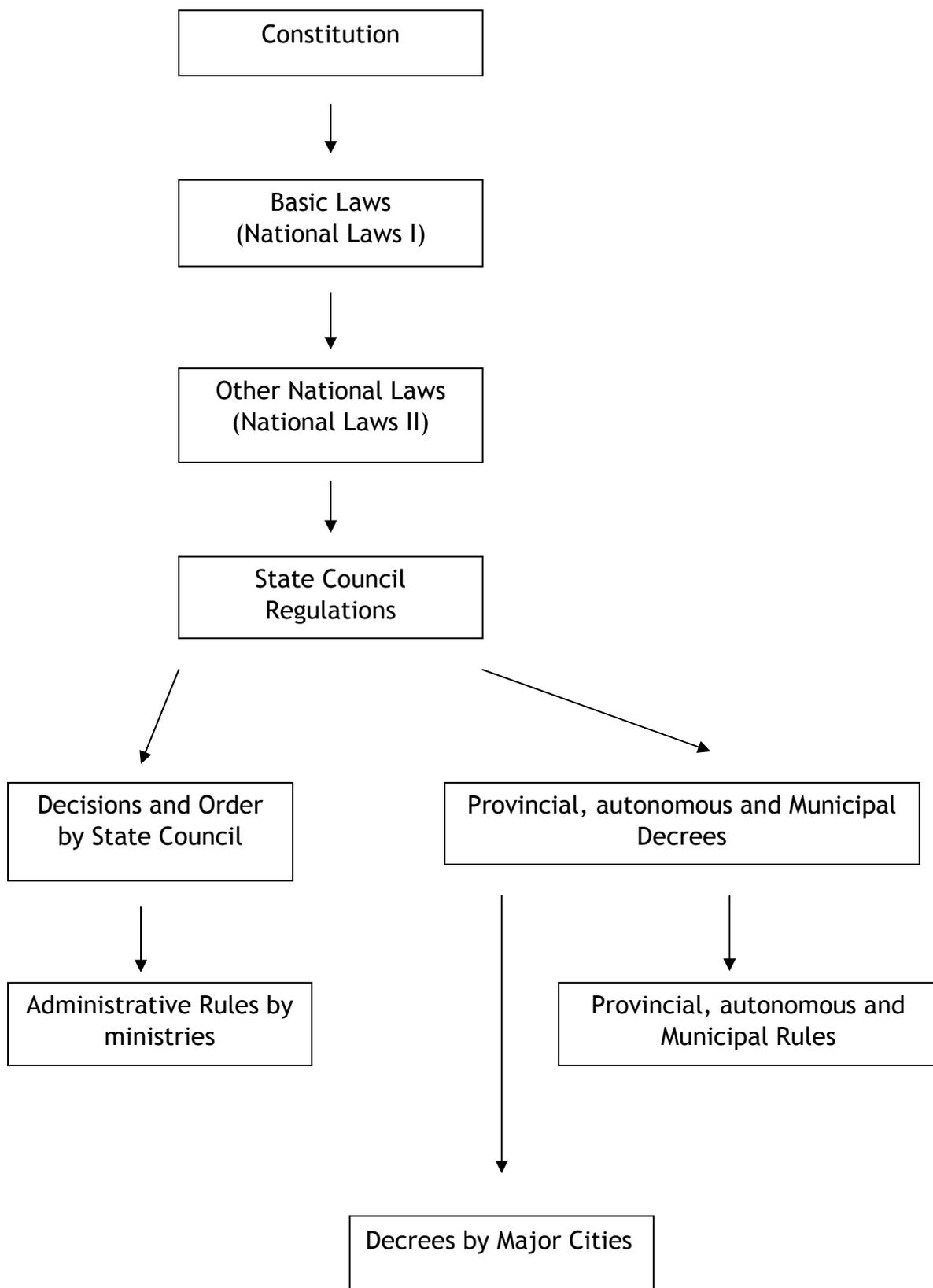
⁹⁵ More about Chinese lawmaking process, see, B. Owen, S. Sun and W. Zheng, (2005), note 41, pp. 136-137; also see, S. Ko, 'Chinese Anti-Monopoly Law: An Introduction to Chinese Legislation', *Washington University Global Studies Law Review*, vol. 3, (2004), 267, pp. 271-274.

⁹⁶ The Legislation Law 2000, Art. 7.

⁹⁷ *Id.*

⁹⁸ *Id.*

Chart Introduction-1: The Hierarchy of Chinese Legal System



Chapter One:

The WTO, Competition Law and China

This chapter examines some issues surrounding the World Trade Organisation (WTO), national competition law and China. To this end, it is structured into two sections. The first section examines some issues surrounding the WTO and competition law, while the second section focuses on some issues surrounding the WTO and China. These issues serve as the basis of this study. Thus, it is necessary to explore them before examining the impact of the WTO on the formulation of the Antimonopoly Law of the People's Republic of China (hereinafter Antimonopoly Law 2007).¹

1 The WTO and Competition Law

First, this section examines the interaction between international trade and competition policy. Second, it explores the evolution of competition-specific provisions under the General Agreement on Tariffs and Trade (GATT)/WTO system. Third, it examines whether WTO Members' national competition laws could be challenged under the existing WTO dispute settlement system.

1.1 International Trade and Competition Policy

The relationship between international trade and competition law and policy has been extensively examined and remains mainly undisputed.² Thus, it is not the

¹ The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

² The OECD and WTO committees charged with studying competition policy issues have produced a wealth of material on the interaction of competition policy and international trade, which is available in their publications and on their respective websites. In addition, many scholars have also contributed to this topic. See, e.g., G. Bercero and S. Amarasingha, 'Moving the Trade and Competition Debate Forward', *Journal of International Economic Law*, vol. 4, (2001), 448; the International Competition Policy Advisory Committee to the Attorney General and Assistant Attorney General for Antitrust, *Final Report to the Attorney General and Assistant Attorney*

purpose of this sub-section to explore comprehensively this relationship. What follows explains briefly how anticompetitive practices could have adverse effects on international trade. It is necessary to explain these effects because they are some of the reasons why China's competition law matters to the WTO and its Members, and they explain why the WTO could have had impacts on the formulation of the Antimonopoly Law 2007.

1.1.1 The Impacts of Anticompetitive Practices on International Trade

What follows explains briefly the impacts of anticompetitive practices on international trade.³

1.1.1.1 Horizontal Restraints

Horizontal restraints are agreements or other forms of collusion among actual or potential competitors.⁴ Although horizontal restraints are generally anticompetitive, they could have pro-competitive efficiency effects.⁵ Some types of horizontal agreements, such as agreements to fix prices, rig bids, limit output, divide markets by allocating customers or territories (these agreements are normally referred to as hard-core cartels), normally have a significant

General for Antitrust, Washington D.C.: US Department of Justice, (2000), pp. 201-279, <http://www.usdoj.gov/aatr/icpac/chapter5.pdf>.

³ For comprehensive studies on the impact of anticompetitive practices on international trade, see, e.g., the Working Group on the Interaction between Trade and Competition Policy (WGTCP), *Communication by the European Community and Its Member States - Impact of Anti-Competitive Practices on Trade*, WT/WGTCP/W/62, (1998); WGTCP, *Communication from Argentina - Opening-up of Markets to International Trade and Market Competition - The Argentine case*, WT/WGTCP/W/63, (1998); WGTCP, *Communication from Norway - Revision*, WT/WGTCP/W/65/Rev.1, (1998); WGTCP, *Communication from the United States*, WT/WGTCP/W/66, (1998); WGTCP, *Communication from Japan*, WT/WGTCP/W/68 (1998); WGTCP, *Communication from Canada*, WT/WGTCP/W/70, (1998); and WGTCP, *Communication from Turkey*, WT/WGTCP/W/77, (1998).

⁴ For a general discussion of horizontal agreements and competition law, see, R. Whish, *Competition Law*, 5th ed., London: LexisNexisUK, (2003), pp. 453-582.

⁵ See, S. Bishop and M. Walker, *The Economics of EC Competition Law: Concepts, Application and Measurement*, London: Sweet & Maxwell, (2002), para. 5.57.

impact in limiting effective competition.⁶ Thus, they are considered as serious infringements under any competition regime.⁷ These agreements could also have negative impacts on international trade by limiting market access and raising barriers to entry by foreign firms. For example, if a group of domestic firms with market power agrees to boycott foreign products, the consequence of that horizontal cartel agreement could be to inhibit foreign firms from gaining access to the market. Another example is that companies from different countries could form an international cartel to fix the prices of their products, control the amount of production, or divide markets. Such a cartel could have an adverse impact on international trade and offset the benefit of trade liberalization achieved by the WTO. This has been illustrated in a number of well-known cartel cases, such as the *National Lead* case,⁸ the *ICI* case,⁹ the *Uranium Cartel* case,¹⁰ and the *Sugar Cartel* case.¹¹

Other types of horizontal agreements, such as joint ventures, licensing agreements between firms and co-operative standards setting, can have pro-competitive efficiency effects under certain circumstances.¹² Thus, they are not *per se* illegal and are normally dealt with according to the rule of reason.¹³ Like hard-core cartels, however, these agreements could have negative impacts on

⁶ For a general discussion of cartels and competition law, see, e.g., M. Guerrin and G. Kyriazis, 'Cartels: Proof and Procedural Issues', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 1992*, New York: Juris Publishing Inc., (1993); J.M. Joshua, 'Attitudes to Anti-Trust Enforcement in the EU and US: Dodging the Traffic Warden, or Respecting the Law?', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 1995*, New York: Juris Publishing Inc., (1996); and M. Jephcott and T. Lübbig, *Law of Cartels*, Bristol: Jordans, (2003).

⁷ See, R. Whish, (2003), note 4, p. 453.

⁸ *United States v. National Lead Co.*, 63 F. Supp. 513 (S.D.N.Y. 1945).

⁹ *United States v. Imperial Chemical Indus.*, 100 F. Supp. 504 (S.D.N.Y. 1951).

¹⁰ *In re Uranium Antitrust Litigation*, 480 F. Supp. 1138 (N.D. Ill. 1979).

¹¹ *Coöperatieve Vereniging 'Suiker Unie' UA and Others v. Commission* [1975] E.C.R. 1163.

¹² For a general discussion of these agreements and competition law, see R. Whish, (2003), note 4, pp. 545- 582.

¹³ It is a method of competition analysis in which the court is permitted to make a detailed inquiry concerning the effect on price and output of a certain practice in order to determine whether consumers have been harmed.

market access and thus lead to an increase of barriers to entry by foreign firms. In other words, horizontal restraints could limit market access and substantially raise barriers to entry by foreign firms even though they are not considered anticompetitive under some competition regimes.

1.1.1.2 Vertical Restraints

Vertical restraints are agreements made between firms operating at different levels of the market.¹⁴ These restraints include exclusive dealing or purchase agreements, exclusive financing agreements, territorial restrictions and resale price maintenance. Although there are a variety of types of vertical agreements, vertical restraints can be divided in general into two categories: pricing vertical restraints and non-price vertical restraints. Like horizontal restraints, vertical restraints can have various positive and negative impacts on competition.¹⁵ Pricing vertical restraints, such as resale price maintenance, are prohibited *per se* in most competition regimes, particularly in the Members of the Organisation for Economic Co-operation and Development (OECD). However, it is not the case for non-pricing vertical restraints. Non-pricing vertical restraints such as exclusive territories and exclusive dealing agreements can have a variety of effects on competition. Such vertical restraints can also have a variety of effects on international trade. For example, vertical restraints on exclusive territories could have parallel positive effects in increasing market access. Similarly, exclusive dealing may, for instance, facilitate new entry by a foreign firm which may find it helpful to offer such an arrangement as an incentive to a potential distributor in a new market. However, vertical restraints could also have negative effects on international trade because they create or enhance barriers to entry by foreign firms. For example, a group of domestic manufacturers with market power could threaten to cut off sources of domestic supply to domestic distributors unless the latter agree not to handle competing imported products.

¹⁴ B. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom*, 2nd ed., London: Cavendish Publishing Limited, (2001), p. 171.

¹⁵ For a general discussion of vertical restraints and competition law, see, e.g., B. Rodger and A. MacCulloch, (2001), note 14, pp. 171-201; S. Bishop and M. Walker, (2002), note 5, paras. 5.36-5.48; and R. Whish, (2003), note 4, pp. 583-653.

1.1.1.3 Abuses of Dominant Positions

Abuses of dominant positions include excessive pricing, price discrimination, discounts and rebates, tying and binding, predatory behaviours, and refusal to supply.¹⁶ These abuses could have a significant impact on both trade and competition, in particular if they involve the exercise of market power in order to deter or foreclose actual or potential competition.¹⁷ Under most competition regimes, exclusionary practices by dominant firms could constitute an infringement of competition law. Different approaches may, however, persist about such issues as the assessment of the relevant product and geographical market, the relevant criteria to define what constitutes a dominant position, the role of barriers to entry etc.

From the international trade perspective, an abuse of a dominant position could raise problems in international trade. For example, if a manufacturer with market power in a domestic market prevents its distributors and retailers from dealing in imported goods that compete with the goods supplied by the company, access to such markets will be blocked or denied. Another example is the tie-in contract. A tie-in contract could exclude imports, because foreign suppliers are deprived of the opportunity to sell competing products. An international dominant company could also leverage into export markets and engage in price predation. These practices could lead a nullification of the benefits of trade liberalization. Due to such potential adverse impacts on trade liberalization by abuses of dominant positions, the Plan of Action that emerged from the United Nations Conference on Trade and Development (UNCTAD) X conference, which was held in Bangkok from 12 to 19 February 2000, noted:

While dominant market positions are not anti-competitive in themselves,

¹⁶ For a general discussion of abuses of dominant positions and competition law, see, R. Whish, (2003), note 4, pp. 653-732.

¹⁷ M. Janow explored the circumstances under which abuses of dominance can raise problems of an international or transborder nature and compared trade and competition policy approaches to the issue under certain scenarios e.g. (i) denial of market access by a dominant firm and (ii) leveraging into export markets and price predation. See, M. Janow, 'International Perspectives on Abuse of Dominance', in OECD, *Abuse of Dominance And Monopolisation*, OECD/GD(96)131, (1996), 33, pp. 40 ff. <http://www.oecd.org/dataoecd/0/61/2379408.pdf>. For the impact of abuses of dominant positions on competition, see S. Bishop and M. Walker, (2002), note 5, paras. 6.71-6.127.

certain practices applied by companies enjoying such positions can limit international competition and market entry by competitors. Anti-competitive practices raise import costs and limit market access and market entry.¹⁸

Despite this consensus that an abuse of a dominant position could have an adverse impact on international trade, it is not unanimous among different countries on what types of abuses of dominant positions should be condemned due to the 'considerable divergence among jurisdictions about the range of practices' of abuses of dominant positions.¹⁹

1.1.2 Trade Liberalization Commitments Could Be Nullified or Impaired in the Absence of An Effective Competition Regime

Thus far, some anticompetitive practices could have adverse impacts on international trade under certain circumstances. Anticompetitive practices could hamper the ability of firms to gain access to or compete in foreign markets. As formal governmental barriers to international trade are reduced or eliminated, international attention is turning more to anticompetitive practices occurring within nations that affect international trade. As Eleanor M. Fox pointed out, 'As the trade barriers fall like a waterline, the low tide reveals rocks and shoals-which are the private restraints and uncaught government restraints'.²⁰

Many of these anticompetitive practices are prohibited in most competition regimes in the world. From the point of view of international trade, therefore, an effective application of competition laws by national authorities will have positive effects on international trade. As the EU claimed, 'competition laws that are effectively enforced will support autonomous trade liberalization measures

¹⁸ The Plan of Action that emerged from the UNCTAD X conference, TD/386, 18th February 2000, para. 69, http://www.unctad.org/en/docs/ux_td386.en.pdf.

¹⁹ M. Janow, (1996), note 17, 33, p. 48.

²⁰ E. Fox, 'Toward World Antitrust and Market Access', *American Journal of International Law*, vol. 91, (1997), 1, p. 3.

taken by countries'.²¹ In the absence of a sound competition regime, the benefits from trade liberalization and regulatory reform would not be delivered—at least not to their fullest extent. Where no competition law and policy is in place or there is competition law and policy but such law and policy is not effectively enforced, it is impossible for a country to prevent anticompetitive practices from replacing former state monopolies and thus raise the barriers for entry by foreign firms. This is clearly reflected in the Plan of Action that emerged from the UNCTAD X conference, which states:

RBPs [restrictive business practices] should not impede or negate the realization of benefits arising from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries. Efforts to tackle the negative effects of RBPs are also necessary to attain greater efficiency in international trade and development by, *inter alia*, promoting competition, controlling concentration of economic power and encouraging innovation. There is a need to prevent enterprises from re-establishing market barriers where governmental controls have been removed.²²

The Argentine government even carried out 18 empirical studies which provided concrete evidence to support this argument.²³ Following comprehensive trade liberalization, the presumption was that prices of certain products would tend towards import parity levels in Argentina. However, these studies discovered that in a number of cases this had not occurred due to some anticompetitive practices. Based on these studies, the Argentine representative argued, during the discussions of the Working Group on the Interaction between Trade and Competition Policy (WGTCP), that an effective competition regime was needed in order to ensure that the benefits from trade liberalization were not nullified by anticompetitive practices.²⁴

²¹ WGTCP, *Communication from the European Community and Its Member States*, WT/WGTCP/W/1, (1997), pp. 2-3.

²² UNCTAD, TD/386, note 18, para. 70.

²³ See WGTCP, WT/WGTCP/W/63, note 3.

²⁴ *Id.* For example, WGTCP, *Submission from Korea*, WT/WGTCP/W/56, (1997).

Similarly, during the discussions of the WGTCP, the EU also argued:

The case, from a trade policy point of view, for an effective application of competition policy is clear. A country that has undertaken trade liberalization measures has every interest in ensuring that the welfare and efficiency benefits arising from such measures are not lost due to anti-competitive practices by firms. Avoiding the nullification or impairment of trade liberalization commitments, as a result of such practices, is also a matter of legitimate concern for trading partners. Competition laws and policies do not normally have specific trade objectives, such as promoting market access. However, in pursuing the goals of promoting economic efficiency and consumer welfare, an effective application of competition law is essential for tackling barriers to entry set up by business in the market or other anti-competitive practices which affect both foreign and domestic producers. As stated by Brazil at the 16 September [1997] meeting: 'Competition policy can suppress barriers where trade policy is less effective. It is possible to imagine a country that strictly follows GATT rules but where cartels, exclusivity arrangements and other forms of restrictive practices prevail impeding market penetration. In that hypothetical case, competition policy could be very helpful to improve market access.'²⁵

It continued:

All WTO Members would benefit from the effective application of competition law to anti-competitive practices which limit access to the markets of other countries for goods, services and investment. The substantial reduction of government obstacles to trade, as a result of successive Rounds of trade liberalization has greatly contributed to enhanced conditions of competition. At the same time, in the absence of an effective competition law framework firms may have an incentive to engage in anti-competitive behaviour with a view to protect the domestic market against foreign competition.'²⁶

In the absence of an effective competition regime, therefore, the benefits of trade liberalization could be nullified or at least reduced.

²⁵ WGTCP, *Submission by the European Community and Its Member States*, WT/WGTCP/W/45, (1997), p. 4.

²⁶ *Id.*

1.1.3 Limitations of the Interaction between International Trade and Competition Policy

1.1.3.1 Not All Trade-Related Restraints Are Anticompetitive

Needless to say, it should be borne in mind that not all restraints which have adverse impacts on international trade are considered anticompetitive under national competition regimes. Under certain circumstances, some restraints may be considered pro-competitive where efficiency-enhancing properties exist, despite the fact that they may have negative impacts on international trade. In addition, the criteria by which restraints are considered as anticompetitive vary during different periods.²⁷

In sum, on one hand, a restraint could have adverse impacts on trade flows and market access where foreign firms are being kept out of a market by virtue of the restraint. On the other hand, this restraint may be considered pro-competitive if it has efficiency-enhancing properties for the participants in the local market. In other words, not all restraints which could have negative impacts on international trade are anticompetitive and thus prohibited under competition regimes.

1.1.3.2 Not All Competition Problems Are Relevant to International Trade

Similarly, not all competition problems are relevant to international trade, either. For example, the procedural and substantive features of multi-jurisdictional merger review warrant additional efforts at convergence, harmonization and minimization. These issues, while important, are not matters customarily considered of consequence for international trade policy. Similarly, expanding cooperation between competition authorities and developing protocols regarding the treatment of confidential information are important global challenges to competition policy but are not matters of relevance to international trade policy.

²⁷ See, K. Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, Cambridge: Cambridge University Press, (2003).

1.2 The Evolution of Competition-Related Provisions in the GATT/WTO

Due to the adverse impacts of anticompetitive practices on international trade, the WTO has paid attention to competition issues. What follows is intended to examine the evolution of competition-related provisions in the GATT/WTO.²⁸ It is divided into four stages: (i) competition-related provisions under the International Trade Organisation (ITO); (ii) competition-related provisions under the GATT; (iii) competition-related provisions under the WTO; and (iv) after the establishment of the WTO.

1.2.1 Competition-Related Provisions under the International Trade Organisation

Anticompetitive practices at the international level, particularly the practices of German cartels and Japanese *zaibatsu*, during the 1930s, illustrated that anticompetitive practices could block market access. This experience provided the incentive to prohibit anticompetitive practices under the Havana Charter for an International Trade Organisation (hereinafter the Havana Charter).²⁹ The anticompetitive practices prohibited under the Havana Charter included: (a) price fixing or agreements on terms and conditions of supply of a product; (b) agreements to exclude suppliers or allocating markets between suppliers; (c)

²⁸ The American Bar Association's Sections of Antitrust Law and International Law made an excellent description on the history of the competition laws at the international level, see the American Bar Association's Sections of Antitrust Law and International Law, *Report of the ABA Sections of Antitrust Law and International Law and Practice on the Internationalization of Competition Law Rules: Coordination and Convergence*, (1999), pp. 1-12, <http://www.abanet.org/antitrust/comments/2000/convexe.html>; E. Fox, 'Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade', *Pacific Rim Law & Policy Journal*, vol. 4(2), (1995), 1, pp. 2-7; and M. Matsushita, 'Competition Law and Policy in the Context of the WTO System', *DePaul Law Review*, vol. 44, (1994), 1097, pp. 1101- 1103.

²⁹ United Nations Conference on Trade and Development, Final Act and Related Documents, United Nations Conference on Trade and Employment, Havana, Cuba, from 21 November 1947 to 24 March 1948, U.N. Doc. E/Conf. 2/78 (1948). For a general discussion of the Havana Charter, see R. Wilson, 'Proposed ITO Charter', *American Journal of International Law*, vol. 41, (1947), 879; also G. Bronz, 'The International Trade Organisation Charter', *Harvard Law Review*, vol. 62, (1949), 1089.

discrimination against particular enterprises (d) limiting production or fixing production quotas; (e) agreements preventing the development of particular technologies; and (f) unjustified or unlawful extensions of patent or intellectual property rights.³⁰

The Havana Charter was the first attempt to provide an international set of rules to combat anticompetitive practices. Under the Havana Charter, the ITO had the power to investigate any complaint brought by a Member and, if upheld, the Member concerned would have to do everything possible to remedy the situation. However, the ITO failed to materialise. Thus, one can only speculate whether and how these comprehensive provisions would be implemented in practice.

1.2.2 Competition-Related Provisions under the GATT

Chapter V of the Havana Charter that prohibits anticompetitive practices was not included in the original GATT. Thus, the GATT was born without competition-related provisions. In 1954 and 1955 a number of Contracting Parties of the GATT pressed for the inclusion of competition-related provisions in the GATT. In 1958, the Group of Experts on Restrictive Business Practices was appointed by the Contracting Parties of the GATT to examine the competition issues relating to international trade. It concluded:

It would be unrealistic to recommend at present a multilateral agreement for the control of international restrictive business practices. The necessary consensus amongst countries [do] not yet have sufficient experience of action in this field to devise an effective control procedure.³¹

This conclusion was due to the perception that cartels were not a major problem at the time and there was opposition to loss of national policy autonomy in such a sensitive policy area. Nevertheless, the Decision on Arrangements for Consultations on Restrictive Business Practices based on this report was eventually adopted by the GATT Contracting Parties in 1960.³² It recognised that:

³⁰ The Havana Charter, Art. 46.

³¹ See the Group of Experts on Restrictive Business Practices, *Restrictive Practices- Arrangements for Consultations*, BISD 3S/170, (1960), para. 7.

³² See Decisions, Reports, etc., of the 16th & 17th Session, BISD 9S/170, (1961).

Business practices which restricted competition in international trade may hamper the expansion of world trade and the economic development in individual countries and thereby frustrate the benefits of tariff reductions and of the removal of quantitative restrictions or otherwise interfere with the objectives of the GATT.³³

However, this decision only recommends that Contracting Parties enter into consultations in the event of harmful restrictive practices in international trade on either a bilateral or multilateral basis.³⁴ Thus, it is not binding on the Contracting Parties. Three decades later, in 1986, developing countries proposed to include restrictive business practices on the agenda for the Uruguay Round negotiations (1986-1994).³⁵ But the US and other developed countries rejected such a proposal.³⁶

1.2.3 Competition-Related Provisions under the WTO

As the result of the Uruguay Round negotiations, GATT Contracting Parties signed the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter the Marrakesh Agreement) in April 1994.³⁷ Although the need for addressing competition issues in the context of trade policies was recognized during the Uruguay Round negotiations, there is no overarching set of principles or interpretation of the WTO rules as they apply to competition issues. Competition-related provisions are scattered around in different WTO agreements.

There are dozens of competition-related provisions under the existing WTO framework.³⁸ These competition-related provisions have been reviewed by the

³³ *Id.*, p. 28.

³⁴ *Id.*, pp. 28-29. This arrangement for consultation has been invoked on only three occasions, all in 1993, between the US and Japan concerning business practices affecting consumer photographic film and paper.

³⁵ See, GATT, *GATT Activities 1986*, Geneva: GATT, (1987), p. 27.

³⁶ *Id.*

³⁷ It is available on the WTO website.

³⁸ For a summary of competition-specific provisions in the WTO Agreements, see, E.-U. Petersmann, *Competition Policy Aspects of the Uruguay Round: Achievements and Prospects-Achievement and Prospects*, Paris: OECD, (1994); OECD, *Competition Elements in*

OECD³⁹, the WTO⁴⁰ and some scholars.⁴¹ There is consensus that these provisions include Articles II, XIX, XVII of the GATT, Articles VIII and IX of the GATS, Articles 8.2, 40, and 31(k) of the TRIPS. In addition, the Agreement on Technical Barriers to Trade (TBT) requires standards be no more restrictive on trade than is necessary. Articles VII to XVI in the Agreement on Government Procurement (AGP) could be used to challenge certain anticompetitive practices, such as bid rigging. Compared to the GATT, thus, competition-related rules under the WTO covered more trade-related anticompetitive practices, although a comprehensive agreement on competition with the existing WTO framework is lacking.

1.2.4 After the Establishment of the WTO⁴²

At the Marrakesh Ministerial meeting at which the Marrakesh Agreement was signed, trade and competition policy was identified as an item for consideration on the WTO future work programme. During the first WTO Ministerial Meeting

International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreement, OECD: Paris, COM/TD/DAFFE/CLP(98)26/FINAL, (1998); M. Matsushita, 'Reflections on Competition Policy/Law in the Framework of the WTO', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 1997*, New York: Juris Publishing, (1998), 31; and M. Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy', *Washington University Global Study and Law Review*, vol. 3, (2004), 363.

³⁹ OECD, *Competition Elements in International Instruments*, Background Document for a Joint Roundtable of the Trade and Competition Law and Policy Committees held on 15 April 1994, Paris: OECD, COM/DAFFE/CLP/TD(94)35, (1994); OECD, *The Note of Discussions held at the Roundtable*, COM/DAFFE/CLP/TD(94)76, Paris: OECD, (1994); OECD, (1998), note 38; OECD, *Competition Elements in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements*, Paris: OECD, COM/TD/DAFFE/CLP(98)26/FINAL, (1999).

⁴⁰ WTO, 'Trade and Competition Policy', in WTO, *WTO Annual Report 1997*, vol. 1, Geneva: WTO, (1997).

⁴¹ See, e.g., E.-U. Petersmann, 'International Competition Rules for Governments and for Private Business', *Journal of World Trade*, vol. 30(3), (1996), 5; M. Matsushita, (1998), note 38, 31; E.-U. Petersmann, *Competition Policy Aspects of the Uruguay Round: Achievements and Prospects*, Paris: OECD, COM/TD/DAFFE/CLP(98)26/FINAL, (1999); M. Matsushita, (2004), note 38, 363.

⁴² For the details of the development of competition issues after the establishment of the WTO, see, P. Marsden, *A Competition Policy for the WTO*, Oxford: Cameron May, (2003); also see, A. Bhattacharjea, 'The Case for A Multilateral Agreement on Competition Policy: A Developing Country Perspective', *Journal of International Economic Law*, vol. 9, (2006), 293, pp. 295- 299.

which was held in Singapore in 1996, WTO Members agreed to set up the WGTCP.⁴³ The mandate of the WGTCP, however, did not imply that any negotiations would eventually be launched; this would only occur after an explicit consensus decision was taken to that effect by WTO members.⁴⁴ For more than seven years, the WGTCP has provided a forum for Members to discuss the ‘relevance of fundamental WTO principles of national treatment, transparency and most-favoured nation treatment to competition policy and vice versa’.⁴⁵ It has also provided a forum for WTO Members to discuss the possibility to set up a peer review in the WTO competition context.⁴⁶

The Doha Ministerial Meeting in 2001 led to the inclusion of competition policy in the Fourth Ministerial Declaration in Doha (hereinafter Doha Ministerial Declaration). During that meeting, WTO Members also agreed to start negotiations on competition policy ‘after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations’.⁴⁷ Moreover, the Doha Declaration specifies the following areas for the negotiations on competition policy: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries

⁴³ The Singapore Ministerial Declaration, WT/MIN(96)/DEC, (1996), para. 20.

⁴⁴ *Id.*

⁴⁵ WGTCP, *Working Group on the Interaction between Trade and Competition Policy Annual Reports for 1997, 1998, 1999, 2000, 2001, 2002, and 2003*, WT/WGTCP/1, WT/WGTCP/2, WT/WGTCP/3, WT/WGTCP/4, WT/WGTCP/5, WT/WGTCP/6, and WT/WGTCP/7, respectively.

⁴⁶ See, WGTCP, *Communication from the European Community and its Member States - Dispute Settlement and Peer Review: Options for a WTO Agreement on Competition Policy*, WT/WGTCP/W/229, (2003); WGTCP, *Communication from the United States - The Benefits of Peer Review in the WTO Competition Context*, WT/WGTCP/W/233, (2003); WGTCP, *Communication from Korea - Peer Review in the Multilateral Framework on Competition Policy*, WT/WGTCP/W/235, (2003); WGTCP, *Communication from Japan - Introducing a Model of Peer Review*, WT/WGTCP/W/236, (2003); WGTCP, *Communication from the OECD - Practical Modalities of Peer Review in a Multilateral Framework on Competition*, WT/WGTCP/W/243, (2003); and WGTCP, *Communication from the OECD - Peer Review: Merits and Approaches in a Trade and Competition Context*, WT/WGTCP/244, (2003).

⁴⁷ The Doha Ministerial Declaration, Adopted on the 14th November 2001, WT/MIN(01)/DEC/1, para. 23.

through capacity building.⁴⁸ China generally supports the idea of establishing a competition-specific agreement within the WTO.⁴⁹

After the failure to reach an agreement on launching negotiations on competition policy at the Cancun Ministerial Meeting in September 2003, consensus was reached to exclude competition policy from the Doha Round of trade negotiations at the WTO General Council meeting in July 2004.⁵⁰

Despite the failure to start negotiations on competition, WTO Members have successfully included competition principles in some new agreements. For example, the Telecommunications Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications (the Reference Paper) was negotiated after the establishment of the WTO.⁵¹ Under the Reference Paper, Members' national competition regulations are potential matters of trade concern.⁵² Lawrence A. Sullivan claimed that the competition rules stipulated in Section 1 of the Reference Paper make the Basic Telecommunications Agreement (BTA), potentially, 'the most significant multilateral 'antitrust' regime ever undertaken'.⁵³ Another example is paragraph 1 of the Understanding on Commitments in Financial Services (UCFS) which was also negotiated after the establishment of the WTO.⁵⁴ It deals with monopolies.

⁴⁸ *Id.*, para. 25.

⁴⁹ See, WGTCP, *Communication from China - Hardcore Cartels and Voluntary Co-operation*, WT/WGTCP/W/241, (2003); and WGTCP, *Communication from China - Elements contained in Paragraph 25 of the Doha Ministerial Declaration*, WT/WGTCP/W/227, (2003).

⁵⁰ Paragraph 1 (g) of the WTO General Council's post Cancun Decision (hereinafter the July Package), http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

⁵¹ The Reference Paper is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

⁵² For more details of this provision, see Chapter Four.

⁵³ L. Sullivan, 'The U.S., the EU, the WTO, the Americas, and Telecom Competition', *Southwestern Journal of Law & Trade in the Americas*, vol. 6, (1999), 63, p. 78.

⁵⁴ The UCFS is available at http://www.wto.org/english/tratop_e/serv_e/21-fin_e.htm.

1.3 National Competition Laws Could Be Challenged under the Current WTO Dispute Settlement System

Anticompetitive practices could have negative impacts on international trade. In theory, therefore, the adoption and the enforcement of competition laws are matters of international trade. As Frédéric Jenny claimed, ‘international trade policy makers are equally concerned with the design of domestic laws and the quality of domestic enforcement to the extent that they may have an effect on the ability of foreign firms to gain market accesses’.⁵⁵

Although there is no requirement for a WTO Member to adopt a national competition law under the current WTO system, the WTO does include dozens of provisions that are relevant to the content and the enforcement of a WTO Member’s national competition law. As Stefan D. Amarasingha pointed out, it is a fact:

[A]t least among trade people, namely that competition laws and competition regulations, etc., are in fact covered by those GATT provisions to the extent that they somehow affect the conditions for trade. That is probably a point which is not always well understood—in fact, there are some who are unwilling to accept it—but, as with so many other things in life, it is a fact that you will have to accept, and that is the situation that we will have to live with.⁵⁶

So far, however, few of the competition-related WTO provisions have led to cases or enforcement within the WTO dispute settlement system. One of the reasons for this could be that the existing WTO framework lacks an overarching set of competition rules. As Francois Souty argued, the dispersion of competition-related provisions under the current WTO framework is ‘not easily and frequently consulted by competition authorities in Member States nor by market operators (which remain unfamiliar with current WTO proceedings that only

⁵⁵ F. Jenny, ‘Competition, Trade and Development Before and After Cancun’, in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 2003*, New York: Juris Publishing Inc., (2004), 631, p. 640.

⁵⁶ S. Amarasingha, discussions on ‘WTO Core Principles and Trade/Competition Policies’, in B. Hawk, ed., (2004), note 55, p. 711.

concern Member States of that organization and not corporations)'.⁵⁷

Nevertheless, it is still possible for a WTO Member to challenge another WTO Member's competition law under the existing WTO dispute settlement system.⁵⁸ Article XXIII (Nullification and Impairment) of the GATT applies to government measures which nullify or impair agreed market access or the attainment of the objectives of the Agreement. There is no doubt that national competition laws belong to government measures. Under the current WTO system, therefore, WTO Members could bring complaints on both the content and the enforcement of a Member's national competition law to the WTO Dispute Settlement Body where the content or the enforcement of such competition law has the effect of impeding market access of foreign products or entry of foreign enterprises.

In *Japan- Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*⁵⁹, the Panel stringently interpreted Article XXIII(1)(b) of the GATT. It imposed a heavy burden of proof on the use of the non-violation complaint of Article XXIII(1)(b) as a mechanism for solving competition cases. It required that Members bringing complaints provide 'a detailed justification' that would address three issues:

- (1) whether the practices in question were government 'measures';
- (2) if so, whether the measure in question related to a benefit reasonably anticipated to accrue from prior tariff concessions by upsetting the competitive relationship between imports and domestic products; and
- (3)

⁵⁷ F. Souty, 'Is there a need for additional WTO competition rules promoting non-discriminatory competition laws and competition institutions in WTO members?', in E.-U. Petersmann, ed., *Reforming the World Trading System*, Oxford: Oxford University Press, (2005), 305, p. 310.

⁵⁸ For a more thorough and authoritative discussion on the extent to which national competition laws could be challenged under the existing WTO dispute settlement system, see C.-D. Ehlermann and L. Ehling, 'WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience', *Fordham International Law Journal*, vol. 26, (2002), 1505; and, A. Alvarez-Jiménez, 'Emerging WTO Competition Jurisprudence and Its Possibilities for Future Development', *Northwest Journal of International Law and Business*, vol. 24, (2003), 441.

⁵⁹ Panel Report, *Japan- Measures Affecting Consumer Photographic Film and Paper (Japan-Film)*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179. For an analysis of this case, see, e.g., M. Furse, 'Competition Law and the WTO Report: "Japan- Measures Affecting Consumer Photographic Film and Paper"', *European Competition Law Review*, vol. 20, (1999), 9.

whether the benefit accruing to the complainant state had in fact been nullified or impaired by the measure in questions (causality).⁶⁰

Despite this heavy burden of proof on the use of the non-violation complaint of Article XXIII(1)(b) imposed by the Panel in this case, the Panel did not reject the idea that a complaint on competition law could be brought in through Article XXIII(1)(b) of the GATT.

In *Japan-Film*, the Panel did not examine the Japanese Fair Trade Commission (JFTC) Rule No. 1 under Article 6 of the Japanese Antimonopoly Law (International Contract Notification Requirement) and JFTC Notification No. 34 on open lotteries (1971) under Article 2(7) of the Japanese Antimonopoly Law because they were not listed separately as measures challenged by the US in its Panel request.⁶¹ However, the Panel made it clear that the reason why the Panel dismissed these two measures was not because they were part of the Japanese competition law. It argued: ‘we see no reason why, as suggested by the United States, the nature of these measures precluded their specification by the United States in the Panel request’.⁶² Moreover, the Panel did examine 1981 JFTC Guidance on Dispatched Employees under the Japanese Antimonopoly Law in this case despite the fact that this Guidance is part of Japan’s competition legislation.⁶³ Thus, this case illustrated that some provisions of a WTO Member’s domestic competition law could be examined under the existing WTO framework, if another WTO Member brought a complaint specifically listing these provisions in its Panel request. Put another way, the nature of these provisions of a WTO Member’s competition law would not bar WTO Panels from considering them.

In *United States- Anti-Dumping Act of 1916-Complaint by the European Communities*, the Panel claimed openly that Members’ national competition law could be covered by WTO provisions if the content or the implementation of national competition law had the effect of impeding market access of foreign products or entry of foreign enterprises by stating:

⁶⁰ M. Trebilcock and R. Howse, *The Regulation of International Trade*, 2nd ed., London: Routledge, (1999), p. 447.

⁶¹ Panel Report, *Japan-Film*, note 59, para. 10.15.

⁶² *Id.*, para. 10.16.

⁶³ *Id.*, para. 10.15.

[T]he mere description or categorization of a measure under the domestic law as well as the policy purpose behind the measure cannot be a decisive factor in the categorization of that measure under the WTO Agreement.⁶⁴

It continued:

[T]he scope of the WTO Agreement does not exclude *a priori* restrictive business practices. Thus, the fact that the 1916 Act would be an anti-trust law would not *per se* be sufficient to exclude the application of WTO rules to that law...panels under GATT 1947 and the WTO have addressed various aspects of restrictive business practices initiated by governments when such practices had the effect of impeding market access of foreign products or entry of foreign enterprises.⁶⁵

Therefore, the Panel concluded that the dichotomy trade law/anti-trust law, to the extent that it would be based on the assumption that WTO disciplines are not intended to apply to business restrictive practices, was not a limitation to the application of WTO rules and disciplines.⁶⁶ This illustrated that WTO Members' national competition laws could be subjected to the WTO rules, if the content or the implementation of national competition laws has the effect of impeding market access of foreign products or entry of foreign enterprises.

From these two cases, it can be seen that both the content and the implementation of a WTO Member's national competition law could become subject to the WTO rules if the content or the implementation of national competition law has the effect of impeding market access of foreign products or entry of foreign enterprises. As Claus-Dieter Ehlermann and Lothar Ehring claimed, under existing WTO rules:

[N]ational competition law and practice are not exempt from, but rather subject to, the application of the dispute settlement system. Both competition laws as such and their application in individual cases must comply with the current substantive standards of the WTO agreement,

⁶⁴ Panel Report, *United States- Anti-Dumping Act of 1916-Complaint by the European Communities (US-1916 Act (EC))*, WT/DS136/R, adopted as upheld by Appellate Body 26 September 2000, DSR 2000:X, 4593, para. 6.101.

⁶⁵ *Id.*, para. 6.172.

⁶⁶ *Id.*

and complaints can be brought against both.⁶⁷

Claus-Dieter Ehlermann was formerly a Member, and in 2001 Chairman, of the Appellate Body of the WTO. And from 1990 to 1995, he was Director-General of the Directorate-General of Competition of the European Commission. Lothar Ehring was formerly an official in the Appellate Body Secretariat. Given their background, therefore, their opinion carries huge weight on this issue. Moreover, they are not alone. Many scholars share their opinion. For example, Alberto Alvarez-Jiménez also claimed that ‘A new competition jurisprudence is emerging within the World Trade Organisation... and its Dispute Settlement Body’.⁶⁸ Therefore, it seems clear that both the content and the enforcement of a WTO Member’s national competition law could be challenged under the existing WTO dispute settlement system if the content or the implementation of such legislation has the effect of impeding market access of foreign products/services, or entry of foreign firms.

2 The WTO and China

This section examines some general issues surrounding the WTO and China. First, it examines briefly the process of China’s accession to the WTO and China’s WTO commitments. Second, it surveys whether China is bound by its WTO commitments. Third, it explores how China is going to implement its WTO commitments.

2.1 China’s Accession to the WTO and China’s WTO Commitments

2.1.1 *Entering the Dragon*

The process of China’s accession to the WTO has been examined extensively.⁶⁹

⁶⁷ C.-D. Ehlermann and L. Ehring, (2002), note 58, 1505, p. 1506.

⁶⁸ A. Alvarez-Jiménez, (2003), note 58, 441, p. 441.

⁶⁹ For a thorough and authoritative analysis of the process of China’s accession to the WTO, see, G. Yang and J. Cheng, ‘The Process of China’s Accession to the WTO’, *Journal of International Economic Law*, vol. 4, (2001), 297 (G. Yang is former Deputy Director a the Department of

Thus, what follows does not explore comprehensively this process. Instead, it explains briefly this process in order to provide necessary background for this study.

Article XII of the Marrakesh Agreement deals with accession. However, it neither gives guidance on the terms to be agreed, nor lays down any procedures to be used for negotiating these terms. The terms on which an applicant is accepted as a new member of the WTO are left to negotiations between the WTO Members and the applicant. The procedure for accession is left to individual Working Parties to agree. In practice, the accession follows closely the corresponding Article XXXIII of GATT 1947. The WTO has summarised the process.⁷⁰ The WTO accession process formally begins when a country informs the WTO Director-General of its desire to join. A working party of Members will then be formed by the WTO General Council to examine the application. After the working party has examined the basic principles and policies, individual WTO Members enter into bilateral negotiations with the applicant over the specific undertakings that the applicant will agree to as a condition of WTO membership. Although the negotiations are bilateral, the commitments apply to all WTO Members due to the most-favoured nation principle (MFN). The working party will finalize the accession terms in three documents after the completion of bilateral negotiations. They are: the working party report, the protocol of accession, and the attached schedules containing the new Member's specific liberalization commitments. The final accession terms are presented to the WTO body for a vote. If two-thirds of WTO Members favour the accession, the applicant may sign

Treaty and Law in the Ministry of Foreign Trade and Economic Cooperation, People's Republic of China, responsible for legal issues in China's application for the WTO membership and hence participated in the Sino-US, Sino-EU, and Sino-Mexican bilateral negotiations and multilateral negotiations in Geneva on China's accession to WTO); also see, R. Bhala, 'Enter the Dragon: An Essay on China's WTO Accession Saga', *American University International Law Review*, vol. 15, (1999), 1469. For a summary of the history of China's accession to the WTO, see, e.g., Q. Kong, *China and the World Trade Organisation: A Legal Perspective*, New Jersey, London, Singapore and Hong Kong: World Scientific, (2002), pp. 3-7; and K. Halverson, 'China's WTO Accession: Economic, Legal, and Political Implications', *Boston College International & Comparative Law Review*, vol. 27, (2004), 319, pp. 323-326.

⁷⁰ See, WTO, *How to Join the WTO: the Accession Process*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org3_e.htm.

the protocol and accede to the WTO.⁷¹

China's accession was arguably in line with the above process for accession.⁷² China was one of the 23 original signatories of the GATT in 1947. Due to some political reasons, however, the Chinese government represented by the Chinese Nationalist Party withdrew from the GATT on the 5th May 1950.⁷³ The Chinese Communist Party then argued that the Chinese Nationalist Party had no right to represent the whole of China because it had lost its control over China at that time except Taiwan.⁷⁴ Based on this argument China, led by the Chinese Communist Party, has never recognised the withdrawal from the GATT by the Nationalist Party. Nevertheless, China applied for a resumption of membership to the GATT as a Contracting Party in 1986. Momentum for China's accession application began to build in 1999 when the US and China concluded a bilateral agreement on China's entry into the WTO.⁷⁵ In 2000, China concluded a similar bilateral agreement with the EU.⁷⁶ In the same year, the US granted China Permanent Normal Trade Relations (PNTR).⁷⁷ China's PNTR status cleared the way for the US to grant China the MFN, as required by Article I of the GATT. After the successful conclusion of the bilateral trade agreements with the US and the EU, China hastened its negotiation process for the accession to the WTO.

After fifteen years of negotiations, the decision to accept China as a WTO Member was made by a consensus at the Doha Ministerial Meeting on the 10th

⁷¹ The Marrakesh Agreement, Art. XII (2).

⁷² See the Table I-1: Events Leading Up to China's WTO Accession.

⁷³ WTO Press Release, 'WTO Successfully Concludes Negotiations on China's Entry', 17th September 2001, pp. 3-4, www.wto.org/english/news_e/pres01_e/pr243_e.htm.

⁷⁴ In 1950, the Nationalist Party retreated to Taiwan and lost control the Mainland China.

⁷⁵ U.S.-China Bilateral WTO Agreement, 15th November 1999, <http://clinton4.nara.gov/WH/New/WTO-Conf-1999/factsheets/fs-004.html>.

⁷⁶ E.U.-China Bilateral WTO Agreement, 19th May 2000, http://europa.eu.int/comm/trade/issues/bilateral/countries/china/index_en.htm.

⁷⁷ The Jackson-Vanik Amendment to the 1974 Trade Act, 19 U.S.C. § 2432 (prohibiting the American government from granting unconditional most favoured nation (MFN) status to any non-market economy country that denies its citizens the freedom to emigrate). Until 2000, China's MFN status had to be renewed by the American Congress every year.

November 2001.⁷⁸ The Chinese government accepted the Protocol on the Accession of the People's Republic of China (hereinafter the Protocol on China's Accession) on the 11th November 2001.⁷⁹ Consequently, it became the 143rd WTO Member on the 11th December 2001. This historical step was the result both of an arduous process within China and intensive negotiations with the world's major trading nations. China's accession to the WTO 'constitutes a landmark decision for the Chinese economy reform comparable, to some extent, to the "open door policy" launched in December 1978'.⁸⁰ It is widely considered as 'part of a larger strategy of massive and fundamental economic reform'.⁸¹ The OECD also expressed a similar view. It notes that China's accession to the WTO 'marks an important milestone along the reform path China has been following for more than twenty years, rather than a new direction.... WTO entry is a complementary aspect of the next phase of China's reforms'.⁸²

China's GATT/WTO negotiations lasted longer than any other Members' negotiations. There are at least two reasons why it took China fifteen years to join the WTO. First, China had to convert its own economic system from a centrally planned economy to a market economy in order to join the GATT/WTO. Although this transition is in line with China's economic reform agenda, it was still not easy to transform China's economic system in a short time due not only to political difficulties but also economic hardship. Second, China's unique economic situation has also contributed to the prolonged negotiation. Its economy and trade are significant. In fact, it was the biggest economy and trading country that was outside of the WTO. In addition, some WTO Members, particularly the US, were worried about China's potential growth. Thus, they required exceptionally severe terms from China. They argued that China should

⁷⁸ Accession of the People's Republic of China, WT/L/432, 10th November 2001.

⁷⁹ For the text of the Protocol on the Accession of the People's Republic of China, see, WTO, *Protocol on the Agreement of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organisation*, Cambridge: Cambridge University Press, (2003).

⁸⁰ OECD, *China in the World Economy: The Domestic Policy Challenges*, Paris: OECD, (2002), p. 163.

⁸¹ D. Clark, 'China's Legal System and the WTO: Prospects for Compliance', *Washington University Global Studies Law Review*, vol. 2, (2003), 97, p. 97.

⁸² OECD, *China in the World Economy: The Domestic Policy Challenges (Synthesis Report)*, Paris: OECD, (2002), p. 5, <http://www.oecd.org/dataoecd/45/57/2075272.pdf>.

join the WTO as a developed country, although many economic indicators suggested that it still fell within the category of a developing country, which would enable it to be in receipt of special and differential treatment and implement reforms over a longer period of time.⁸³

2.1.2 China's WTO Commitments

China's WTO commitments comprise the consolidation of the thirty-seven bilateral agreements with thirty-seven WTO Members including the US and the EU, and several multilateral agreements with the WTO working party concerning modalities by which China carries out its obligations and responsibilities. The negotiations between China and the WTO Working Party on the Accession of China aimed to ensure that China would bring its trade regime into conformity with all the rules, practices, and obligations required by the WTO agreements. The results of these negotiations were finalised in the Report of the Working Party on the Accession of the People's Republic of China (hereinafter Report of the Working Part on China's Accession)⁸⁴ and the Protocol on China's Accession that outline the terms of China's membership.

The full list of China's WTO commitments is in the Annexes of the Protocol on China's Accession and is available at the WTO website. These commitments are extensive. For a comprehensive understanding of them, one could pore over the some 1,000 pages of the Protocol, the Report of the Working Party on China's Accession, and Schedules of China's Commitments on Goods and Services.⁸⁵ The OECD published a summary of China's WTO commitments.⁸⁶ The Office of US

⁸³ About how China insisted on being treated as a developing country member of the WTO during the negotiation of accession to the WTO, see, F. Abbott, 'Reflection Paper on China in the World Trading System: Defining the Principles of Engagement', in F. Abbott, ed., *China in the World Trading System: Defining the Principles of Engagement*, The Hague, London and Boston: Kluwer Law International, (1998), 1, pp. 26-28.

⁸⁴ For the text of the Report of the Working Party on the Accession of the People's Republic of China, see WTO document, WT/ACC/CHN/49, (2001).

⁸⁵ See, WTO, (2003), note 79.

⁸⁶ OECD, *China in the World Economy: The Domestic Policy Challenges*, Paris: OECD, (2002), pp. 749 ff.

Trade Representative also summarised China's WTO commitments.⁸⁷ Some academics also produced some summaries of China's WTO commitments.⁸⁸

By becoming a full member of the WTO, China has in fact made three tiers of commitments. These three categories of commitments constitute China's WTO accession package. The first category is the commitment to the principles of the WTO, such as free trade, MFN, national treatment and transparency. These principles are the spirit of the WTO and expounded in the various agreements setting up the WTO and its predecessor, the GATT. The second category is the multilateral agreements within the WTO. This is the basic requirement for joining the WTO. The third category is the commitment to the set of rules governing trade for specific sectors, such as agricultural goods, textile goods, information technology and telecommunications.

2.2 Is China Bound by Its WTO Commitments?

There is no doubt that the fundamental principle of treaty law is the proposition that treaties are binding upon the parties to them and must be performed in good faith.⁸⁹ This principle is referred to as *pacta sunt servanda* and is arguably the oldest principle of international law. It was reaffirmed in Article 26 of the Vienna Convention on the Law of Treaties.⁹⁰ Article II of the Marrakesh Agreement provides:

⁸⁷ See, WTO, *Background Information on China's Accession to the World Trade Organisation*, 11th December 2001,

http://www.ustr.gov/Document_Library/Fact_Sheets/2001/Background_Information_on_China's_Accession_to_the_World_Trade_Organization.html.

⁸⁸ See, e.g., C. Ching and H.-Y. Ching, *Handbook on China's WTO Accession and Its Impacts*, London: World Scientific, (2003), pp. 7-152; Q. Kong, 'China's WTO Accession: Commitments and Implications', *Journal of International Economic Law*, vol. 3, (2000), 655; For a sector-by-sector comparison of China's WTO commitments with those of other WTO Members, see, N. Lardy, *Integrating China into the Global Economy*, Washington: Brookings Institution Press, (2002), pp. 69-79.

⁸⁹ See the Vienna Convention on the Law of Treaties, Arts. 31, 46 and 69; *Nicaragua Case (Merit)*, I.C.J. Rep. 1986, pp. 392 and 418; *Legality of the Threat or Use of Nuclear Weapons Case*, I.C.J. Rep. 1996, para. 102.

⁹⁰ See e.g., the *Gabčíkovo-Nagymaros Project Case*, I.C.J. Rep. 1997, pp. 7, 78-79.

2. The agreements and associated legal instruments included in Annexes 1, 2 and 3 (hereinafter referred to as ‘Multilateral Trade Agreements’) are integral parts of this Agreement, binding on all Members.

...

3. The agreements and associated legal instruments included in Annex 4 (hereinafter referred to as ‘Plurilateral Trade Agreements’) are also part of this Agreement for those Members that have accepted them, and are binding on those Members. The Plurilateral Trade Agreements do not create either obligations or rights for Members which have not accepted them.

Now the question is whether China’s WTO commitments are binding on China. The Protocol on China’s Accession provides:

The WTO Agreement to which China accedes shall be the WTO Agreement as ratified, amended or otherwise modified by such legal instruments as may have entered into force before the date of accession. This Protocol, which shall include the commitments referred to in para. 342 of the Working Party Report, shall be an integral part of the WTO Agreement.⁹¹

In essence, thus, the Protocol on China’s Accession is an agreement between China and other WTO Members.

The Chinese Constitution 1982 stipulates that the State Council is responsible for ‘conducting foreign affairs and conclude[ing] treaties and agreements with foreign states’.⁹² It also provides that the Standing Committee of the National People’s Congress (NPC) has the power to ‘decide on the ratification or abrogation of treaties and important agreements concluded with foreign states’.⁹³ Article 7 of the Law of Procedures for Concluding Treaties of the People’s Republic of China 1990, which concerns the procedures for negotiating and ratifying international legal instruments, including treaties (条约, *Tiaoyue*) and agreements (协定, *Xieding*), lists the conditions under which a treaty or agreement needs the approval of the Standing Committee of the NPC. In regard to WTO Agreements, the Report of the Working Party on China’s Accession clearly

⁹¹ The Protocol on China’s Accession, Part I, Art. 1(2).

⁹² The Chinese Constitution 1982 (as amended in 2004), Art. 89(9).

⁹³ *Id.*, Art. 67(14).

provides: ‘the WTO Agreement fell within the category of “important international agreements” subject to the ratification by the Standing Committee of the National People’s Congress’.⁹⁴

The Chinese Constitution does not require the publication of an international treaty as a precondition of its validity. Therefore, an international treaty that is signed by the State Council becomes effective upon ratification by the NPC Standing Committee. In theory, the NPC Standing Committee can refuse to ratify a treaty signed by the State Council. In practice, however, there has been no case so far in which the NPC Standing Committee refused to ratify a treaty that has been signed by the State Council. There is no exception for the ratification of China’s WTO commitments. The NPC Standing Committee ratified them at different times since these negotiations were not concluded at the same time. For instance, the US and China reached a bilateral agreement on the conditions of China’s WTO accession in 1999. Like other treaties and agreements that China has ratified, thus, all China’s WTO commitments, except the Protocol on China’s Accession, are binding on China. There is a procedural problem in regard to the ratification of the Protocol on China’s Accession. The 9th NPC Standing Committee ratified the Protocol on China’s Accession on the 25th August 2000, long before the Protocol on China’s Accession itself had taken its final form and been signed by the Chinese government’s representative in Doha. Thus, the act of the 9th NPC Standing Committee is virtually a before-the-fact authorization rather than an after-the-fact ratification. From this view, the ratification procedure for the Protocol on China’s Accession is defective. Does this imply that the Protocol on China’s Accession is ineffective?

In regard to this issue, the Vienna Convention on the Law of Treaties clearly provides:

A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of

⁹⁴ The Report of the Working Party on China’s Accession, para. 67. This paragraph itself is not binding on China since it is not included in paragraph 342. Nevertheless, it does show that China is going to implement its WTO commitments through incorporating these commitments into domestic laws.

fundamental importance.⁹⁵

Despite this procedural defect, therefore, the validity of the Protocol on China's Accession is unquestionable as a matter of international law under Article 46 of the Vienna Convention on the Law of Treaties.

Article II:2 of the Agreement Establishing the WTO clearly sets out that 'The agreements and associated legal instruments included in Annexes 1, 2 and 3 ... are integral parts of this Agreement, binding on all Members'. As a signatory and party to the WTO, China clearly accepts that the obligations contained in the WTO Agreements are legally binding upon it. How those obligations are to be given effect may be a matter of dispute, but their binding nature is not, and it is primarily the political institutions in China which must give effect to WTO law. If a Chinese action or measure is found to conflict with the provisions of the WTO, for example, it is up to China to find a solution.

2.3 How Does China Implement its WTO Commitments?

Article XVI:4 of the Marrakesh Agreement requires that "Each Member shall ensure conformity of its laws, regulations and administrative procedures with its obligations provided in the annexed Agreements".⁹⁶ However, it does not stipulate how WTO Members shall ensure the conformity. As the Panel in *United States- Sections 301-310 of the Trade Act of 1974* claimed, the WTO had not so far been interpreted by WTO institutions as a legal order producing direct effect in WTO Members' domestic law.⁹⁷ Consequently, each WTO Member can decide its own means and ways to implement its obligations in its domestic legal system as long as they 'ensure the conformity of its laws, regulations and administrative procedures with its obligations provided in the annexed Agreements'.⁹⁸ The implementation of this conformity obligation and the effect on domestic law are,

⁹⁵ The Vienna Convention on the Law of Treaties, Art. 46 (1).

⁹⁶ The Marrakesh Agreement, Art. XVI(4).

⁹⁷ Panel Report, *United States- Sections 301-310 of the Trade Act of 1974 (US-Section 301 Trade Act)*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815, para. 7.72.

⁹⁸ J. Bourgeois, 'The European Court of Justice and the WTO: Problems and Challenges', in J. Weiler, ed., *The EU, the WTO and the NAFTA: Towards a Common Law of International Trade?*, Oxford: Oxford University Press, (2000), 71, p. 109.

therefore, left to individual WTO Members to determine. What follows is to examine how China will implement its WTO commitments.

2.3.1 WTO Members' Approaches to Implement Their WTO Commitments

Legal theory posits two basic solutions with respect to the relationship between international law and domestic law: monism and dualism. Monism means that both international law and domestic law form parts of the same legal order.⁹⁹ Exponents of monism generally agree that international law is directly applicable in domestic law and prevails over inconsistent domestic laws.¹⁰⁰ Dualism means that international law and domestic law are separate systems of law.¹⁰¹ Neither international law nor domestic law has the power to alter the rules of the other. Each is supreme within its own sphere so that a domestic court would apply domestic law in the case of a conflict between domestic law and international law. According to the dualist view, international treaties are not self-executing with the domestic legal system. In order to take effect in the national legal regime, international treaties must be implemented by enactment of domestic legislation. In reality, however, neither monism nor dualism corresponds entirely with state practice. In fact, practice by most countries combines the monist and dualist approaches.

The WTO Agreements can be applied directly within a WTO Member's domestic legal system without further domestic legislation, where such Member follows monist approach.¹⁰² In practice, several WTO Members follow a monist approach to implement WTO Agreements. These countries include Chile, Mexico, the

⁹⁹ See, e.g., I. Brownlie, *Principles of Public International Law*, 5th ed., Oxford: Oxford University Press, (1998), pp. 31-33.

¹⁰⁰ See, e.g., H. Kelsen, *Principles of International Law*, 2nd ed., New York: Rinehart and Company, (1966), pp. 553-588.

¹⁰¹ See, I. Brownlie, (1998), note 99, pp. 31-33.

¹⁰² But it does not mean that there is no domestic legislation in regard to implementing WTO Agreements in these Members. It only means that WTO rules can be applied in domestic law even without the enactment of such domestic legislation. Some WTO Members which follow monist approach, such as Chile, have enacted several new pieces of legislation in order to implement the WTO Agreements.

Netherlands, Philippines, Poland, and Venezuela. However, the situation is different where a WTO Member follows the dualist approach. The WTO rules cannot be applied in the domestic legal system unless there is further relevant legislation transforming the WTO agreements. In practice, the majority of the WTO Members, including the four major trading powers— the US,¹⁰³ the EU,¹⁰⁴ Japan and Canada, follow a dualist approach.¹⁰⁵

There are two ways of implementing WTO Agreements where WTO Members follow the dualist approach. First, a WTO Member enacts an overarching statute in which the WTO Agreements are given effect in such Member's domestic law. In practice, Brazil, Canada, Hungary, Indonesia, and the US follow this approach. In the US, for instance, the WTO Agreements were given effect in the American law by the Uruguay Round Agreements Act (URAA) on the 8th December 1994. In Canada, the WTO Agreements were given effect in Canadian law by the WTO Agreement Implementation Act on the 1st January 1995.

Second, instead of enacting an overarching statute, a WTO Member may enact numerous new laws and amend existing laws in order to implement WTO agreements. In practice, Argentina, Australia, the EC, Hong Kong, India, Japan, Singapore, Switzerland, and Thailand adopt this approach. For example, the EC Council Decision 94/800/EEC promulgates the WTO Agreements.¹⁰⁶ In addition to this Decision, the Community institutions have adopted several legislative instruments to ensure that Community law complies with the international obligations of the Community under the WTO law. The Community Customs Code¹⁰⁷ and its implementing legislation, as amended,¹⁰⁸ contain several

¹⁰³ See, D. Leebron, 'Implementation of the Uruguay Round Results in the United States', in J. Jackson and A. Sykes, eds., *Implementing the Uruguay Round*, Oxford: Clarendon Press, (1997), 175.

¹⁰⁴ See, P. Van den Bossche, 'The European Community and the Uruguay Round Agreements', in J. Jackson and A. Sykes, eds., (1997), note 102, 23.

¹⁰⁵ For an overview of whether specific WTO Members give direct effect to WTO Agreements in their domestic legal order, see, C. George and S. Orava, eds., *A WTO Guide for Global Business*, Oxford: Cameron May, (2002).

¹⁰⁶ EC Council Decision 94/800/EEC was adopted on the 22nd December 1994, OJ 336, 23.12.94.

¹⁰⁷ The Community Customs Code by Council Regulation (EEC) No. 2913/92, OJ 302, 19.10.92.

¹⁰⁸ Commission Regulation (EEC) No. 2454/93, OJ 253, 11.10.93.

provisions that reflect the terms of the relevant WTO Agreements. Following the conclusion of the Uruguay Round, the Community also enacted (or upgraded) a number of commercial policy instruments, such as Council Regulation 2026/97 on protection against subsidised imports from countries not members of the EC.¹⁰⁹

2.3.2 China's Approach to Implementing Its WTO Commitments

The Chinese Constitution 1982 remains silent on whether a treaty shall be applied directly or through domestic law. Chinese practice in this regard is not consistent. Sometimes, China follows a monist approach. For example, Article 142 of General Principles of Civil Law of the People's Republic of China, provides: 'If any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall prevail, except for those provisions to which China has declared its reservations'. Sometimes, China follows a dualist approach. In 1986, for instance, the 6th NPC Standing Committee adopted a special law 'Regulations on Diplomatic Privileges and Immunity' for the purpose of implementing the Vienna Convention on Diplomatic Relations.¹¹⁰

In regard to implementing the WTO rules, China follows a dualist approach. Thus, China's WTO commitments need to be given further legislative effect in order to be applicable within China's domestic legal system. There are several reasons for this. First, the WTO Agreements are very complicated. Thus, it is far from easy for China, like other WTO Members that follow a dualist approach, to implement the WTO rules automatically without further domestic legislation. Second, some WTO obligations are not clearly defined. It would be difficult to expect domestic courts to apply these obligations without further definition. Third, implementing WTO rules through further legislation gives China extra time to fulfil its WTO obligations.

The Report of Working Party on China's Accession lays down China's approach to the implementation of its WTO commitments. It stated:

¹⁰⁹ OJ 288, 21.10.1997.

¹¹⁰ China acceded to the Vienna Convention on Diplomatic Relations 1961 in 1975.

China would ensure that its laws and regulations pertaining to or affecting trade were in conformity with the WTO Agreement and with its commitments so as to fully perform its international obligations. For this purpose, China had commenced a plan to systematically revise its relevant domestic laws. Therefore, the WTO Agreement would be implemented by China in an effective and uniform manner through revising its existing domestic laws and enacting new ones fully in compliance with the WTO Agreement.¹¹¹

Thus, China has clarified that it will implement the WTO obligations through enacting new laws and amending existing legislation rather than enacting an overarching law. This involves the examination and review of all existing laws, regulations and rules. In principle, those which are found inconsistent with WTO Agreements have to be amended or repealed; where no provisions can be found corresponding to relevant WTO Agreements, new laws or regulations will be enacted pursuant to the WTO Agreements.

This approach has been confirmed in the Secretariat Report of China's first trade policy review under the Trade Policy Review Mechanism (TPRM) by claiming that China implements the WTO Agreement and the Protocol on China's Accession through enabling legislation.¹¹² During the Meeting for China's trade policy review, the Chinese delegate also claimed:

To implement its accession commitment, the Chinese government reviewed its legal framework, including laws enacted by the NPC and its Standing Committee, administrative regulations by the central government, i.e. the State Council, and rules and measures promulgated by ministries and agencies of the central government. As depicted in the Secretariat Report, amendment and enactment of laws and regulations reflected the effort by the Chinese government to bring its legal framework in line with the WTO rules.¹¹³

China's approach to implementing the WTO rules has a disadvantage. According

¹¹¹ The Report of the Working Party on China's Accession, para. 67.

¹¹² Trade Policy Review Body, *Trade Policy Review - Report by the Secretariat – People's Republic of China*, WT/TPR/S/161, 28th February 2006, p. 34.

¹¹³ Trade Policy Review Body- Trade Policy Review of People's Republic of China- Report by the Secretariat, WT/TPR/M/161/Add.2, 11th September 2006, p. 14.

to this approach, China has to review hundreds of if not thousands of pieces of legislation in order to bring such legislation into conformity to the WTO rules. Thus, Donald C. Clarke claimed: 'It is well understood both inside and outside of China that the task of making China's laws and regulations conform to World Trade Organization (WTO) requirements is a huge one'.¹¹⁴

3 Conclusion

In general, the adverse impact of anticompetitive practices on international trade has been widely recognised, although there is no unanimous agreement on what practices should be condemned in different competition regimes. In the absence of an effective competition policy, the benefits of trade liberalization could be nullified or at least reduced. In acknowledging this, the GATT/WTO has included a number of competition-related rules during the last five decades. However, there still lacks a general agreement on competition within the existing WTO framework. On the one hand, this leads to the situation that the WTO can have impact on the adoption and implementation of WTO Members' national competition laws due to the existence of the competition-related WTO rules. On the other hand, the WTO impact has been limited due to the lack of a competition-specific agreement under the WTO. The WTO does not impose an obligation on its Members to enact a comprehensive domestic competition law. Because of this, some WTO Members, the EU in particular, tried to initiate a negotiation of a new agreement on competition within the WTO system. It is necessary to recognize the relevance and the limitations of the WTO to the development of WTO Members' national competition policy and law in order to understand the following chapters (chapter three, four, five and six) that examine the impact of the WTO on the formulation of the Antimonopoly Law 2007.

After fifteen years of negotiations, China joined the WTO in December 2001. As Karen Halverson summarized on China's accession to the World Trade Organisation (WTO), 'No country has endured as lengthy an accession process to the GATT.../WTO as China, nor has any country acceding to the WTO been asked

¹¹⁴ D. Clark, (2003), note 81, 97.

to take on as many concessions as the price for admission.¹¹⁵ Like other WTO Members, China is bound by its WTO commitments. Since the WTO does not specify how its Members should implement their WTO commitments, WTO Members adopt different approaches to implement their WTO commitments. China adopts the dualist approach and gives effects of its WTO commitments through amending existing legislation and enacting new one.

¹¹⁵ K. Halverson, (2004), note 69, 319, p. 323.

Table I-1: Events Leading Up to China's WTO Accession

Year	Event
1948	GATT went into effect and China was a Contracting Party
1950	China (represented by Chinese National Party) withdrew from GATT
1982	China was granted observer status in GATT
1986	China notified GATT of intent to renegotiate terms of membership, Hong Kong became a GATT Contracting Party
1987	Working party on China's membership to GATT was established
1989	Discussions of China's membership was suspended until 1992
1992	Working party on Taiwan's accession established
1994	Uruguay round of trade negotiations was completed
1995	WTO entered into force, China applied for accession to WTO
1999	United States and China signed bilateral agreement on China's accession
2000	U.S. Congress passed PNTR legislation, EU and China signed bilateral agreement on China's accession
2001	China's accession to WTO becomes effective

Sources: WTO website and the website of PRC Ministry of Foreign Affairs.

Chapter Two:

China's Competition Legislation

This chapter examines the issues surrounding China's competition legislation in order to provide a background for understanding the arguments in the following chapters. To this end, it is structured into two sections. The first section focuses on the history and the status of China's competition-related legislation before the adoption of the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007) on the 30th August 2007.¹ The second section explores the reasons why China needs a comprehensive competition law and sets out the history of the formulation of the Antimonopoly Law 2007.

1 The History and the Status of China's Competition-Related Legislation before the Adoption of the Antimonopoly Law 2007

1.1 The History of China's Competition-Related Legislation before the Adoption of the Antimonopoly Law 2007²

The development of China's competition-related legislation is closely related to the process of China's Economic Reform and Open Door Policy in 1978.³ Before that, China applied a centrally planned economy where market mechanism was

¹ The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

² For the examination of the development of competition-related legislation in China, also see, J. Berry, 'Antimonopoly Law in China: A Socialist Market Economy Wrestles with Its Antitrust Regime', *International Law & Management Review*, vol. 2, (2005), 129, pp. 129-140.

³ China's Economic Reform and Open Door Policy [改革开放, *Gaige Kaifang*] refers to the program of economic changes in China.

denied as an efficient means to allocate resources. The development of competition-related legislation in China can be divided into three stages.

1.1.1 Stage One: Planned Commodity Economy (From 1978 to 1992)

From 1978 to 1992, China applied a planned commodity economy.⁴ This means that the Chinese economy was operated in a market setting but did not amount to an overall market economy during that period.⁵ Accordingly, market competition was allowed under the planned commodity economy. The underlying theory is that on the one hand, competition was no longer considered to be unique to capitalism, but could ‘stimulate the economy and benefit socialism’.⁶ On the other hand, Chinese officials stressed that competition between the State Owned Enterprises (SOEs) was ‘fundamentally different from that under capitalism’.⁷ Competition was discouraged when it posed a threat to other more favourable strategies to strengthen the SOEs, such as merger and horizontal co-operation.⁸

Under these circumstances, China started its competition-related legislation. In 1980, the Interim Regulation for the Promotion and Protection of Competition in the Socialist Economy (hereinafter the Interim Regulation for Competition 1980) was promulgated by the State Council.⁹ It is a set of general and abstract rules.

⁴ See the Decision of the Central Committee of the Communist Party of China on Reform of the Economic Structure, Part IV, adopted by the 12th Central Committee of the Chinese Communist Party at its Third Plenary Session on the 20th October 1984. For an English translation, see B. Liu and Q. Wu, eds., *China's Socialist Economy: An Outline History (1949-1984)*, Beijing: Beijing Review, (1986), 672, pp. 680-683.

⁵ S. Shou, *The Prerequisites to Successfully Reform State Enterprises*, 6th July 2001, http://www.chinareform.org.cn/cgi-bin/BBS_Read.asp?Topic_ID=604.

⁶ S. Liu and Q. Wu, (1986), note 4, 672, p. 688.

⁷ *Id.*

⁸ Centre of Economics Studies of Fu Dan University, *New Approach to Enterprises reform and development*, Shanghai: Fu Dan University, (1988), pp. 199-203.

⁹ The Interim Regulation for the Promotion and Protection of Competition in the Socialist Economy, [关于开展和保护社会主义的竞争的暂行规定, *Guanyu Kaizhan He Baohu Shehui Zhuyi De Jingzheng De Zanxing Guiding*], was promulgated on 17th October 1980 and reprinted in Wang

It aims to introduce a maximum degree of competition into the planned commodity economy. It represents the first legislative attempt to combat anticompetitive practices in China. It stipulates: 'In economic life, apart from the products which are to be exclusively traded in by the departments or units designated by the state, no other products may be monopolized or exclusively traded in'.¹⁰ There are contradictions in this regulation. For example, on the one hand, it stipulates that necessary adjustments should be made to the pricing system in order to stimulate effective competition. On the other hand, it provides that enterprises need to apply for government approval to raise prices. Furthermore, it provides that prices of designated key products must remain 'stable'.¹¹ In addition, its contents are 'proclamations rather than concrete provisions that could be applied by judges' in courts.¹²

Based on the Interim Regulation for Competition 1980,¹³ various competition-related rules at the local level were promulgated in many provinces, autonomous regions and municipalities during the 1980s, such as the Provisional Rule of Wuhan City against Unfair Competition 1985¹⁴ and the Provisional Rule of Shanghai Municipality against Unfair Competition 1987.¹⁵

Huaian et al. eds., *Collection of Laws of the People's Republic of China 1949-1989* [《中华人民共和国法律全书 1949-1989, Zhonghua Renmin Gongheguo Falu Quanshu 1949-1989》], (1989), pp. 1137-1138. It ceased into force in 2000.

¹⁰ The Interim Regulation for Competition 1980, Art. 3.

¹¹ *Id.*, Art. 5.

¹² C. Jin and W. Luo, *Competition Law in China*, New York: William S. Hein & Co., (2002), p. 6.

¹³ Article 10 of the Interim Regulation for Competition 1980 encourages local governments to adopt their own measures in order to implement this regulation.

¹⁴ The Provisional Rule of Wuhan City against Unfair Competition, [《武汉市制止不正当竞争暂行办法》, *Wuhan Shi Zhizhi Bu Zhengdang Jingzheng Zanxing Banfa*]. It came into force on the 29th November 1985, http://www.law-star.com/showtxt?dbstype=lar&dbstext=?????????&multisearch=false&multisearch=false&dbstype=lar&dbstext=?????????&isopen=1&keywords=&dbn=lar&fn=lar_17.086.txt&upd=1.

¹⁵ The Provisional Rule of Shanghai Municipality against Unfair Competition, [《上海市制止不正当竞争暂行规定》, *Shanghai Shi Zhizhi Bu Zhengdang Jingzheng Zanxing Guiding*], it came into force on the 15th October 1987, http://www.law-star.com/showtxt?dbstype=lar&dbstext=?????????&multisearch=false&multisearch=false&dbstype=lar&dbstext=?????????&isopen=1&keywords=&dbn=lar&fn=lar_6.150.txt&upd=1.

On the 12th April 1986, the 6th National People's Congress (NPC) adopted the General Principles of the Civil Law of the People's Republic of China (hereinafter the General Principles of Civil Law 1986).¹⁶ Article 58 (4) invalidates acts performed through malicious collusion and are detrimental to the interests of the State, a collective or a third party. On the 11th September 1987, the State Council promulgated the Regulation on the Administration of Prices of the People's Republic of China (hereinafter the Regulation of Prices 1987),¹⁷ which prohibits enterprises and industrial institutions from negotiating on and monopolizing prices.

Except Article 58 (4) of the General Principles of Civil Law 1986, all the competition-related rules during this period were promulgated by the State Council and some ministries. During this period, therefore, competition-related legislation remained at relatively low level. In addition, it was sporadic. This illustrated that competition-related legislation was not considered as the top legislative priority by Chinese policy-makers during this period, because competition was only allowed in a limited sphere during this period. In sum, China's competition-related legislation was at the beginning stage during this period.

1.1.2 Stage Two: Socialist Market Economy (From 1992 to 2001)

During the 14th Congress of the Chinese Communist Party held in 1992, China further readjusted the goal of its economic reform to establish a socialist market economy, under which the market mechanism replaces the planning system as the means to allocate resources.¹⁸ In response to this new development of

¹⁶ The General Principles of the Civil Law of the People's Republic of China, [《中华人民共和国民法通则》, *Zhonghua Renming Gongheguo Minfa Tongzhe*] came into force on the 1st January 1987, http://www.law-lib.com/law/law_view.asp?id=3633.

¹⁷ The Regulation on the Administration of Prices of People's Republic of China [《中华人民共和国价格管理条例》, *Zhonghua Renmin Gongheguo Jiage Guanli Tiaoli*] came into force on the 11th September 1987, <http://www.sz.sx.cei.gov.cn/DNKJ/flfg/fl50.htm>.

¹⁸ See, 'Report of the 14th National Congress of the Chinese Communist Party', 12th October 1992, <http://www.people.com.cn/GB/shixheng/252/5089/index.html>.

economic reform, the Chinese Constitution 1982 was amended in 1993. It stipulates: 'The state has put into practice a socialist market economy'.¹⁹

In 1993, the 8th NPC Standing Committee enacted the Anti Unfair Competition Law of the People's Republic of China (hereinafter the LAUC 1993).²⁰ As its name illustrates, the LAUC 1993 mainly focuses on unfair competition practices, such as false advertising, forgery, and defamation. In theory, anticompetitive practices should not be the subject of the LAUC. However, at the time when the LAUC was enacted, the draft Antimonopoly Law failed to be enacted. Due to this reason, a few provisions regarding anticompetitive practices were incorporated into the LAUC. From this view, thus, the LAUC 1993 is a significant piece of legislation in the history of the Chinese competition-related legislation. It signals a desire by Chinese officials to incorporate some competition rules into the Chinese legal system. However, it is inadequate to deal with all types of anticompetitive practices due to its limited competition-related provisions. Thus, Youngjin Jung and Qian Hao argued: 'As the LAUC is limited in scope and its implementing regulations have little authority, anti-monopoly provisions have appeared in legislation beyond the reach of the LAUC'.²¹

On the 24th December 1993, the State Administration for Industry and Commerce (SAIC),²² which is the enforcement authority of the LAUC 1993, promulgated Certain Rules on Prohibiting Public Utility Enterprises from Committing Restrictive Acts against Competition.²³ These rules are based on Article 6 of the LAUC 1993. They provide more details on prohibiting statutory monopolies, since the purpose of these rules is to facilitate the application of Article 6 of the LAUC 1993.

¹⁹ The Chinese Constitution 1982 (as amended in 1993), Amend. Two, Sec. 7.

²⁰ An English version is available at <http://en.chinacourt.org/public/detail.php?id=3306>.

²¹ Y. Jung and Q. Hao, 'The New Economic Constitution in China: A Third Way for Competition Regime?', *Northwestern Journal of International Law & Business*, vol. 24, (2003), 107, p. 129.

²² The SAIC is an organization directly under the State Council. For the function of the SAIC, see, www.saic.gov.cn.

²³ The Certain Provisions on the Prohibiting Public Utility Enterprises from Committing Restrictive Acts against Competition was promulgated by Order No. 20 of the SAIC on the 24th December 1993. An English version is available at <http://www.apeccp.org.tw/doc/China/Decision/cndec05.html>.

In 1997, the 8th NPC Standing Committee adopted the Price Law of the People's Republic of China (hereinafter the Price Law 1997).²⁴ The purpose of the Price Law 1997 is to combat price wars and predatory pricing in China, particularly in consumer goods markets. The Price Law 1997 replaced the Regulation of Prices 1987. The State Planning Commission was the enforcement authority before March 2003. After that, the National Development and Reform Commission (NDRC) replaced the State Planning Commission and thus became the enforcement authority of the Price Law 1997.²⁵

On the 30th August 1999, the 9th NPC Standing Committee adopted the Bid-Inviting and Submitting Law of the People's Republic of China (hereinafter the Bidding Law 1999).²⁶ It provides regulations in regard to bidding and inviting bids. It prohibits collusive tendering practices.²⁷ On the 20th September 2000, the State Council issued the Regulation of the People's Republic of China on Telecommunications (hereinafter the Telecommunications Regulation 2000).²⁸ Article 17 of the Telecommunications Regulation 2000 provides: 'the dominant operator in telecommunication service shall not refuse requests of the interconnection by other operators and the special-purpose net operators'. It also defines the term 'dominant operator in telecommunication service'.²⁹

This period is, therefore, significant in regard to China's competition-related legislation. It witnessed the enactment of several key competition-related

²⁴ The Price Law of the People's Republic of China came into force on the 1st May 1998. An English version is available at <http://www.chinagate.com.cn/english/430.htm>.

²⁵ In March 2003, the NDRC took over the responsibilities of the State Planning Commission. It is a macro-economic regulatory department under the State Council, with a mandate to develop national economic strategies, long-term economic plans and annual plans, and to report on the national economy and social development to the NPC. See, <http://www.ndrc.gov.cn>.

²⁶ The Bid-Inviting and Submitting Law of the People's Republic of China came into force on the 1st January 2000. An English version is available at <http://www.sh360.net/law/law12/3398.html>.

²⁷ The Bidding Law 1999, Art. 32.

²⁸ The Regulation of the People's Republic of China on Telecommunications came into force on the 25th September 2000. An English edition is available at <http://www.chinaitlaw.org/?p1=print&p2=040929235127>.

²⁹ The Telecommunication Regulation 2000, Art. 17.

national laws, such as the LAUC 1993, the Price Law 1997 and the Bidding Law 1999. These national laws and the administrative rules issued by the relevant ministries in order to implement such laws replaced most of the previous competition-related regulations, administrative rules and local rules issued during 1978-1992, such as the Regulation of Prices 1987 and the Provisional Rule of Wuhan City against Unfair Competition 1985. Compared to the previous stage, both the quality and quantity of the Chinese competition-related legislation were improved during this period.

1.1.3 Stage Three: After China's Accession to the World Trade Organisation (WTO) (From 2001 to Present)

Since China's accession to the WTO in 2001, China's transition from a centrally planned economy to a market economy was deepened and broadened.³⁰ Under its WTO commitments, China is opening its previously protected sectors and liberalizing its trade and investment policies. In order to implement its WTO commitments, China is amending its existing laws and enacting new laws. China's competition-related legislation is no exception.

On the 18th June 2003, the Interim Rule on Prohibiting Monopolistic Pricing Behaviour was issued by the newly established NDRC.³¹ It came into force on the 1st November 2003 and is based on the Price Law 1997.³² It aims to 'promote fair competition and to protect the legal rights and interests of operators and consumers'.³³ Despite its name, it focuses on both abuses of dominant positions³⁴ and horizontal restraints,³⁵ which are collectively referred to as 'monopolistic pricing activities'. It not only reiterates the existing prohibitions in other laws and regulations but also further explains such laws and regulations. According to

³⁰ For the impacts of the WTO on China's economic reform, see, e.g., H.-G. Fung, C. Pei and K. Zhang, *China and the Challenge of Economic Globalisation: The Impact of WTO Membership*, London: M. Sharpe, (2006).

³¹ An unofficial English version is available at http://51trans.net/Article_Show.asp?ArticleID=618.

³² The Interim Rule on Prohibiting Monopolistic Pricing Behaviour 2003, Art. 1.

³³ *Id.*

³⁴ *Id.*, Arts. 5, 6, 7, and 8.

³⁵ *Id.*, Art. 4.

the press release dated 30th June 2003 on the website of the NDRC, it was declared to be a 'preliminary exploration of antitrust legislation'.³⁶

1.2 The Status of China's Competition-Related Legislation before the Adoption of the Antimonopoly Law 2007

Before the adoption of the Antimonopoly Law 2007, China's competition-related legislation was scattered in different laws, administrative regulations and departmental or local government rules. The major national laws that contain competition rules were the LAUC 1993, the Price Law 1997, and the Bidding Law 1999. There were some administrative rules based on these three national laws, such as the Interim Rule on Prohibiting Monopolistic Pricing Behaviour 2003. There were also numerous competition-related rules at the local level, which are based on these three national laws. For example, more than 25 provinces in China had promulgated detailed rules based on the LAUC 1993 before the adoption of the Antimonopoly Law 2007. In addition, there were some sector regulations on competition, such as the Telecommunication Regulation 2000.

What follows focuses on the LAUC 1993, the Price Law 1997, the Bidding Law 1999 and administrative rules based on these three national laws because they were the most important competition-related legislation in China before the adoption of the Antimonopoly Law 2007. The comments regarding China's competition-related legislation are provided in the next sub-section.

1.2.1 Prohibiting Anticompetitive Agreements

Article 14 (1) of the Price Law 1997 prohibits horizontal price fixing. It stipulates that operators must not 'collude with others in controlling market prices, thereby harming the lawful rights and interests of other operators or consumers'. Article 4 of the Interim Rules on Prohibiting Monopolistic Pricing Behaviour 2003 further expands Article 14 (1) of the Price Law 1997. It prohibits price cartels by stipulating:

Operators shall not conduct any of the following acts of price monopoly through agreements, decisions or coordination: (1) Uniformly determining,

³⁶ See the NDRC website, <http://en.ndrc.gov.cn/>.

maintaining or changing prices; (2) Controlling prices by limiting the production or supply quantities; (3) Controlling prices in bid invitation and bid tendering, or auction; (4) Other acts of controlling prices.

The Bidding Law 1999 prohibits collusive tendering practices by stipulating:

Bidders shall not collude on the bid price, preclude fair competition from other bidders or prejudice the lawful rights and interests of the bid inviting party or other bidders. Bidders and the bid inviting party shall not collude in the submission of bids in order to harm the interests of the State, the public interest or the lawful rights and interests of a third party.³⁷

In fact, it reiterates Article 15 of the LAUC 1993 which provides:

Tenderers shall not submit tenders in collusion with one another to force the tender price up or down. A tenderer shall not collaborate with the party inviting tenders to exclude competitors from fair competition.³⁸

1.2.2 Abuses of Dominance

1.2.2.1 Abuses of Dominance through Pricing Practices

Articles 5, 6, 7 and 8 of the Interim Rule on Prohibiting Monopolistic Pricing Behaviour 2003 prohibit abuses of dominance through pricing practices. Article 5 prohibits resale price setting. Article 6 prohibits exploitative pricing. Article 7 prohibits predatory pricing and making price below costs through rebates, subsidies and rewards. Article 8 prohibits price discrimination under similar transaction situations.

The Price Law 1997 stipulates that business operators must not act:

To engage in dumping sales (except the cases of sales of fresh and live merchandise, seasonal merchandise and stockpiled merchandise at discount) at below cost prices in order to force out competitors or monopolise the market and disrupt the normal production and operation order to great detriment to the interests of the State or the lawful rights

³⁷ The Bidding Law 1999, Art. 32.

³⁸ The LAUC 1993, Art. 15.

and interests of other business operators.³⁹

But this provision does not specially stipulate that it is only applicable to dominant firms. Thus, the enforcement agencies do not need to consider first whether a company has a dominant position in the relevant market in order to apply this provision.

Article 11 of the LAUC 1993 can be used to combat the abuses of dominance through predatory pricing. It provides that a business operator may not, for the purpose of forcing out his competitors, sell his commodities at prices lower than cost.⁴⁰ However, it is not designed specially for combating abuses of dominance. Thus, the enforcement agencies do not need to consider first whether a company has a dominant position in the relevant market in order to apply to Article 11. Moreover, Article 11 does not define costs. But the Price Law 1997 suggests that costs include production and operation costs.

1.2.2.2 Abuses of Dominance through Non-Pricing Practices

The LAUC 1993 stipulates:

Public utility enterprises or other operators having monopolistic status according to law shall not force others to buy the goods of the operators designated by [the public utility enterprises or other operators] so as to exclude other operators from competing fairly.⁴¹

Thus, it only prohibits a particular type of abuse by statutory monopolies. There is no mention of other types of abuses by statutory monopolies, such as refusal to supply and price-fixing. Moreover, there is no mention of monopolistic firms other than statutory monopolies. In order to facilitate the application of Article 6 of the LAUC 1993, the SAIC issued the Provisions on the Prohibition of Public Utility Enterprises from Committing Restrictive Acts against Competition in 1993. As a guidance of Article 6 of the LAUC 1993, these Provisions prohibit various abuses of dominance by statutory monopolies.⁴²

³⁹ The Price Law 1997, Art. 14 (2).

⁴⁰ The LAUC 1993, Art. 11.

⁴¹ *Id.*, Art. 6.

⁴² The Provisions on the Prohibition of Public Utility Enterprises from Committing Restrictive Acts against Competition 1993, Art. 4.

Article 12 of the LAUC 1993 can be used to combat certain types of abuses of dominance. It stipulates that a business operator may not, against the will of the purchasers, conduct a tie-in sale of commodities or attach any other unreasonable conditions to such a sale. Like Article 11 of the LAUC 1993, however, Article 12 of the LAUC 1993 is not specially designed for combating abuses of dominance. Thus, the enforcement agencies do not need to consider whether a company has a dominant position in the relevant market in order to apply to Article 12.

2 The Antimonopoly Law 2007

What follows focuses on three issues: (1) Why China needs a comprehensive competition law; (2) how the Antimonopoly Law 2007 was drafted; (3) why it took so long for China to enact the Antimonopoly Law 2007.

2.1 Why Does China Need A Comprehensive Competition Law?

There are a number of reasons why China needs a comprehensive competition law.⁴³ What follows focuses on two most significant reasons.

2.1.1 Increasing Anticompetitive Practices in China

The central theme of China's Economic Reform and Open Door Policy is the switch from the centrally planned economy to the market economy. The advent of this policy witnessed far-reaching market-oriented reform leading to considerable diminution in the direct role of the State in economic activity. This policy has been associated with the deregulation of prices, the privatization of the SOEs, and the liberalization of trade and investment.⁴⁴ With the introduction

⁴³ For the discussions of these reasons, see, e.g., Y. Jung and Q. Hao, (2003), note 21, 107, pp. 110-123; also, X. Wang, 'The Prospect of Antimonopoly Legislation in China', *Washington University Global Studies Law Review*, vol. 1, (2002), 201, pp. 201-216.

⁴⁴ For a general discussion on China's transformation to market economy, see, O. Suliman, ed., *China's Transition to a Socialist Market Economy*, London: Quorum Brooks, (1998). For a

of market economy, have anticompetitive practices emerged in China?

One of the arguments that support China not adopting a comprehensive competition law is that Chinese companies are relatively small and do not possess dominant positions in the relevant markets.⁴⁵ This claim underestimates the extent of dominance possessed by some Chinese companies. At the international level, there were no less than 20 Chinese firms among the Fortune global 500 list in 2006.⁴⁶ Aluminum Corp of China (Chalco) is the second-largest maker of alumina in the world.⁴⁷ Lenovo, a Chinese personal computer (PC) manufacturer, is the third largest PC maker in the world. Four Chinese companies now supply the majority of the global demand for vitamin C. At the domestic level, Chinese companies are dominant players in some sectors, such as telecommunications, alumina, oil mining, lottery machines, insurance, banking, computer, and TV manufacture.⁴⁸ In the telecommunications sector (mobile service), for instance, China Mobile and China Unicom together had 100% market share in 2005.⁴⁹ Chalco had 100% market share in the Chinese alumina market in 2005.⁵⁰ Currently, the Chinese oil mining industry is monopolized by Petrochina, Sinopec and CNOOC. Therefore, these examples demonstrate that some Chinese companies do possess dominant positions in the relevant markets.

With the existence of dominant Chinese companies, anticompetitive practices have also emerged in China. In June 2000, for example, top managers of nine Chinese TV manufacturers, which accounted for more than 80% of the market at

detailed analysis of post-reform structures of China's economy, see, G. Chow, *China's Economic Transformation*, London: Blackwell Publishers, Inc., (2002); and, OECD, *China in the World Economy: The Domestic Policy Challenges*, Paris: OECD, (2002).

⁴⁵ J. Holden, 'China's Modernization: The Role of Competition', Harvard University Asia Center, 26th March 1999, http://www.fas.harvard.edu/~asiactr/MAS_O32699.htm; OECD, note 43, (2002), p. 391.

⁴⁶ <http://money.cnn.com/magazines/fortune/global500/2006/>.

⁴⁷ 'Chalco to spend US\$ 1.2 billion', *China Economic Review*, 15th March 2006, <http://www.chinaeconomicreview.com/subscriber/newsdetail.php?id=7023>.

⁴⁸ See Table II-1: Market Share of Top Three Companies in Sector in China.

⁴⁹ *Id.*

⁵⁰ *Id.*

that time, held a summit and agreed to form an alliance. The top TV producer, Changhong, did not join the alliance. The alliance agreement covers, among other deals, setting minimum prices for TVs sold domestically.⁵¹

Five big shopping malls in Jinan city boycotted Changhong colour TVs in 1997, forcing the producer to lower its price.⁵² In June 2002, seven gas companies in Xinyang city jointly raised gas prices by 60% (from 29 RMB per unit to 48 RMB). One term of the agreement even required each company to deposit 5,000 RMB as a good faith pledge, which would be forfeited upon violation of the price cartel.⁵³

In February 2005, Animal Science Products and Ranis Company filed petitions against six Chinese vitamin C producers, including Bulk vitamin C manufacturer China Pharmaceutical Group, at the Supreme Court of California.⁵⁴ They claimed that vitamin C customers in the United States (US) paid more for vitamin C as a result of the alleged cartel. When these cases were filed, Chinese vitamin C producers made 60% of the world's vitamin C supply, and about 80% of this was exported.⁵⁵ Although these cases were filed in the US and focused on the damage in foreign countries, 20% products by these Chinese producers were still sold in the Chinese domestic market. Thus, their practice could have an impact on

⁵¹ P. Lin, 'People's Republic of China', in D. Brooks and S. Evenett, eds., *Competition Policy and Development in Asia*, London: Palgrave Macmillan, (2005); Asian Development Bank, 'Part III. Promoting competition for long-term development', in Asian Development Bank, *Asian Development Outlook 2005*, (2005), p. 252, <http://www.adb.org/documents/books/ado/2005/ado2005-part3.pdf>; C. Wang and Y. Shen, 'Four Questions to Chinese Antimonopoly', *Worker's Daily* [工人日报, *Gongren Ribao*], 20th April 2001.

⁵² See, X. Long and D. Du, 'How to Effectively Protect Competition' [我们怎样保护有效竞争, *Women Zenyang Baohu Youxiao Jingzheng*], 9th January 2001, www.people.com.cn/GB/jinji/36/20010109/374202.html.

⁵³ See J. Yang, 'Ugly "co-Operation"' [丑陋的联合, *Choulou De Lianhe*], 14th September 2002, www.people.com.cn/GB/guandian/30/20020914/822295.html.

⁵⁴ 'China's Vitamin C Makers Ready for Anti-trust Battle', 7th June 2005, <http://www.nutraingredients.com/news/ng.asp?id=60491-vitamin-china-anti-trust>; also see, 'Chinese Vitamin C Maker in Antitrust Complaints', 23rd February 2005, <http://www.ap-foodtechnology.com/news/ng.asp?id=58285-chinese-vitamin-c>.

⁵⁵ 'China's Vitamin C Makers Ready for Anti-trust Battle', note 54.

Chinese consumers.

The latest example is in the telecommunications sector in China. As of 2007, there are only four landline providers in China: China Telecom, China Netcom, China Unicom and China TieTong.⁵⁶ China Telecom is the largest landline provider in China, while China Netcom is the second largest landline provider. China Unicom and China TieTong are much smaller than China Netcom and China Telecom. Geographically, China Telecom covers 21 provinces in Southern China, while China Netcom covers 10 provinces in Northern China.⁵⁷ In February 2007, China Netcom and China Telecom signed an agreement not to compete for landline customers in the other's territory.⁵⁸ This agreement is the result of two-year preparation by these two companies. It is even described as a gentleman's agreement.⁵⁹

With China's continuing trade liberalization, more and more international companies have invested in China. On the one hand, the entry of foreign companies has many positive effects on the Chinese economy, such as bringing in much needed investment, increasing employment and improving technology. On the other hand, China has also become the target of anticompetitive practices that are carried out by foreign companies. According to a report by the SAIC, there were a number of industries where free competition could have been limited by multinationals.⁶⁰ The affected industries included sectors of software, photosensitive materials, mobile phones, cameras, vehicle tires, and soft packaging.

⁵⁶ More about the telecommunications sector in China, see Chapter Four.

⁵⁷ There are 31 provinces totally in China.

⁵⁸ See 'China Telecom and China Netcom Reaching Agreement Not to Compete for Landline Customers' [电信网通签署君子协议承诺固话互不侵犯, *Dianxin Wangtong Qianshu Junzi Xiyi Chengnuo Guhua Hubu Qinfan*], *Beijing Morning Daily* [北京晨报, *Beijing Chenbao*], 27th February 2007, <http://tech.sina.com.cn/t/2007-02-27/01011391578.shtml>.

⁵⁹ *Id.*

⁶⁰ SAIC, 'The Competition-restricting Behaviour of Multinational Companies in China and Counter Measures' [在华跨国公司限制竞争行为表现及对策, *Zaihua Kuaguo Gongsu Xianzhi Jingzheng Xingwei Biaoxian Ji Duice*], *Journal of the State Administration of Industry and Commerce* [工商管理杂志 *Gongshang Guanli Zazhi*], vol. 5, (2004), 42. More about this report, see Chapter Three.

These are just a few examples of the existence of anticompetitive practices in China. According to the statistics provided by the SAIC, 1459 cases regarding restrictions by public utilities, predatory pricing, tie-in sales, and bid rigging were investigated by the SAIC in 2002, while there were 172 such cases in 1995.⁶¹ In particular, the number of the cases in regard to restrictions by public utilities was increased from 55 in 1995 to 1089 in 2002.⁶² However, it is not possible to know the exact number of anticompetitive practices in China because many types of anticompetitive practices are not prohibited under the existing Chinese competition-related legislation. The lack of legislation on competition leads to a lack of awareness of the existence of anticompetitive practices. Nevertheless, these data still demonstrate that anticompetitive practices are rising in China as a result of introducing a market economy.

2.1.2 China's Competition-Related Legislation Cannot Effectively Combat Anticompetitive Practices

In order to combat anticompetitive practices, China has adopted a number of pieces of competition-related legislation. Why does China need a comprehensive competition law?

2.1.2.1 Inadequacies

First, the existing competition-related legislation in China does not provide a general ban on anticompetitive practices.⁶³ Many types of anticompetitive practices, such as agreements on market share, boycott, quotas and other restrictions on production, are not prohibited. Neither the LAUC 1993 nor the Price Law 1997 provides a general ban on anticompetitive practices.

Second, the existing competition-related legislation in China is not specifically

⁶¹ See Table II-2: Competition Cases Concluded by the SAIC.

⁶² *Id.*

⁶³ The term 'the existing competition-related legislation in China' refers to the competition-related legislation before the adoption of the Antimonopoly Law 2007 since the Antimonopoly Law 2007 will not come into force until the 1st August 2008.

designed for the purpose of preventing anticompetitive practices. Most of the existing competition regulations are simply principles rather than applicable legal provisions.⁶⁴ It also lacks procedural provisions. There are no clear provisions dealing with complaints of anticompetitive practices.

Third, some key terms under a competition regime are not defined in the existing Chinese competition-related legislation. For instance, the term ‘monopoly’ is not defined in China’s competition-related legislation, although it is used in several pieces of legislation, such as the LAUC 1993. The term ‘dominant position’ is only defined in the Interim Rule on Prohibiting Monopolistic Pricing Behaviour 2003, which only applies to pricing-related abuses of dominant positions.⁶⁵ Thus, there is no general definition of ‘dominant position’.

Fourth, some terms which are used in the existing Chinese competition-related legislation are not always consistent. For example, Articles 5, 6, 7, and 8 in the Interim Rule on Prohibiting Monopolistic Pricing Behaviour 2003 use the term ‘dominance’, while Article 6 of the LAUC 1993 use the term ‘monopoly’. It is unclear whether there are any differences between dominance and monopoly under the existing Chinese competition-related legislation.

2.1.2.2 Ineffective Sanctions

First, the sanction provisions under the existing Chinese competition-related legislation are too light to prevent anticompetitive practices. Under the LAUC 1993, for instance, violators can be fined between RMB 50,000 (less than £3,400) and RMB 200,000 (less than £14,000) and can also attract the confiscation of between 100 per cent and 300 per cent of the illegally acquired revenues.⁶⁶ This fine cannot deter business operators and is not suitable to the situation of economic development.

⁶⁴ See, C. Jin and W. Luo, (2002), note 12, pp. 90-91.

⁶⁵ The Interim Regulations on Prohibition of Monopolistic Pricing Acts 2000, Art. 3 (providing that ‘dominant position’ is determined by reference to the share of the business operator in the relevant market, the degree of interchangeability of the subject products, and the difficulty of market entry for new competitors).

⁶⁶ The LAUC 1993, Art 23.

Second, the sanction provisions under the existing Chinese competition-related legislation are too complicated to be applicable in practice. Under the Price Law 1997, for instance, the maximum fine is up to five times of illegal gains.⁶⁷ However, it is extremely difficult for the enforcement agency to find out the exact gains from anticompetitive practices because lots of relevant information cannot be easily accessed. In practice, thus, such a provision does not work very well.

Third, criminal punishment is only available to one type of anticompetitive practice under the existing Chinese competition-related legislation. Under Article 50 of the Bidding Law 1999, bidder collusion can lead to imprisonment. Article 223 of the Criminal Law of the People's Republic of China provides that bidders and tenderers who collude can be fined and put into prison up to 3 years.⁶⁸ Therefore, hard-core cartels do not lead to imprisonment under the existing Chinese competition-related legislation.

2.1.2.3 Ineffective Enforcement Agencies

The impact of the existing Chinese competition-related legislation on combating anticompetitive practices has been further reduced due to the overlapping jurisdiction of enforcement agencies. At present, more than ten governmental agencies are responsible for interpreting and enforcing the competition-related legislation in China. These agencies include the NDRC for the area of pricing practices, the SAIC for overall regulation of business activities including the enforcement of the LAUC 1993, and the Ministry of Commerce as the regulator of domestic and foreign trade and inward investment. Such overlapping jurisdictions, compounded with the lack of coordination among the government agencies, have made it difficult to efficiently enforce the existing competition-related legislation.

Current enforcement agencies lack authority. They are normally departments of

⁶⁷ The Price Law 1997, Art. 40.

⁶⁸ The Criminal Law of the People's Republic of China was adopted in 1997. An English translation is available at http://www.novexc.cn/criminal_law.html.

the State Council. Combating anticompetitive practices needs an agency that has the power to oversee and monitor different sectors. Abuses of dominance are committed by giant companies. Without enough power, the agencies cannot effectively combat abuses of dominant positions. Current competition-related enforcement agencies are incapable to investigate abuses of dominant positions, not to mention enforcing their decisions.

The current enforcement agencies are decentralized. The NDRC and the pricing administration department at local government level are responsible for the Price Law 1997.⁶⁹ The SAIC and its local branches are the enforcement authorities for the LAUC 1993. In the case of the SAIC, there are no more than four levels from the national level to the county level. Because there is no central enforcement agency, the implementation of the existing Chinese competition-related legislation is fragmented.

Finally, the judicial system does not play a significant role in the enforcement of the existing Chinese competition-related legislation. Very few anticompetitive cases have been brought to courts. This is partly due to the lack of procedural rules in the existing Chinese competition-related legislation. This leads to the failure of the Chinese courts to gain experiences of handling competition cases.

2.1.3 Sub-Section Conclusion

From the above discussion, we can see that after nearly thirty years of economic reform, China has shifted its economy from a centrally planned system to a market mechanism. Competition is the main means to allocate resources in the current Chinese economy. Domestic firms have started to restrain competition through carrying out anticompetitive practices. These practices are increasing due to the improvement of the level of industry concentration. With the liberalization of Chinese investment policies, more and more foreign companies have invested in China. The increased presence of foreign companies in China has also brought anticompetitive concerns into the Chinese economy.

In the last two decades, China has combated anticompetitive practices through

⁶⁹ The Price Law 1997, Art. 40.

enacting some specified laws and regulations, such as the enactment of the LAUC 1993, the Price Law 1997 and the adoption of the Interim Regulations on Prohibition of Monopolistic Pricing Acts 2003. This approach worked well during the time when there were very few anticompetitive practices in China. With the increasing anticompetitive practices in China, however, this approach cannot accommodate the need of combating anticompetitive practices since the existing Chinese competition-related legislation is not systematic and specific enough and does not ban all types of anticompetitive practices. The absence of a comprehensive competition law is proving to be a source of major concern. Both domestic and foreign companies are exploiting the situation and curbing competition through engaging anticompetitive practices. Therefore, it is necessary and essential for China to adopt a comprehensive competition law in order to effectively combat the increasing anticompetitive practices.

2.2 The Process of Formulating the Antimonopoly Law 2007

In order to understand the Antimonopoly Law 2007, it is instructive to consider how this law was formulated. Thus, what follows explores the process of the formulation of the Antimonopoly Law 2007.

2.2.1 Stage One: Before China Joined the WTO in 2001

As early as 1987, the SAIC and five other authorities set up a drafting group to draft a competition law (including both an antimonopoly law and unfair competition law).⁷⁰ In the following year, a draft entitled ‘Interim Regulation against Monopoly and Unfair Competition’ was provided.⁷¹ As its name illustrates, this draft includes both antimonopoly and unfair competition. On the 4th March 1989, the State Council issued the Circular on Key Points of Economic System

⁷⁰ J. Yang, ‘Market Power in China: Manifestations, Effects and Legislation’, *Review of Industrial Organisation*, vol. 21, (2002), 167, p. 180. For the definition of competition law, see the Introduction of this thesis.

⁷¹ The Interim Regulation against Monopoly and Unfair Competition [反对垄断和不正当竞争暂行条例草案, *Fandui Longduan He Buzhengdang Jingzheng Zanxing Tiaoli Caoan*], 1988.

Reform.⁷² Article 20 of the Circular calls for the ‘establish[ment] and improve[ment of] the market supervisory system made up of relevant government agencies, propaganda units and non-governmental institutions...rapid enact[ment] of Antimonopoly Law, Law against Unfair Competition Law’. In September 1993, the 8th NPC Standing Committee adopted part of the draft of Interim Regulation against Monopoly and Unfair Competition as the LAUC 1993. In general, the rest of the draft of Interim Regulation against Monopoly and Unfair Competition, which prohibits anticompetitive practices, failed to materialize, although some provisions were incorporated into the LAUC 1993.

In 1994, the 8th NPC Standing Committee listed the Antimonopoly Law in its five-year legislative plan for the first time. It authorized the State Economic & Trade Commission (SETC) and the SAIC to set a Drafting Group in order to work on drafting an antimonopoly law.⁷³ This Drafting Group also included members of the NPC legislative affairs committee and other ministries, such as the Ministry of Railway.

In the process of drafting the Antimonopoly Law, domestic opinions were consulted by the Drafting Group. The Ministries that are responsible for tobacco, construction, pharmaceuticals, metallurgy, telecommunications, posts, electricity generation and distribution, chemicals and civil aviation gave their views and inputs to the Drafting Group in 1994. Many of them tried to make a case for special treatment or exemption from the forthcoming Antimonopoly Law based on the national interest, the need to take advantage of economies of scale, or the disastrous consequences of cut-throat price competition. Industries were also worried about local protectionism, the demarcation line between permissible and impermissible competition, and the need to have a clear distinction between acceptable economies of scale and monopolisation. Academics worried that making a distinction between economic monopoly and administrative monopoly would not be suitable considering the difficulties of

⁷² [http://www.law-star.com/showtxt?dbsType=chl&dbsText=中国法律法规规章司法解释数据](http://www.law-star.com/showtxt?dbsType=chl&dbsText=中国法律法规规章司法解释数据&multiSearch=false&multiSearch=false&dbsType=chl&dbsText=中国法律法规规章司法解释数据&isopen=1&keywords=&dbn=chl&fn=chl_20.133.txt&upd=1)
&multiSearch=false&multiSearch=false&dbsType=chl&dbsText=中国法律法规规章司法解释数据
&isopen=1&keywords=&dbn=chl&fn=chl_20.133.txt&upd=1.

⁷³ See S. Hu, ‘Long Way to Go for Antimonopoly Mission’ [反垄断也是行百里者半九十, *Fanlongduan Yeshi Xingbaili Zhe Ban Jiushi*], (2002)
<http://www.chinapostnews.com.cn/288/kd04.htm>.

implementation.

Not only were domestic opinions considered during the process of formulating the Antimonopoly Law, but also recommendations from governmental organizations (including the Organisation for Economic Co-operation and Development (OECD), the World Bank, and the United Nations Conference on Trade and Development (UNCTAD)), non-governmental organizations and several countries (including the U.S., Germany, Japan, Australia, and South Korea) were consulted. In 1994, the U.S. antitrust enforcement agencies, the Directorate General (DG) of the European Commission, and the Japan Fair Trade Commission submitted comments and proposed revisions to the Drafting Group. Chinese officials convened two conferences on competition policy. The first conference, which was sponsored by the UNCTAD, convened in Shenzhen on the 21st March 1994. The second conference, which was organized under the joint auspices of the Center for International Studies of the University of Toronto and China's Ministry of Foreign Economic Relations and Trade, was held in Beijing on the 25th April 1994.

In 1998, the Antimonopoly Law was again listed in the five-year legislative agenda of the 9th NPC Standing Committee. During 8th -10th November 1998, the OECD held a conference in Beijing named 'Forum on China's Draft Antimonopoly Law' attended by Chinese government officials and academics.⁷⁴ In October 1999, a Chinese delegation including high-level officials and members of the Drafting Group visited the headquarters of the OECD in Paris. This visit provided the opportunity for further discussion of the draft law. During the visit, the Chinese delegation and the OECD also planned a conference in Shanghai on 'Legislating China's Antimonopoly Law' in December 1999. The Shanghai Conference marked a significant step forward in the process of adopting the Antimonopoly Law in China. It brought together top officials from Chinese government and expertise from major OECD countries for what all participants found to be a very productive discussion of the most substantive provisions of the draft Antimonopoly Law, as well as an important contribution to the understanding of the relevance of competition policy to China's ongoing economic reform

⁷⁴ OECD, *OECD Technical Assistance in the Field of Competition Policy (1990-1999)*, Paris: OECD, (2000), pp. 1 and 8, <http://www.oecd.org/dataoecd/23/37/2697403.pdf>.

process.⁷⁵

Originally the Drafting Group planned to complete a draft at the end of 1995. But this was too optimistic to be true. The original timetable slipped significantly. The first outline of the Antimonopoly Law ‘the 1999 Draft’ was not finalized until the 30th November 1999 just before the Shanghai Conference.⁷⁶ The 1999 Draft consists of eight chapters and fifty-six articles. It is a milestone in the process of formulating China’s Antimonopoly Law because it lays down the basic structure of the forthcoming Antimonopoly Law.

Both the US and the European Union (EU) and its Member States tried to influence the design of the 1999 Draft. In general, the 1999 Draft is based on the model of EU competition law.⁷⁷ There are several reasons why China prefers the model of EU competition law.⁷⁸ First, since China is a civil law country, it is difficult for China to adopt the American court-based antitrust system. China’s legal tradition determines that China has to follow the model of EC competition law. Second, China’s court system would not be able to accommodate the demands of applying the Antimonopoly Law, if China followed the US model.⁷⁹ In 1999, judges were not required to have a law degree. Only after 2003, have judges been required to pass a specially designed exam. Since then, the quality of judges in China has been improving. However, the complexity of competition issues can still be overwhelming to most of them. Thus, it is unrealistic to expect Chinese courts to be the core organs to enforce the forthcoming Antimonopoly Law at least at the early stage. Third, considering the level of economic development and other social conditions, China cannot adopt ‘economic efficiency’ as the sole objective of its forthcoming Antimonopoly Law at this moment, like the US. In fact, the US changed the objectives of its antitrust laws

⁷⁵ *Id.*, p. 2.

⁷⁶ The outline of this draft can be seen from M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge: Cambridge University Press, (2005), pp. 177-191; also, X. Wang, (2002), note 43, 201, pp. 224-225.

⁷⁷ About a summary of the differences between US antitrust laws and EU competition law, see, e.g., Y. Jung and Q. Hao, (2003), note 21, 107, pp. 123-124; A. Jones and B. Sufrin, *EC Competition Law*, Oxford: Oxford University Press, (2004), p. 21.

⁷⁸ See, Y. Jung and Q. Hao, (2003), note 21, 107, pp. 124-125.

⁷⁹ About the Chinese court system, see, e.g., M. Williams, (2005), note 76, pp. 129 ff.

over the past century.⁸⁰ In other words, it does not always only apply 'economic efficiency'. Thus, the multi-objective model of the EU competition law is more suitable for China's Antimonopoly Law.

Compared to the US antitrust laws, the most distinctive feature of the 1999 Draft is that it differentiates economic anticompetitive practices and administrative anticompetitive acts. The US antitrust laws do not regulate administrative or regulatory anticompetitive acts.⁸¹ Under the 1999 Draft, Chapters two, three and four deal with economic anticompetitive practices, while Chapter five prohibits administrative anticompetitive acts.

In sum, the economic conditions for enacting a comprehensive competition law were emerging during this period. However, these conditions were far from mature for enacting a competition law. Generally, anticompetitive behaviour was not a major concern in China during this period. Consequently, it was not widely supported to adopt an antimonopoly law. Due to these factors, the enactment of a competition law failed to materialise.

2.2.2 Stage Two: After China's Accession to the WTO

China joined the WTO in December 2001. This historical event hastened the process of formulating the Antimonopoly Law in China. Xiaoye Wang claimed that 'the call for the speedy adoption and promulgation of an antimonopoly law' was 'now much louder' with China's accession to the WTO.⁸² In general, the interests of enacting a competition law have grown and activities of drafting such a law

⁸⁰ See, D. Valentine, 'US Competition Policy and Law: Learning from a Century of Antitrust Enforcement', in Y.-C. Chao, G. San, C. Lo and J. Ho, eds., *International and Comparative Competition Law and Policies*, The Hague: Kluwer Law International, (2001), 73, p. 72.

⁸¹ In the US, the state action and petitioning immunities preclude challenge under the federal antitrust laws against a wide range of competition-suppressing government acts, as well as efforts by private parties to elicit such action. See generally, E. Elhauge, 'Making Sense of Antitrust Petitioning Immunity', *California Law Review*, vol. 80, (1992), 1177 (discussing immunity for efforts to solicit government action that reduces competition); E. Elhauge, 'The Scope of Antitrust Process', *Harvard Law Review*, vol. 104, (1991), 667 (discussing dimensions of state-action immunity).

⁸² X. Wang, (2002), note 43, 201, p. 201.

were intensified after China's WTO accession.

China continued studying other competition regimes. In May 2002, for instance, officials from the SETC visited Australia and New Zealand to study their competition regimes.⁸³ In September 2002, they visited Russia, Finland and Sweden to study their competition regimes.⁸⁴

During the 5th Plenary Session of the 9th NPC held in March 2002, 31 deputies of the NPC submitted a bill to urge the government to adopt an antimonopoly law as soon as possible.⁸⁵ This action demonstrated the recognition of the urgency of enacting an antimonopoly law after China's accession to the WTO. It also illustrated that some deputies were not impressed by the progress of formulating a competition law.

After the 5th Plenary Session of the 9th NPC, the process of formulating China's Antimonopoly Law was accelerated. In April and October 2002, the April 2002 Draft and the October 2002 Drafts were circulated respectively.⁸⁶ These two drafts addressed some concerns raised in regard to the 1999 Draft. Compared to the 1999 draft, for example, the 2002 drafts do not contain blanket exemption provisions. Such improvements were confirmed by the note submitted by China's officials to the OECD Global Forum on Competition that was held during 10th-11th February 2003.⁸⁷ Some commentators even argued that these two drafts could be adopted as an antimonopoly law subject to only minor changes.⁸⁸ However, the later development proved that this opinion was too optimistic to be true. Dramatic changes emerged in the later drafts.

⁸³ <http://101.stock888.net/020812/100,101,71987,00.shtml>

⁸⁴ <http://www.setc.gov.cn/jmfzjs/200208020044.htm>

⁸⁵ See, 'A Bill on Promulgation of Antimonopoly Law in Near Future', *China NPC News*, 7th March 2002, www.npcnews.com.cn/gb/paper289/1/class028900001/hwz204276.htm.

⁸⁶ These two drafts are only circulated in a limited scope. There is a discussion article based on these two drafts, see, Y. Jung and Q. Hao, (2003), note 21, 107.

⁸⁷ See, China, *Objectives of the Competition Law of People's Republic of China and the Optimal Design of Competition Authority*, 9th January 2003, www.oecd.org/dataoecd/58/25/2485968.pdf.

⁸⁸ See, e.g., Y. Jung and Q. Hao, (2003), note 21, 107, p. 108.

In December 2003, the Antimonopoly Law was not only listed on the 10th NPC legislative agenda, but also treated as key economic legislation by the 10th NPC Standing Committee.⁸⁹ It was listed as a first class legislation by the 10th NPC Standing Committee in 2003. In general, first class legislation means that this legislation is the most urgently needed law for China.

In March 2003, the SETC and the Ministry of Foreign Trade and Economic Cooperation merged into a new ministry called the Ministry of Commerce.⁹⁰ The introduction of a comprehensive competition law became a priority for the Ministry of Commerce.⁹¹ In July 2004, the Ministry of Commerce submitted the 2004 Submitted Draft to the Legislative Affairs Office of the State Council for further consideration.⁹² The big difference between the 2004 Submitted Draft and previous drafts, particularly the 1999 draft, is that the former does not provide an independent agency to oversee implementation or to report violations of the Antimonopoly Law. It took a step back on this critical issue by proposing that the competition enforcement authority is a sub-organ under the Ministry of Commerce.⁹³ This could be because the 2004 Submitted Draft is submitted by the Ministry of Commerce.

In early 2005, it was widely reported that the Ministry of Commerce, the SAIC and the NDRC each released independent and conflicting suggestions relating to the structural framework of the Antimonopoly Law.⁹⁴ The Ministry of Commerce even had to publicly deny these reports that differences regarding the draft

⁸⁹ 'China's top legislator unveils five-year lawmaking plan', 18th December, 2003, http://english.people.com.cn/200312/18/eng20031218_130627.shtml.

⁹⁰ For the function of the Ministry of Commerce, see, <http://english.mofcom.gov.cn>.

⁹¹ 'Commerce Ministry defines its policy goals', Ministry of Commerce Press Release, 25th March 2003, http://english.mofcom.gov.cn/article/200303/20030300077225_1.xml.

⁹² An English edition is available at <http://www.ibanet.org/images/downloads/Questionnaire%20-%20final.pdf>. For an overview of this draft, see, e.g., H. Harris, 'An Overview of the Draft China Antimonopoly Law', *Georgia Journal of International and Comparative Law*, vol. 34, (2005), 131.

⁹³ The 2004 Submitted Draft, Art. 6.

⁹⁴ L. Zhang, 'Three Central Government Ministries Conflict, Antimonopoly Law has no Hope of Being Introduced This Year' [中央三部委争立, (反垄断法) 今年出台无望, *Zhongyang San Buwei Zhengli, 'Fanlongduan Fa' Jinnian Chutai Wuwang*], *Xinhua News Agency*, 11th January 2005, http://news.xinhuanet.com/fortune/2005-01/11/content_2442715.htm.

antimonopoly law existed among these three ministries.⁹⁵ This illustrates the fierce competition among these three ministries in order to be the designated competition enforcement authority once a competition law was adopted.

The April 2005 Draft that was based on the 2004 Submitted Draft was released on the 8th April 2005.⁹⁶ Compared to the 2004 Submitted Draft, one of the major changes of the April 2005 draft is that the competition authority is revised to be an organ under the State Council rather than a sub-organ under the Ministry of Commerce. This means that the forthcoming anticompetitive agency will be equal to a ministry, while the competition enforcement agency is under a ministry under the 2004 Submitted Draft. It is a significant change because this change will lead to the increase of the authority of the forthcoming competition enforcement agency.

On the 23rd and 24th May 2005, the Legal Affairs Office of the State Council, the Ministry of Commerce and the SAIC hosted a conference on the enactment of China's Antimonopoly Law in Beijing.⁹⁷ Some officials from other competition regimes, such as the deputy minister of the American Department of Justice and the head of the DG Competition of the EC attended this conference. Shortly before the seminar, the American Bar Association's Sections on Antitrust Law, Intellectual Property Law and International Law jointly submitted comments on the April 2005 Draft.⁹⁸ In June 2005, Chinese officials held another conference on its Antimonopoly Law in Beijing. Representatives from some multinational companies, such as Microsoft Corp., Intel Corp., General Electric Co., Cisco

⁹⁵ *Id.*

⁹⁶ An English edition is available at <http://www.ibanet.org/images/downloads/China%20Antimonopoly%20Law%20April%208%2005%20Draft%20-%20English-v1.pdf>.

⁹⁷ <http://www.fzb.shenyang.gov.cn/ReadNews.asp?NewsID=1281>.

⁹⁸ The American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law, *Proposed Revisions to Selected Articles of the April 8, 2005 Revised Draft of the Antimonopoly Law of the People's Republic of China, In Supplementation of the Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law, On the Proposed Law, dated May 19, 2005, Submitted to Mr Wu Zhengguo of MOFCOM*, (2005), http://www.abanet.org/intlaw/committees/business_regulation/antitrust/jointcomments05supplement.pdf.

Systems Inc., Eastman Kodak Co. and Dow Chemical Co. attended this meeting and discussed the April 2005 Draft with Chinese officials and academics.⁹⁹

Based on the recommendations from other governments, companies, organisations and academics regarding the April 2005 Draft, the July 2005 Draft was circulated on the 27th July 2005.¹⁰⁰ About five months later, on the 11th November 2005, the November 2005 Draft was issued by the State Council, which further revised previous drafts.¹⁰¹ Under the November 2005 Draft, the chapter for the prohibition of administrative monopoly and the provisions on penalties for administrative monopoly were entirely deleted. After this revision, only one provision was kept in regard to administrative monopoly. It provides that administrative authorities and other organizations with public affairs management functions are prohibited from abusing their administrative powers and eliminating or restraining competition.¹⁰² Some scholars believed that this was because China wanted its Antimonopoly Law to be consistent with the practices of major competition regimes and focused on economic anticompetitive behaviour,¹⁰³ while others argued that this was because the

⁹⁹ See, 'China Antitrust Law Worries Foreign Interests', *The Wall Street Journal Europe*, 26th January 2006.

¹⁰⁰ An English edition of this draft is available at <http://www.ibanet.org/images/downloads/Draft%20of%2027%20July%202005.pdf>; a Chinese edition is available at [http://donclarke.net/chinalaw/features/documents/AntimonopolylawDraft20050727\(Ch\).pdf](http://donclarke.net/chinalaw/features/documents/AntimonopolylawDraft20050727(Ch).pdf).

¹⁰¹ J. Liu, 'NPC Announces Its 2006 Legislative Schedule', *China Update*, February 2006, 4, p. 5, http://www.ssd.com/files/tbl_s29Publications%5CFileUpload5689%5C9526%5CChinaUpdateFeb2006.pdf. This draft is only circulated in a limited scope and is not available at website. An English edition of this draft is on the author's file. For an overview of this draft, see, e.g., H. Harris, 'The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China', *Chicago Journal of International Law*, vol. 7, (2006), 169.

¹⁰² J. Liu, (2006), note 101, p. 5; 'Draft Antimonopoly Law Deletes Administrative Monopoly' [反垄断法草案整体删除行政垄断, *Fanlongduan Fa Caoan Zhengti Shanchu Fa Xingzheng Longduan*], 4th January 2006, http://www.zjkc.gov.cn/upfiles/xy_col22xxzx__20060112085556070283.htm; 'Draft Antimonopoly Law Reduces Burden—Chapter of Administrative Monopoly Has Been Deleted' [反垄断法草案减负: 反行政垄断被整体删除, *Fanlongduan Fa Caoan Jianfu—Fan Xingzheng Longduan Bei Zhengti Shanchu*], 11th January 2006, <http://www.people.com.cn/GB/54816/54822/4016799.html>.

¹⁰³ 'Draft Antimonopoly Law Deletes Administrative Monopoly', note 102.

government aimed to reduce the resistance of adopting the Antimonopoly Law since the incorporation of administrative monopoly was considered as one of the reasons why China delayed adopting a competition law.¹⁰⁴

On the 7th June 2006, the State Council discussed and approved in principle the June 2006 Draft.¹⁰⁵ This was the final stage before the 10th NPC Standing Committee considered the draft. Consequently, the 10th NPC Standing Committee deliberated the June 2006 Draft for the first time at the 22nd session of the 10th NPC Standing Committee, which was held from the 24th to the 29th June 2006.¹⁰⁶ This illustrated that the process of adopting an antimonopoly law entered the final stage of being enacted.¹⁰⁷ The 10th NPC Standing Committee did not adopt the Antimonopoly Law in June 2006.

On the 4th November 2006, Shengming Wang, vice head of legislative affairs work for the 10th NPC Standing Committee, said that the Antimonopoly Law would be deliberated for the second time in the first half of 2007 and the State Council would establish an antimonopoly law committee.¹⁰⁸ In March 2007, the Antimonopoly Law was listed in the legislation plan 2007 of the 10th NPC Standing Committee.¹⁰⁹

¹⁰⁴ 'Draft Antimonopoly Law Reduces Burden—Chapter of Administrative Monopoly Has Been Deleted', note 102.

¹⁰⁵ 'Chinese government approves draft of anti-monopoly law', 7th June 2006, http://news.xinhuanet.com/english/2006-06/07/content_4659507.htm.

¹⁰⁶ 'China Parliament to Mull Anti-monopoly Law', 25th June 2006, <http://www.forbes.com/markets/feeds/afx/2006/06/25/afx2838352.html>. For a Chinese edition of this draft, see, <http://www.jingshilawyer.com/d/cn/Print.asp?ArticleID=229>, for an English edition of this draft, see, <http://www.buyusa.gov/asianow/270.pdf>. For a comparison study of this draft, see, M. Lorenz, 'Guarding the Pass—the Forthcoming Chinese Competition Legislation', *World Competition*, vol. 30, (2007), 137 (comparing this draft with EU competition law).

¹⁰⁷ See, Y. Chin, 'The Final Stages of China's Antimonopoly Law', *ChinaBrief*, vol. 6, Issue 14, 5th July 2006, pp. 6-9, http://jamestown.org/images/pdf/cb_006_014.pdf.

¹⁰⁸ 'State Council will establish antimonopoly law committee, antimonopoly law will be deliberated for the second time next year' [国务院将成立反垄断委员会，反垄断法望明年二审, *Guowuyuan Jiang Chengli Fanlongduan Weiyuanhui, Fanlongduan Fa Wang Mingnian Ershen*], 6th November 2006, <http://finance.sina.com.cn/roll/20061106/06041022067.shtml>.

¹⁰⁹ 'The Standing Committee of the NPC Decides 2007 Legislation Plan' [全国人大常委会圈定今年立法规划, *Quanguo Renda Changweihui Quandi Jinnian Lifa Guihua*], *China Youth Daily*, [中国

On 24th June 2007, the 10th NPC Standing Committee deliberated the June 2007 Draft for the second time. Compared to the June Draft 2006, the June 2007 Draft includes six new provisions.¹¹⁰ One of them is Article 7 that clearly prohibits big SOEs from abusing their dominant positions and harming consumers' interests.¹¹¹ The June 2007 Draft was improved so much that many scholars believed that it only needed minor changes before it was adopted. The further development proves that they are right.

After more than a decade of drafting, the Antimonopoly Law 2007 was finally adopted by the 10th NPC Standing Committee on the 30th August 2007 by 150 out of the 153 votes.¹¹² The adoption of the Antimonopoly Law 2007 is a landmark in the history of the Chinese economic legislation. James Zimmerman, the chairman of the American Chamber of Commerce in Beijing, stated that the Antimonopoly Law 2007 is a 'defining moment in the development of China's legal system, which establishes a basic framework to build a fair, uniform and national competition law system that benefits consumers by recognizing and preserving the incentives to compete'.¹¹³

The Antimonopoly Law 2007 contains eight chapters and 57 provisions. Article 13 and Article 14 of the Antimonopoly Law 2007 ban monopolistic arrangements, such as cartels and other forms of collusion. Article 15 grants exemptions to monopolistic arrangements that promote innovation and technological advancement. Article 17 prohibits monopolies from using their dominant status

青年报, *Zhonguo Qingnian Bao*], 2nd March 2007, http://zqb.cyol.com/content/2007-03/02/content_1686841.htm.

¹¹⁰ 'Second Reading the Antimonopoly Law Adds Six New Provisions', [二审反垄断法草案新增六项规定, *Ershen Fanlongduan Fa Caoan Xinzeng Liuxiang Guiding*], 26th June 2007, <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=367617&pdm=1520>.

¹¹¹ *Id.*

¹¹² 'China adopts anti-monopoly law', *China Daily*, 30th August 2007, http://www.chinadaily.com.cn/bizchina/2007-08/30/content_6069370.htm.

¹¹³ C. Bodeen, 'China Passes Antimonopoly Law', *Forbes*, 30th August 2007, <http://www.forbes.com/feeds/ap/2007/08/30/ap4069451.html> ; also see, 'Landmark anti-monopoly law passed', *China Daily*, 31st August 2007, http://www.chinadaily.com.cn/china/2007-08/31/content_6070127.htm.

in the market to curb competition, fix prices, enforce package sales, and refuse or enforce trade. Chapter Four of the Antimonopoly Law 2007 deals with mergers and acquisitions. In addition, the Antimonopoly Law 2007 also bans the so-called administrative monopoly.¹¹⁴

It will improve the existing competition regime in China in four aspects once it comes into force on the 1st August 2008. First, it will bring some coherence to China's competition regime through uniting all the existing Chinese competition-related legislation into one piece. Second, it will provide a systematic legal basis for combating anticompetitive practices. Third, it will provide a general ban on all types of anticompetitive practices which are normally prohibited by a competition law in most competition regimes, such as hard-core cartels. Four, it will improve the enforcement of competition legislation through centralizing enforcement by setting up an Antimonopoly Commission under the State Council which will be responsible for organization, coordination and supervision of the enforcement of this Law.

2.3 Why Has It Taken China Nearly 20 Years to Adopt the Antimonopoly Law 2007?

There are several reasons why it has taken China nearly 20 years to enact the Antimonopoly Law 2007.¹¹⁵ What follows summarises some of these reasons.

First, political elements delayed the adoption of an antimonopoly law. Despite its aim to establish a market economy, China has not abandoned its socialist political system. Before China adopted the Antimonopoly Law 2007, Vietnam was the only communist country which had adopted a competition law. Considering its relatively small size, Vietnam does not provide a useful solution for China. Moreover, Vietnam's competition law itself suffers from criticism as well. From this view, no comparable example can be considered for the Chinese officials in order to formulate the Antimonopoly Law. Youngjin Jung and Qian Hao, therefore,

¹¹⁴ See Chapter V of the Antimonopoly Law 2007.

¹¹⁵ For more discussions on this issue, see, e.g., X. Wang, 'Issues Surrounding the Drafting of China's Antimonopoly Law', *Washington University Global Studies Law Review*, vol. 3, (2004), 285, pp. 292-295.

claimed that:

In tune with its ambition to achieve a market economy without completely abandoning the socialist political system, China is experimenting with what may be referred to as a ‘third way’ in framing competition law, which rejects both pure capitalism and socialism.¹¹⁶

Second, Chinese culture is not very helpful to formulate a comprehensive competition law. The word ‘competition’ originates from the Latin word ‘concurro’ (‘concurr’ ere’), which refers to running together, emulation and rivalry. However, the translation of ‘competition’ into Chinese varies from the Latin meaning. It is translated as 竞争 [*Jingzheng*] in Chinese, a creation with two Chinese characters. The first character 竞 [*Jing*] refers to emulation and race. The second character 争 [*Zheng*] stands for the negative meaning of dispute, quarrel, conflict and fight. From this translation, we can see that competition or ‘Jingzheng’ does not reflect the traditional understanding of the harmonization [和谐, *Hexie*] culture. For more than 2,000 years, Chinese society has been influenced by Confucianism.¹¹⁷ According to Confucianism, harmonization is the basis of a society. This concept has also influenced the way in which businessmen operate their business. Businessmen believe in harmonious cooperation among themselves over competition. A harmonization culture exists not only in China, but also in other East Asian countries, such as Japan whose culture is also dominated by Confucianism.¹¹⁸ Although China has been governed by the Chinese Communist Party for nearly sixty years, the influence of the concept of ‘harmonization’ still exists in Chinese Society. For example, building a socialist harmonious society is one of the aims of China’s Eleventh Five-year Plan.¹¹⁹

¹¹⁶ Y. Jung and Q. Hao, (2003), note 21, 107, p. 109.

¹¹⁷ See, H. Creel, *Confucius and the Chinese Way*, Reprint, New York: Harper Torchbooks, (2000) (Originally published under the title *Confucius—the Man and the Myth*); also see, D. Nivison, *The Ways of Confucianism: Investigations in Chinese Philosophy*, Chicago: Open Court Press, (1997).

¹¹⁸ About Japan’s Harmonization culture, see, A. Uesugi, ‘Where Japanese Competition Policy is Going—Prospect and Reality of Japan’, in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law Institute (2004)*, New York: Juris Publishing, (2005), 57, pp. 59-60.

¹¹⁹ See, ‘Building a Socialist Harmonious Society’, *The Outline of the Eleventh Five-Year Plan*, http://en.ndrc.gov.cn/hot/t20060529_71334.htm. However, a paper published in November 2006 argued that China’s antimonopoly law is helpful to establish harmony society in China. See,

Traditionally, therefore, China does not have a favourable culture for competition as understood in the west.

Third, there was a struggle for power among different ministries during the process of adopting the Antimonopoly Law 2007. Some ministries have huge power in regard to some industries, although such power is diminishing in recent years. For example, the Ministry of Railway is still in charge of the daily business of trains. Adopting a competition law could reduce the power possessed by these ministries. During the process of adopting the Antimonopoly Law 2007, therefore, they were anxious to either seek exemption from this Law or try to block the adoption of this Law in order to protect their own existing interests and power. For example, the 1999 Draft provides that this Law shall not apply, within five years after its promulgation, to behaviour ratified by the competition authorities under the State Council in natural monopolies or public utilities such as the postal service, railroads, electricity, gas, and water. This hostile attitude towards a competition law delayed the adoption of the Antimonopoly Law 2007.

Fourth, there were disagreements regarding the establishment of a competition authority or competition authorities during the process of adopting the Antimonopoly Law 2007. The administrative enforcement authority will play a key role in implementing China's Antimonopoly Law. It will play the part of law-maker, policeman, investigator, prosecutor, judge, and jury. Thus, the Ministry of Commerce, the SAIC, and the NDRC, which are in charge of drafting the Antimonopoly Law 2007, compete with each other in order to be chosen as the designated competition enforcement authority. For example, the 2004 Submitted Draft submitted by the Ministry of Commerce provides that the competition authority is a sub-organ under the Ministry of Commerce. The power struggle among these three ministries seriously delayed the adoption of the Antimonopoly Law 2007, particularly during the final stage.

'The Roles Played by the Antimonopoly Law in Establishing Harmony Society' [反垄断法在构建和谐社会中的作用, *Fanlongduan Fa zai Guojian Hexie Shehui zhong de Zuoyong*], 21st

November 2006, <http://www.ccaj.net/html1/2006/11/21/f329093.shtml>.

3 Conclusion

China started to combat anticompetitive practices nearly 30 years ago when the State Council promulgated the Interim Regulation for Competition 1980. Since then, it has adopted a number of pieces of competition-related legislation. However, these pieces of competition-related legislation became insufficient to combat the increasing anticompetitive practices during China's market-oriented economic reform and its rapid integration into the global economy particularly after China's accession to the WTO. Hence, China needed a comprehensive competition law. It started to draft an antimonopoly law in the late 1980s. The Antimonopoly Law 2007 was adopted on the 30th August 2007. As China's first comprehensive competition law, it unites the existing competition-related legislation in China and provides a general ban on all anticompetitive practices. It will change the landmark of China's competition regime once it takes effect on the 1st August 2008. Moreover, it will inevitably have international reach due to China's increasingly significant role in the global economy.

Table II-1: Market Share of Top Three Companies in Sector in China

Market Share of top three companies in sector (%)		
Telecoms (mobile)	100.0	China Mobile, China Unicom
Telecoms (fixed-line)	100.0	China Telecom, China Netcom, China Unicom
Alumina	100.0	Calco
Oil mining	100.0	Petrochina, Sinopec, CNOOC
Lottery machines	100.0	China Lottery
Insurance (property)	89.7	PICC, China Pacific, Ping An
Insurance (life)	86.7	China Life, Ping An, China Pacific
Instant noodles	60.0	Master Kong, Uni-president, Hualong
Dairy products	60.0	Yili, Mengniu, Bright
Banking	58.5	ICBC, CCB, Aboc
Notebook PCs	54.0	Lenovo+IBM, Dell, Hewlett-Packard
Desktop PCs	52.5	Lenovo+IBM, Founder, Tongfang
Colour TVs	50.0	Konka, Changhong, TCL
Cars	27.5	Shanghai GM, Shanghai Volkswagen, Beijing Hyundai
Aluminium	23.1	Chalco, Qingtongxia, Jiaozhowanfang
Sportswear	15.0	Nike, Adidas, Li Ning
Steel	12.2	Bao Steel, Wugang Steel, Shougang Steel
Coal mining	12.0	Shenhua, Shanxi Coking, Datang

Source: Deutsche Bank (quoted from Financial Times, 'Challenging Change: Why an ever fiercer battle hinders China's march to the market', p.15, 28 February, 2006)

Table II-2: Competition Cases Concluded by the SAIC

Type of Case	1995	1996	1997	1998	1999	2000	2001	2002
Restrictions by public utilities	55	102	94	131	432	758	1,614	1,089
Predatory pricing	10	59	32	19	26	39	31	43
Tie-in sales	91	42	85	44	84	64	110	139
Bid rigging	16	23	37	77	51	210	316	188
Total number of anticompetitive cases	172	226	248	271	593	1071	2071	1459
Total number of cases	5,288	11,388	14,891	14,646	18,199	26,053	35,371	40,851
The percentage of anticompetitive cases in the whole cases concluded by the SAIC	About 3.25%	About 1.98%	About 1.665%	About 1.85%	About 3.258%	About 4.11%	About 5.855%	About 3.572%

Source: SAIC, there is English version at

<http://www.apeccp.org.tw/doc/China.html#Statistics>

Chapter Three:

The Impact of the National Treatment Principle under the WTO on the Formulation of the Antimonopoly Law 2007

This chapter examines the impact of the national treatment principle under the World Trade Organisation (WTO) on the formulation of the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007).¹ To this end, it is structured into two sections. The first section explores whether a WTO Member's competition law needs to be consistent with the WTO national treatment principle. The second section examines, if so, to what extent the formulation of the Antimonopoly Law 2007 has been influenced by such an obligation.

Before that, it has to be acknowledged that it is always far from easy to apply general principles even at domestic level. Peter M. Gerhart and Michael S. Baron argued: 'Rules against discrimination are easy to state at a general level but are devilishly difficult to apply in particular cases; the gulf between articulating principles of non-discrimination and applying them is wide'.² This becomes even more difficult to apply the national treatment principle at the international level considering the weaknesses of international law.

¹ The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

² P. Gerhart and M. Baron, 'Understanding National Treatment: The Participatory Vision of the WTO', *Indiana International & Comparative Law Review*, vol. 14(3), (2003), 505, p. 505.

1 The WTO National Treatment Principle and WTO Members' National Competition Laws³

This section examines whether, and if so, to what extent, and how the WTO national treatment principle matters to WTO Members' national competition laws.

1.1 The WTO National Treatment Principle⁴

What follows focuses on the meaning, the purpose and the exceptions of the WTO national treatment principle.

1.1.1 The Meaning of the WTO National Treatment Principle

The principle of national treatment has long been 'a cornerstone of the world

³ For more discussions on the matter of the relevance of the WTO national treatment principle to competition law and policy, see, e.g., the Working Group on the Interaction between Trade and Competition Policy (WGTCP), *Communication from the European Community and Its member states -The Relevance of Fundamental WTO Principles of National Treatment, Transparency and Most-Favoured-Nation Treatment to Competition Policy and Vice Versa*, WT/WGTCPW/115, (1999); WGTCP, *Communication from Switzerland*, WT/WGTCPW/117, (1999); WGTCP, *Communication from Japan*, WT/WGTCPW/119, (1999); WGTCP, *Communication from Japan*, WT/WGTCPW/120, (1999); WGTCP, *Communication from the United States*, WT/WGTCPW/131, (1999); and E.-U. Petersmann, 'WTO Core Principles and Trade/Competition', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 2003*, New York: Juris Publishing Inc., (2004), 669.

⁴ For more discussions of the WTO national treatment principle, see, WGTCP, *The Fundamental WTO Principles of National Treatment, Most-Favoured-Nation Treatment- Background Note by the Secretariat*, WT/WGTCPW/114, (1999); J. Jackson, *The World Trading System*, 2nd ed., Cambridge: MIT Press, (1997), pp. 213-245; J. Jackson, W. Davey and A. Sykes, eds., *Legal Problems of International Economic Relations: Cases, Materials and Text*, 4th ed., St. Paul: West Group, (2002), pp. 479-531; P. Van den Bossche, *The Law and Policy of the World Trade Organisation: Text, Cases and Materials*, Cambridge: Cambridge University Press, (2005), pp. 326-369; M. Matsushita, T. Schoenbaum and P. Mavroidis, eds., *The World Trade Organisation: Law, Practice, and Policy*, Oxford: Oxford University Press, (2006), pp. 233-256.

trading system that is served by the WTO'.⁵ It is set out in the following provisions of the three main WTO Agreements: Article III of the General Agreement on Tariffs and Trade (GATT)⁶, Article XVII of the General Agreement on Trade in Services (GATS)⁷ and Article 3 of the Trade-Related Aspects of Intellectual Property Rights (TRIPS)⁸. In addition, it is incorporated in various other WTO Agreements, such as the Agreement on Technical Barriers to Trade (TBT)⁹, the Application of Sanitary and Phytosanitary Measures¹⁰ and the Agreement on Government Procurement (AGP).¹¹

The WTO national treatment principle requires a WTO Member to treat foreign products, services or persons not less favourably than it treats 'like' domestic products, services and service suppliers. Put another way, a WTO Member is not allowed to discriminate against foreign products, services and service suppliers. The WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) claimed: 'The essence of the principle of national treatment is to require that a WTO Member does not put the goods or services or persons of other WTO Members at a competitive disadvantage *vis-à-vis* its own goods or services or nationals'.¹² The national treatment principle is a significant rule under the WTO framework that has given rise to many trade disputes.¹³

⁵ Appellate Body Report, *United States- Section 211 Omnibus Appropriations Act of 1998 (US- Section 211 Appropriations Act)*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589, para. 241.

⁶ The GATT is available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.

⁷ The GATS is available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

⁸ The TRIPS is available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

⁹ The TBT is available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

¹⁰ The Agreement on the Application of Sanitary and Phytosanitary Measures is available at http://www.wto.org/english/docs_e/legal_e/15sps_01_e.htm.

¹¹ The AGP is a plurilateral agreement and available at http://www.wto.org/english/docs_e/legal_e/gpr-94_01_e.htm.

¹² WGTCP, WT/WGTCP/W/114, note 3, para.13, p. 4.

¹³ See, e.g., GATT Panel Report, *Italian Discrimination against Imported Agricultural Machinery (Italy-Agricultural Machinery)*, L/833, adopted 23 October 1958, BISD 7S/60; GATT Panel Report, *Canada-Foreign Investment Review Act (Canada - FIRA)*, L/5504, adopted on 7 February 1984, BISD 30S/140; GATT Panel Report, *United States- Section 337 of the Tariff Act of 1930 (US-Section 337 Tariff Act)*, L/6439, adopted 7 November 1989, BISD 36S/345; GATT

1.1.2 The Purpose of the WTO National Treatment Principle

The purpose of the national treatment principle under the GATT/WTO has been interpreted by Panels and the Appellate Body. In *Japan-Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)*, for example, the Appellate Body claimed:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III 'is to ensure that internal measures not be applied to imported or domestic products so as to afford protection to domestic production.' Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products... Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products.¹⁴

This anti-protectionist thrust is supported by Article III:1 of the GATT which reads:

Members recognize that internal taxes and other internal charges and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use

Panel Report, *European Economic Community- Regulation on Imports of Parts and Components (EEC-Parts and Components)*, L/5155, adopted 16 May 1990, BISD 37S/132; Appellate Body Report, *Japan-Taxes on Alcoholic Beverages (Japan-Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:1, 97; Panel Report, *EC-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)*, WT/DS27/R, circulated 22 May 1997, DSR 1997:II, 943; Appellate Body Report, WT/DS27/AB/R, *EC-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)*, adopted 25 September 1997, DSR 1997:II, 591; Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243; Appellate Body Report, *United States—Tax Treatment for 'Foreign Sales Corporations'—Recourse to Article 21.5 of the DSU by the European Communities (US-FSC)*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55; and Appellate Body Report, *US-Section 211 Appropriations Act*, note 5.

¹⁴ Appellate Body Report, *Japan-Alcoholic Beverages II*, note 13, p. 15.

of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.¹⁵

In *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products (EC-Asbestos)*, the Appellate Body re-emphasized: ‘there must be consonance between the objective pursued by Article III, as enunciated in the “general principle” articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4’.¹⁶

Hence, Peter M. Gerhart and Michael S. Baron argued:

[T]he Appellate Body has developed an interpretive framework for the national treatment provision of Article III that is consistent with the process-oriented role of the WTO, and re-emphasizes it as an institution whose central mission is to insure that when a member country takes regulatory action affecting foreigners, the interests of the foreigners are not ignored in the decision-making process.¹⁷

In general, therefore, the purpose of the WTO national treatment principle is as a legal yardstick to scrutinize the appropriateness of a WTO Member’s domestic legislation to see whether or not such legislation is consistent with the values that make up the WTO’s free trade regime.¹⁸ The inclusion of the national treatment principle in the WTO Agreements helps to define the appropriate balance between the regulatory autonomy of WTO Members that is part of state sovereignty and the suppression of hidden protectionism.¹⁹ From this point of

¹⁵ The GATT, Art. III :1.

¹⁶ Appellate Body Report, *EC-Asbestos*, note 13, para. 98.

¹⁷ P. Gerhart and M. Baron, (2003), note 2, p. 549.

¹⁸ Generally, the WTO rules limit the WTO Members’ domestic regulatory power in trade-related areas.

¹⁹ See generally, J. Jackson, (1997), note 4, p. 212, (referring to the ‘clash of policies’ inherent in the national treatment provision); F. Roessler, ‘Diverging Domestic Policies and Multilateral Trade Integration’, in J. Bhagwati and R. Hudec, eds., *Fair Trade and Harmonization*, vol. 2, Cambridge: MIT Press, (1996), 1, p. 1 (stating: ‘the rules of [GATT] primarily aim at the reduction of barriers between markets, not at the harmonization of competitive conditions in markets. They therefore impose in principle only constraints on trade policies, but leave the contracting parties free to conduct their domestic policies’.); G. Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy*, Oxford:

view, thus, its function is similar to the so-called Commerce Clause of the United States (US) Constitution that has helped define the balance of power between the federal government and individual states.²⁰ This could be the reason why Gaetan Verhoosel claimed that: ‘Defining National Treatment means determining the constitutional function of the WTO’.²¹

1.1.3 Exceptions to the Application of the WTO National Treatment Principle

Under the WTO Agreements, there are some exceptions where the national treatment principle is not applicable. Moreover, the scope of the application of the national treatment principle varies in different WTO Agreements. What follows focuses on the GATT and the GATS since they are the most important agreements under the WTO framework.

The GATT only covers goods and does not apply to producers, while the GATS applies to both services and service providers. From this sense, the national treatment principle under the GATS has a broader scope than under the GATT. The GATT requirement is also limited to ‘internal’ measures. The corresponding requirement in the GATS is dependent on specific commitments having been scheduled by the WTO Member concerned. In other words, the national treatment principle is not applicable automatically under the GATS.

In addition, there are also a number of other permissible exceptions to the national treatment principle under the GATT and the GATS. First, it is not applicable to government procurement of goods and services under Article III:8(a) of the GATT and Article XIII of the GATS. Under the AGP which is a plurilateral

Hart Publishing, (2002), p. 2 (portraying the national treatment analysis as turning on the desire to liberalize trade without requiring deeper market integration or harmonization).

²⁰ The United States (US) Constitution, Art. I, Sec. 8, Clause 3 (stipulating: ‘The Congress shall have Power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes’). Peter Gerhart and Michael Baron argued: ‘The national treatment provision, like its counterpart in the dormant Commerce Clause doctrine of the US Constitution, is designed to oversee the political process in member countries to ensure that the interests of foreigners are not denigrated or ignored’. See, P. Gerhart and M. Baron, (2003), note 2, p. 517.

²¹ G. Verhoosel, (2002), note 19, p. 7.

agreement, however, it applies to some WTO Members in regard to a large proportion of their government procurement of goods and services.²² Second, it is not applicable to such matters as measures necessary to protect public morals or maintain public order, to protect human, animal, or plant life or health and to secure compliance with laws and regulations not inconsistent with the provisions of the agreement in question under Article XX of the GATT and Article XIV of the GATS. Such general exceptions are subject to the requirement that measures taken pursuant to them are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same (GATT) or like (GATS) conditions prevail, or a disguised restriction on international trade. Third, the national treatment principle is not applicable to the measures regarding security issues under Article XXI of the GATT and Article XIVbis of the GATS.

1.2 Whether, and If So, To What Extent Is the WTO National Treatment Principle Applicable to WTO Members' Competition Laws?

Despite the existence of exceptional provisions, the national treatment principle under the WTO framework could still have significant effects on WTO Members' domestic legislation. This is why some commentators think the national treatment principle is the gatekeeper for the WTO's constitutional function.²³ What follows explores whether, and if so, to what extent the WTO national treatment principle is applicable to WTO Members' competition laws.

1.2.1 Is the WTO National Treatment Principle Applicable to WTO Members' Competition Laws?

In order to apply the national treatment under the GATT or the GATS, two conditions must be fulfilled. First, a piece of domestic legislation must fall within either the term 'all laws, regulations and requirements' under the GATT or the term 'measures' under the GATS. Second, such legislation must have

²² Currently 25 WTO Members are parties to the Agreement on Government Procurement.

²³ See, G. Verhoosel, (2002), note 19, pp. 1 ff, particularly, p. 4.

effects on ‘internal sale, offering for sale, purchase, transportation, distribution or use’ of goods under the GATT or services or service providers under the GATS.

1.2.1.1 Terms ‘Laws, Regulations and Requirements’ and ‘Measures’

Under the GATT, Article III: 4 applies to ‘all laws, regulations and requirements affecting [the] internal sale, offering for sale, purchase, transportation, distribution or use’ of products of national origin. In general, the GATT/WTO case law consistently interprets the term ‘laws, regulations and requirements’ broadly. In *Italian Discrimination against Imported Agricultural Machinery (Italy-Agricultural Machinery)*, the GATT Panel emphasized that the application of Article III was not intended to be limited to measures that were overtly focused on regulating the conditions of trade. Instead, it claimed that ‘laws, regulations and requirements’ could cover ‘any laws or regulations which might adversely modify the conditions of competition between domestic and imported products on the internal market’.²⁴ This case signals the start of a broad approach to the meaning of ‘laws, regulations and requirements’. Subsequent GATT/WTO cases have followed this trend. In the *Canada-Foreign Investment Review Act (Canada - FIRA)*, for instance, the GATT Panel considered that written and legally binding purchase and export undertakings submitted by investors were covered by Article III, although the Canadian Foreign Investment Review Act did not make the submission obligatory.²⁵ In *European Economic Community- Regulation on Imports of Parts and Components (EEC-Parts and Components)*, the GATT Panel considered that requirements which an enterprise voluntarily accepted in order to obtain an advantage from the government came within the scope of Article III: 4.²⁶ In addition, in *United States- Section 337 of the Tariff Act of 1930 (US-Section 337 Tariff Act)*, the GATT Panel made it clear that Article III: 4 applies to both procedural and substantive laws, regulations and requirements.²⁷

Under the GATS, the national treatment principle applies to ‘measures affecting the supply of services, treatment no less favourable than that it accords to its own

²⁴ GATT Panel Report, *Italy-Agricultural Machinery*, note 13, para. 12.

²⁵ GATT Panel Report, *Canada - FIRA*, note 13, para. 5.4.

²⁶ GATT Panel Report, *EEC-Parts and Components*, note 13, para. 5.21.

²⁷ GATT Panel Report, *US-Section 337 Tariff Act*, note 13, para. 5.10.

like services and service suppliers'. Article XXVIII of the GATS defines the term 'measure' as 'any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form'. Article XXVIII(c) of the GATS defines 'measures by Members affecting trade in services' to include measures in respect of:

- (i) the purchase, payment or use of a service; (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally; and (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

Thus, the scope of application of the national treatment principle under the GATS is relatively clearer than it is under the GATT, because it is defined in the GATS. Like the approach to the meaning of 'laws, regulations and measures' in Article III: 4 of the GATT, WTO Panels and the Appellate Body have taken the view that the term 'measures' as defined in the GATS must be given a broad scope of application²⁸, although there is less experience in applying this provision in particular cases than there is in respect of Article III of the GATT. In fact, the scope of the application of national treatment in GATS could be broader than in the GATT, because the GATS provisions make no distinction between measures which directly govern or regulate services and measures that otherwise affect trade in services. In *EC-Regime for the Importation, Sale and Distribution of Bananas (EC-Bananas III)*, the WTO Panel argued that if the drafters of the GATS had intended to impose a similar limitation on the scope of the application of national treatment in the GATS to the GATT, they would have provided for the limitation explicitly in the text of the GATS itself or in the provisions of the Agreement Establishing the WTO.²⁹ These Panel findings were upheld by the Appellate Body.³⁰

1.2.1.2 Term 'Affecting'

As discussed above, both GATT/WTO Panels and the Appellate Body have taken a

²⁸ See, e.g., Appellate Body Report, *EC-Bananas III*, note 13, para. 220; also, Appellate Body Report, *US-FSC*, note 13, paras. 209 and 210.

²⁹ Panel Report, *EC-Bananas III*, note 13, paras. 283-284.

³⁰ Appellate Body Report, *EC-Bananas III*, note 13, paras. 217-222.

broad approach to interpret the meaning of ‘laws, regulations and requirements’ under the GATT and the meaning of ‘measures’ under the GATS. However, this is not enough to claim that all domestic regulatory measures are covered by the national treatment principle within the WTO. In order to apply the national treatment principle, the term ‘affecting’ has to be examined. A domestic regulatory measure would not be covered by the national treatment principle under the WTO, if the term ‘affecting’ were interpreted narrowly. Fortunately, it is not the case here. In *Italy-Agricultural Machinery*, the GATT Panel found that, due to the verb ‘affecting’, Article III: 4 covered ‘any laws or regulations which might adversely modify the conditions of competition’ of imports.³¹ In *US-FSC*, the Appellate Body confirmed that the word ‘affecting’ in Article III: 4 had ‘a broad scope of application’.³²

The interpretation of the term ‘affecting’ in the GATS has followed the approach adopted by the case law in GATT. In *EC-Bananas III*, for instance, the Appellate Body claimed:

The ordinary meaning of the word ‘affecting’ implies a measure that has ‘an effect on’, which indicates a *broad scope of application*. This interpretation is further reinforced by the conclusions of previous panels that the term ‘affecting’ in the context of Article III of the GATT is wider in scope than such terms as ‘regulating’ or ‘governing’. (emphasis added).³³

In *US-FSC*, the Appellate Body confirmed that like the word ‘affecting’ in Article III of the GATT, the word ‘affecting’ in Article XVII of the GATS had also had a similar ‘broad scope of application’.³⁴

³¹ GATT Panel Report, *Italy-Agricultural Machinery*, note 13, para. 12.

³² Appellate Body Report, *US-FSC*, note 13, paras. 209-210 (referring to Appellate Body Report, *EC-Bananas III*, note 13, para. 220 and Appellate Body Report, *Canada-Certain Measures Affecting the Automotive Industry (Canada-Autos)*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VII, 3043, para. 150).

³³ See, Appellate Body Report, *EC-Bananas III*, note 13, para. 220.

³⁴ See, Appellate Body Report, *US-FSC*, note 13, para. 210.

1.2.1.3 National Competition Laws Could Be Covered by the WTO National Treatment Principle

Because the terms ‘laws, regulations and requirements’, ‘measures’, and ‘affecting’ have been interpreted broadly, a WTO Member’s competition law could easily fall into the scope of the national treatment principle under the WTO. The WTO Secretariat has itself confirmed this conclusion. It claimed that competition ‘laws would fall within the scope of the national treatment rule of Article III:4 to the extent that they affect the internal sale, offering for sale, purchase, transportation, distribution or use of goods’.³⁵ Furthermore, it also claimed that among WTO Members there is a ‘general recognition that the fundamental principles of the WTO [including the national treatment principle] are already applicable... to the field of competition law and policy’.³⁶ In addition, Claus-Dieter Ehlerman, a former Chairman of the Appellate Body, and Lothar Ehring, a former member of the Appellate Body Secretariat, also argued:

There can be no doubt that a piece of national competition legislation belongs to those provisions that have to comply with Article III:4 of the GATT. A national competition act falls within the category of ‘laws, regulations and requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use’ of goods.³⁷

This opinion is also shared by other leading scholars. Bernard Hoekman and Petros Mavroidis, for instance, argued that WTO Members’ national competition laws were covered by the WTO national treatment principle as the enforcement of national competition laws was a ‘requirement affecting’ trade.³⁸

³⁵ WTO, ‘Special Topic: Trade and Competition’, in WTO, *Annual Report 1997*, Geneva: WTO, (1997), p. 69.

³⁶ WGTCP, *Core Principles, including Transparency, Non-Discrimination and Procedural Fairness- Background Note by the Secretariat*, WT/WGTCP/W/209, (2002), p. 7.

³⁷ C.-D. Ehlermann and L. Ehring, ‘WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body’s Experience’, *Fordham International Law Journal*, vol. 26, (2003), 1505, p. 1520.

³⁸ B. Hoekman and P. Mavroidis, ‘Economic Development, Competition Policy and the WTO’, Paper presented at the Roundtable ‘Informing the Doha Process: New Trade Research for Developing Countries’, Cairo, (2002), p. 15.

1.2.2 To What Extent Is A WTO Member's National Competition Law Covered by the WTO National Treatment Principle?

Although a WTO Member's domestic competition law is covered by the WTO national treatment principle, it has to be recognised that this coverage has limitations. The obvious one is that the national treatment principle has inherent limitations in regard to its application to WTO Members' domestic competition laws because of the scope of the application of the national treatment principle under the WTO generally.³⁹ What follows explores two limitations in regard to the application of the national treatment principle to WTO Members' domestic competition laws.

1.2.2.1 Existing Competition Laws

Article III: 4 of the GATT expressly applies only to existing governmental treatment accorded in respect of 'laws, regulations and requirements'. Article XVII of the GATS only applies to existing governmental measures. Under the current WTO law, therefore, it does not seem that the national treatment principle can be a possible yardstick of legal scrutiny where WTO Members' competition laws are totally non-existent. In other words, the WTO national treatment principle cannot be used as a tool to force WTO members to adopt competition laws, if they have not done so. It can only be applicable to the WTO Members' domestic competition laws that already exist.

1.2.2.2 Affecting Trade

As discussed above, in order to apply the WTO national treatment principle to national competition law, provisions or the enforcement of WTO Members' competition laws must affect 'internal sale, offering for sale, purchase, transportation, distribution or use' under the GATT or 'the supply of services' or service providers under the GATS. This has been made clear by the Appellate Body in the *US-FSC*.⁴⁰ In this case, the Appellate Body stated that Article III:4 of

³⁹ See the previous discussion on the scope of the WTO national treatment principle.

⁴⁰ WTO Appellate Body Report, *US-FSC*, note 13, para. 208.

the GATT did not cover all laws, regulations and requirements.⁴¹ Instead, it ruled that only the laws, regulations and requirements which *affected* the specific transactions, activities and uses mentioned in Article III of the GATT.⁴² Thus, the GATT/WTO case law has made it clear that the national treatment principle cannot be applicable to a WTO Member's competition law if the enforcement of such law has no effects on trade, although the term 'affecting' has been interpreted broadly by GATT/WTO Panels and the Appellate Body.

1.3 The Potential Areas under A WTO Member's National Competition Law Where Violations of the National Treatment Principle Could Arise

Thus far the discussion has advanced to the point of recognizing that the WTO national treatment principle can reach WTO Members' domestic competition laws. That means, the national treatment principle, such as Article III:4 of the GATT, prohibits WTO Members from applying their competition laws in a manner that discriminates against foreign goods, services or service providers. The above discussion also illustrates that the scope of the application of the national treatment principle to WTO Members' domestic competition laws is limited. Not all aspects of a WTO Member's domestic competition law are covered by the national treatment principle. Now, the question is what the potential areas are under a WTO Member's national competition law where violations of the WTO national treatment principle could arise.

GATT/WTO case law has made it clear that the national treatment principle applies to both procedural and substantive laws, regulations and requirements under the GATT and measures under the GATS.⁴³ Thus, a violation of the national treatment principle could arise through both procedural and substantive provisions of a national competition law. In addition, the GATT/WTO case law has already clarified that the national treatment principle covers cases of both *de facto* and *de jure* discrimination, although Article III of the GATT itself is not

⁴¹ *Id.*

⁴² *Id.*

⁴³ See, e.g., GATT Panel Report, *US-Section 337 Tariff Act*, note 13, para. 5.10.

clear on this issue. In *Canada-Certain Measures Affecting the Automotive Industry (Canada-Autos)*, for instance, the Appellate Body claimed:

In approaching this question, we observe first that the words of Article I:1 do not restrict its scope only to cases in which the failure to accord an 'advantage' to like products of all other Members appears on the face of the measure, or can be demonstrated on the basis of the words of the measure. Neither the words 'de jure' nor 'de facto' appear in Article I:1. Nevertheless, we observe that Article I:1 does not cover only 'in law', or de jure, discrimination. As several GATT panel reports confirmed, Article I:1 covers also 'in fact', or de facto, discrimination.⁴⁴

Unlike Article III of the GATT, Article XVII of GATS clearly provides that the national treatment principle does not require formally identical treatment of domestic and foreign suppliers: formally different measures can result in effective equality of treatment; just as formally identical measures can in some cases result in less favourable treatment of foreign suppliers (*de facto* discrimination). Thus, a violation of the national treatment can exist through both *de jure* and *de facto* discrimination in a national competition law.

What follows explores the potential areas under a national competition law where a violation of the national treatment principle might exist from the angle of substantive issues: objectives and exemptions. It then focuses on each of these two substantive issues from the angle of both *de jure* and *de facto* discrimination.

1.3.1 Objectives

The objectives of a national competition law are significant for the enforcement and application of the law because:

1. They inform the enforcement and application of the law.
2. They help identify and explain differences in legal standards and outcomes in individual cases.
3. They increase transparency and facilitate reasoned debate to the extent that they make explicit the rationales for decisions

⁴⁴ WTO Appellate Body, *Canada-Autos*, note 32, para. 78 (footnote in quotation is deleted).

in individual cases.⁴⁵

Nowadays, many competition laws adopt multiple objectives. Barry Rodger and Angus MacCulloch argued that multi-objectives were likely to bring uncertainty and unpredictability in the enforcement of competition law.⁴⁶ Deunden Nkikomborirak also claimed: ‘the broader the objective of the competition law, the greater the discretionary power the administration has in granting exception to competition cases’.⁴⁷ What follows is to examine the objects which could present a risk of violating the WTO national treatment principle.

1.3.1.1 Public Interest

The concept of public interest has always arisen whenever competition law reforms take place. Michal Gal argued that virtually all competition regimes in developing countries included public interest as one of the objectives of their competition legislation.⁴⁸ The term ‘public interest’ generally refers to domestic public interest. So far, no competition law in the world defines ‘public interest’ as a global public interest or an international public interest. Thus, when they consider public interest as the reason for granting exemptions, competition authorities are likely to discriminate against companies according to their nationality. Thus, it is questionable how the term ‘public interest’ can be consistent with the national treatment principle since such a term could be applied discriminately against foreign firms. In practice, however, it is far from easy to prove such violations. There is no such case in the GATT/WTO case law to date.

⁴⁵ The American Bar Association, *Re: Report on Antitrust Policy Objectives*, (2003), p.2, <http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf>.

⁴⁶ B. Rodger and A. MacCulloch, *Competition Law and Policy in the European Community and United Kingdom*, 2nd ed., London, Sydney, Portland and Oregon: Cavendish Publishing Limited, (2001), p. 15.

⁴⁷ See, D. Nkikomborirak, ‘Exemptions and Exceptions: Implications for Economic Performance: the Case of Thailand’, in United Nations Conference on Trade and Development (UNCTAD), *Competition, Competitiveness and Development: Lessons from Developing Countries*, Geneva and New York: United Nations, UNCTAD/DITC/CLP/2004/1, (2004), 91, p. 92.

⁴⁸ These countries include, inter alia, Cameroon, Gabon, Jamaica, Kenya, Macedonia, Morocco, Pakistan, Sri Lanka, Chinese Taipei, Tunisia and Zambia. See, M. Gal, ‘The Ecology of

1.3.1.2 Development of the National Economy

It is not unusual to include the development of the national economy as one of the objectives of a competition law.⁴⁹ In Japan, for example, one of the objectives of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade 1947 is ‘to promote... wholesome development of the national economy’.⁵⁰ In India, one of the objectives of the Competition Act 2002 is to keep ‘in view the economic development of the country’.⁵¹

However, the practice of incorporating the development of the national economy into competition laws is not popular among some developed countries. Ratnakar Adhikari claimed: ‘The question of the development dimension is largely a Southern phenomenon’.⁵² However, Terry Winslow argued:

[O]ne reason why the OECD [Organisation for Economic Co-operation and Development] countries are increasing their emphasis on efficiency and decreasing their use of competition law and policy to promote non-competition goals is that they have other policy mechanisms that are more effective to promote such goals. Developing countries may not yet have alternative effective policy mechanisms for dealing with non-competition goals.⁵³

It is not clear where the inclusion of the development of the national economy as a primary objective of competition law is a *de jure* violation of the WTO

Antitrust: Preconditions for Competition Law Enforcement in Developing Countries’, in UNCTAD, (2004), note 47, 21, p. 52.

⁴⁹ About the issue of development dimension of competition law and policy, see, e.g., R. Adhikari, ‘Prerequisite for Development-Oriented Competition Policy Implementation: A Case Study of Nepal’, in UNCTAD, (2004), note 47, 53; also, W. Lachmann, *The Development Dimension of Competition Law and Policy*, Geneva and New York: United Nations, (1999).

⁵⁰ The Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade 1947, Sec. 1. The official English version is available at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf.

⁵¹ It is available at http://www.competition-commission-india.nic.in/Act/competition_act2002.pdf.

⁵² See, R. Adhikari, (2004), note 49, 53, p. 68.

⁵³ T. Winslow, ‘Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity’, *OECD Journal of Competition Law and Policy*, vol. 6(1), (2004), 7, p. 48.

national treatment principle. However, inclusion of the development of the national economy as an objective of a national competition law could leave the doors open for *de facto* discriminations when the term ‘national economy’ is applied. Competition authorities could protect domestic firms in the name of promoting *national* economic development. However, it has to be acknowledged that such violation of the national treatment principle is far from easy to prove. There is no such case in the GATT/WTO case law to date.

1.3.2 Exceptions and Exemptions

As Pamela Sittenfeld claimed, ‘one of the most controversial issues in competition and international trade is that of exceptions and exemptions’.⁵⁴ Very few competition laws cover all aspects of a national economy.⁵⁵ Instead, exemptions are common practices in major competition regimes. In general, exemptions can be divided into sector and non-sector exemptions. Generally speaking, it is very rare that an exemption provided by a competition regime explicitly refers to different treatment to be accorded on the basis of nationality. In other words, a violation normally arises from *de facto* discrimination rather than *de jure* discrimination. A violation of the national treatment principle in the WTO could arise either from the case where less favourable treatment exists because the application of the exemption has been more burdensome for imported goods or services, or from the case where the design of the overall competition law is intended to exempt sectors where only domestic firms

⁵⁴ P. Sittenfeld, ‘International Cooperation between Developed and Developing Countries’, in B. Hawk, ed., (2004), note 3, 685, p. 699.

⁵⁵ See, e.g., OECD, *Antitrust and Market Access: the Scope and Coverage of Competition Laws and Implications for Trade*, Paris: OECD, (1996) (providing a comprehensive study of the scope and coverage of competition laws in member states of the OECD); UNCTAD, *Application of Competition Law: Exemptions and Exceptions*, Geneva and New York: the United Nations, UNCTAD/DITC/CLP/Misc.25, (2002) (providing an excellent discussion on exemptions and exceptions granted to industries and certain types of economic activities under competition law in a selected sample of both developing and developed countries); and OECD, *Coverage of Competition Laws: Illustrative Examples of Exclusions*, Paris: OECD, COM/DAFFE/TD(2003)6/FINAL, (2003).

benefit or few foreign firms benefit.⁵⁶

1.3.2.1 Non-Sector Exemptions

Many competition regimes grant exemptions from the prohibition against cartels. These exempted cartels normally include export cartels, crisis cartels, and cartels involving small and medium-sized businesses. These exemptions could be, on their face, discriminatory where they are available only to domestic firms. Export cartels provide an example to illustrate how granting non-sector exemptions could violate the national treatment principle under the WTO.⁵⁷

An export cartel here refers to a group or association of firms ‘that cooperate in the marketing and distribution of their product to foreign markets’.⁵⁸ The anticompetitive conduct by associations or combinations of exporters affects exports and hurts foreign customers. According to the study by Simon Evenett, Margaret Levenstein and Valerie Suslow, virtually all competition regimes grant exemptions to export cartels from prosecution by domestic authorities.⁵⁹ The argument here is not about whether export cartels can be justified from a competition point of view⁶⁰ but whether the exemptions of export cartels violate the WTO national treatment principle. These are two different issues. Whether export cartels violate the WTO national treatment principle does not depend on whether such cartels are harmful to domestic consumers. Export cartels could violate the WTO national treatment principle even if they can benefit domestic

⁵⁶ UNCTAD, *WTO Core Principles and Prohibition: Obligations Relating to Private Practices, National Competition Laws and Implications for a Competition Policy Framework*, Geneva and New York: United Nations, UNCTAD/DITC/CLP/2003/2, (2003), pp. 27-28.

⁵⁷ For a review of the treatment of export cartels in various jurisdictions, see, A. Bhattacharjea, ‘Export Cartels- A Developing Perspective’, *Journal of World Trade*, vol. 38(2), (2004), 331, pp. 336-340; OECD, (2003), note 55; and S. Evenett, M. Levenstein and V. Suslow, ‘International Cartel Enforcement: Lessons from the 1990s’, *World Economy*, vol. 24, (2001), 1221.

⁵⁸ See, R. Adhikari, (2004), note 51, 53, p. 75.

⁵⁹ S. Evenett, M. Levenstein and V. Suslow, (2001), note 57, 1221.

⁶⁰ Not all agreements that are formed under these laws are competitively harmful. They may have efficiency-enhancing, pro-competitive effects on the exports from the country of origin, and hence, rather than harm, consumers in importing countries. See, A. Dick, ‘Are Export Cartels Efficiency-enhancing or Monopoly-promoting Evidence from the Webb-Pomerene Experience’, *Research in Law and Economics*, vol. 15, (1992), 89, pp. 89-127.

consumers. Thus, whether or not the WTO national treatment principle is violated by granting exemptions to export cartels depends on how the firms which benefit from such exemptions are selected. Put another way, the violation of the WTO national treatment principle by exemption provisions under national competition regimes could happen where foreign-invested export firms are treated less favourably than domestic export firms either *de jure* or *de facto* under an export cartel exemption.

In practice, domestic firms can generally have more chances to be granted exemptions than foreign-invested companies. Through export cartels, a domestic competition regime provides 'legal privileges and immunities to their own nation's firms that are members of export cartels'.⁶¹ It is very rare that foreign-invested firms are the majority of the firms which benefit from an export cartel exemption. Instead, the majority, if not all, of the firms which benefit from an export cartel exemption are domestic firms. In addition, it is debatable whether or not the WTO national treatment obligation is violated when imports, which do not enjoy the exemption, are obviously treated less favourably than the exempted exports.

From the examination of export cartels, therefore, it can be seen that whether a non-sector exemption is consistent with the WTO national treatment principle depends on how such a non-sector exemption is selected and what kind of companies benefit from such an exemption. If such an exemption is granted based on some criteria which discriminate against foreign companies or only domestic companies can benefit from such an exemption, the concern of violation of the WTO national treatment principle might be raised. In practice, however, it is far from easy to examine such a violation because it is very difficult to argue why only domestic companies benefit from a non-sector exemption.

1.3.2.2 Sector Exemptions

Some economic sectors are exempted from the application of a national

⁶¹ Asian Development Bank, *Asian Development Outlook 2005*, Mandaluyong City: Asian Development Bank, (2005), p. 258, <http://www.adb.org/documents/books/ado/2005/ado2005-part3.pdf>.

competition law through either this law itself or other sector legislation. Labour organisations, agriculture and transportation are the most common sectors that are exempted by a national competition law.⁶² Other sectors that could be exempted from a national competition law are energy, telecommunications, postal services, media and publishing industries.

As the European Union (EU) argued, 'Broad sectoral exclusions from the application of competition law are a matter of concern' from the point of view of discrimination.⁶³ Sector exemptions could violate the WTO national treatment principle under the following circumstances. First, the absence of effective competition law disciplines in a sector of economic activity can result in anticompetitive practices by domestic firms, which can lead to deny access to the domestic market to foreign competitors. Second, when a sector exemption is granted, the scope and criteria could discriminate against foreign firms. For example, competition law or other legislation can grant exemptions to the sector where domestic firms dominate the market, while at the same time it refuses to grant exemptions to the sector where foreign firms dominate the market. Thus, the application of sector exemption could *de facto* discriminate against foreign firms. In practice, however, it is far from easy in reality to argue that a WTO Member should not grant an exemption to a sector because the result of implementing such an exemption could benefit domestic firms only.

2 To What Extent Has the Formulation of the Antimonopoly Law 2007 Been Influenced by the WTO National Treatment Principle?

The national treatment principle in international law is not an unfamiliar obligation and dates back to earlier centuries.⁶⁴ But certainly it is not a happy application of this principle for China during the late nineteenth and the early

⁶² UNCTAD, (2002), note 55, p. 11.

⁶³ WTGCP, WT/WGTCP/W/115, note 3, p. 5.

⁶⁴ See, P. Van Themaat, *The Changing Structure of International Economic Law*, Boston: Nijhoff, (1981), pp. 16 ff.

twentieth centuries.⁶⁵ China was first forced to accept the national treatment principle in 1842 because it was defeated by the UK in Opium War. Nevertheless, China is bound by the WTO national treatment principle since its accession to the WTO. China has confirmed its commitment regarding the WTO national treatment principle.⁶⁶ This section examines to what extent the formulation of the Antimonopoly Law 2007 has been influenced by such an obligation. To this end, it is structured into three sub-sections. First, it surveys the general impact of the WTO national treatment principle on the formulation of the Antimonopoly Law 2007. Second, it explores the impact of the WTO national treatment principle on the formulation of the objectives of the Law. Third, it examines the impact of the WTO national treatment principle on the formulation of the exemption provisions of it.

2.1 The General Impact: Recognising the Relevance of the WTO National Treatment Principle in the Formulation of the Antimonopoly Law 2007

As discussed before, the WTO national treatment principle matters when WTO Members formulate their competition laws because such competition laws have to be consistent with the WTO national treatment principle once they are adopted. Initially, the WTO national treatment principle was not an issue of concern for the Chinese government in regard to the formulation of China's competition law before it joined the WTO in 2001. However, it became relevant after China joined the WTO. It is far from easy for China to recognise the role played by the national treatment principle in the formulation of the Antimonopoly Law 2007 partly due to the painful experience of the application of the national treatment in China during the late nineteenth and the early twentieth centuries. What follows is to analyze the general impact of the WTO

⁶⁵ About the historical evolution of national treatment in China, See, W. Wang, 'Historical Evolution of National Treatment in China', *International Law*, vol. 39, (2005), 759.

⁶⁶ The Protocol on the Accession of the People's Republic of China (hereinafter the Protocol on China's Accession), Part I, Arts. 3 and 8(2). For the text of the Protocol on China's Accession, see, WTO, *Protocol on the Agreement of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organisation*, Cambridge: Cambridge University Press, (2003).

national treatment principle on the formulation of the Antimonopoly Law 2007 by exploring how China has gone through from denying or ignoring to recognising the relevance of the WTO national treatment principle to its competition legislation. This journey can be divided into three stages. However, there is no black and white line between each stage. In fact, these three stages are sometimes mixed with each other. The reason why this journey is divided into three stages is purely for convenience.

2.1.1 Stage One: Denying or Ignoring the WTO National Treatment Principle

After a year of investigation, the Chinese corporation watchdog, the SAIC, published a report in 2004.⁶⁷ This report listed a number of industries where free competition may be threatened by multinationals. The list included industries that produced software, photosensitive materials, mobile phones, cameras, vehicle tires, and soft packaging. In addition, it also named some foreign companies which had a 'market edge or even a monopoly' in the Chinese market. According to this report, Microsoft enjoyed a 95% market share of computer operating system in China. Tetra Pac held 95% market share in the sterilized packaging market. Nokia and Motorola together took up for 70% of Chinese mobile phone market. Eastman Kodak, which had already held more than 50% of China's roll film market, strengthened its dominant position after taking 20% of its sole major Chinese rival, Lucky Film.⁶⁸

This report not only listed some foreign monopoly companies but also accused them of abusing their dominant positions. On the eve of the release of WPS97, the report cited, a set of computer programs developed by a Chinese company, a multinational company hurriedly brought forward its versions of similar products at much lower prices. Some companies set different prices for the same kinds of

⁶⁷ SAIC, 'The Competition-restricting Behaviour of Multinational Companies in China and Counter Measures' [在华跨国公司限制竞争行为表现及对策, *Zaihua Kuaguo Gongsi Xianzhi Jingzheng Xingwei Biaoxian Ji Duice*], *Journal of the State Administration of Industry and Commerce* [工商管理杂志 *Gongshang Guanli Zazhi*], vol. 5, (2004), 42.

⁶⁸ Currently, there are only three companies in China's roll film market: Kodak (an American company), Fuji (a Japanese company) and Lucky Film (a Chinese company).

products, with the Chinese goods costing twice as much as the equivalents in their countries of origin. The report also indicated that foreign companies that owned rights to advanced technology or other intellectual properties squeezed the market by refusing to sell their services or products to Chinese companies. Based on these reasons, the report concluded that China needed to adopt an antimonopoly law in order to combat anticompetitive practices by foreign firms.

One of the major concerns of foreign officials and companies in regard to China's competition law is whether foreign companies will be treated no less favourably than domestic firms under the new law. Some multinational companies, such as Microsoft, have frequently given comments on the drafts of China's Antimonopoly Law.⁶⁹ Thus, it is not surprising that this report sparked outcries from foreign firms, particularly the ones whose names were mentioned. These firms requested explanations from Chinese officials through their own governments.⁷⁰

This report did not represent an exceptional example during that period. Some Chinese officials and Chinese scholars also argued that China should adopt a competition law as a means of fending off competition from multinational companies in order to protect domestic companies. For example, the head of China's statistics bureau called for action to limit 'malicious' attempts by multinational companies that wanted to buy local companies to establish market monopolies.⁷¹ Some Chinese companies were also keen to lobby the Chinese government to adopt a competition law as a tool to protect them from the competition of foreign companies.⁷² To some extent, these comments and lobbies denied or ignored the relevance of the WTO national treatment principle

⁶⁹ See, 'Antimonopoly Law Fighting: Multinational Companies Confuse on the Multi-Competition Enforcement Authority' [反垄断法波以: 多头执法问题令跨国公司无所适从, *Fanlongduan Fa Boyi: Duotou Zhifa Wenti Ling Kuaguo Gongsu Wusuo Shicong*], *Hexun News* [和讯要闻, *Hexun Yaowe*], 1st December 2005, <http://news.hexun.com/detail.aspx?lm=1713&id=1429514>.

⁷⁰ J. Lin, J. Tan and J. Ye, '19 Years of Drafting Antimonopoly Law' [反垄断法的 19 年风雨历程, *Fanlongduan Fa De 19 Nian Fengyu Licheng*], *Hexun News* [和讯要闻, *Hexun Yaowe*], 3rd July 2007, http://news.hexun.com/1713_1712620A.shtml.

⁷¹ M. Dickie, 'Chinese Cabinet approves anti-monopoly law', *Financial Times*, 9th June 2006, p. 9.

⁷² 'China reality check', *The Australian Business*, 12th June 2006, <http://www.theaustralian.news.com.au/story/0,20867,19438482-643,00.html>.

to China's forthcoming competition law, despite the fact that the Protocol on China's Accession clearly provides: 'foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises'.⁷³

2.1.2 Stage Two: Struggling Period

Gradually, the argument shifted. Some scholars started to argue that a competition law should not be used as a means against foreign companies.⁷⁴ It also seemed that the Chinese government started to be aware of its WTO commitment regarding the national treatment principle.⁷⁵ During this period, however, the Chinese government still did not fully recognise the relevance of the WTO national treatment principle to the formulation of China's Antimonopoly Law. This was reflected in the words of the Chinese delegate at the WGTCP. On one hand, he stated:

China's current Anti-Unfair Competition Law places domestic and foreign firms on an equal footing, thereby observing the principle of non-discrimination. We believe in the philosophy that the enforcement of competition law should reflect the competitive nature of the market as a whole.⁷⁶

On the other hand, he argued:

[M]ore flexibility is needed for developing countries in applying the principle of non-discrimination, the aspect of national treatment in particular, in their legislation on competition and the implementation thereof. This flexibility should also be reflected in any future multilateral framework on trade and competition policy.⁷⁷

He continued:

The flexibility for developing members as provided in the existing WTO

⁷³ The Protocol on China's Accession, Part I, Arts. 3 and 8(2).

⁷⁴ 'Antimonopoly Law to Benefit All', *China Daily*, 2nd June 2004, <http://www.china.org.cn/english/government/97133.htm>.

⁷⁵ The Protocol on China's Accession, Part I, Arts. 3 and 8(2).

⁷⁶ WGTCP, *Communication from China- Elements contained in Paragraph 25 of the Doha Ministerial Declaration*, WT/WGTCP/W/227, (2003), para. 8.

⁷⁷ *Id.*

Agreements related to competition policy is inadequate. Due to the big gap and contrast between the developing countries and the developed ones in terms of economic systems, economic sizes, economic structures, levels of economic development as well as the sizes and competitiveness of various industries and enterprises, many specific *de jure* and *de facto* distinctions by the developing countries in the treatment offered to domestic enterprises as compared to that to foreign enterprises as referred to in the paper of the OECD will not be completely avoidable.⁷⁸

This comment clearly illustrates that on the one hand, China generally accepted the applicability of the WTO national treatment principle to its competition legislation; on the other hand, China argued that discrimination both *de jure* and *de facto* should be allowed to protect some domestic firms due to China's economic conditions. Thus, it clearly demonstrates that, during this period, China was still struggling to fully recognise the relevance of the national treatment principle in the formulation of its competition law.

2.1.3 Stage Three: Recognising the Relevance of the National Treatment Principle in the Formulation of the Antimonopoly Law 2007

After more than five years as a WTO Member, China is gaining the confidence of implementing WTO rules in general. This has had an impact on the implementation of the national treatment principle as well. China started to accept the WTO national treatment principle despite its previous unhappy experience. Moreover, China started to realise that it was not possible to ignore the relevance of the WTO national treatment principle in the formulation of the Antimonopoly Law 2007. As a WTO Member, China has a duty to make sure that its competition law is not inconsistent with the WTO national treatment principle. Otherwise, it could face complaints from other WTO Members and thus possibly unfavourable rulings by a WTO Panel or the Appellate Body. This potential risk of facing complaints was recognised by the Chinese government. It changed its tune to accept the relevance of the WTO national treatment principle to the formulation of the Antimonopoly Law 2007. This is illustrated by a recent comment from the Chinese delegate to the WTO. During China's trade

⁷⁸ *Id.*, para. 9.

policy review, some WTO Members were concerned whether foreign companies would be treated equally in China's forthcoming competition law. In response to such concerns, the Chinese delegate reassured WTO Members that the forthcoming Antimonopoly Law 'would strictly follow the principle of national treatment and would not be discriminatory against foreign enterprises'.⁷⁹ Unlike the previous comment given in the WGTCP, this comment makes it very clear that China's Antimonopoly Law will strictly follow the WTO national treatment principle without any reservation. Thus, this illustrates that China has finally recognised the relevance of the WTO national treatment principle in the formulation of the Antimonopoly Law 2007. This general impact of the WTO national treatment on the formulation of the Antimonopoly Law 2007 has also been reflected in the formulation of some of its provisions, which are examined in the following two subsections.

2.2 The Impact of the WTO National Treatment Principle on the Formulation of the Objectives of the Antimonopoly Law 2007

All drafts of China's Antimonopoly Law adopt multi-objectives. Thus, it is not surprising that the Antimonopoly Law 2007 adopts multi-objectives.⁸⁰ During the process of formulating the Law, some foreign government officials and companies were not convinced that some of the objectives would not be used as a means to protect inefficient domestic companies. What follows explores the impact of the WTO national treatment principle on the formulation of the Antimonopoly Law 2007. To this end, it focuses on two objectives: development of the national economy and public interest because these two areas could present a risk of violating the WTO national treatment principle.

2.2.1 Development of the National Economy

All the drafts of the Antimonopoly Law 2007 emphasize that one of the

⁷⁹ Trade Policy Review Body, *Trade Policy Review- People's Republic of China- Minutes of Meeting*, WT/TPR/M/161, 6th June 2006, para. 158.

⁸⁰ See, the Antimonopoly Law 2007, Art. 1.

objectives of China's Antimonopoly Law is to ensure the development of the Chinese economy. This might be because 'Maintaining adequate growth is arguably the central challenge for China's macroeconomic policy in the coming decade'.⁸¹ China's competition law inherently aims to promote China's economy. Therefore, it is not surprising that one of the objectives of the Antimonopoly Law 2007 is to ensure 'the healthy development of the socialist market economy'.⁸²

During the drafting process, however, the continued inclusion of the development of the national economy as an objective raised concerns from other WTO Members because the meaning of the development of national economy could be very flexible to competition enforcement agencies and courts. As some commentators pointed out, this language could provide a basis for unsuccessful competitors to attempt to seek shelter from competition and they therefore stressed the need to avoid the use of competition law to protect competitors, as opposed to the competitive process.⁸³ If that happened, domestic companies could be more likely to benefit from this flexible application of competition law than foreign companies due to the influence of protectionism and national interests. Thus, the inclusion of such an abstract concept as an aspirational goal in the Antimonopoly Law 2007 presents a risk that competition enforcement agencies and courts may resort to this objective as a ground for protecting inefficient domestic companies against efficient foreign ones.⁸⁴ In other words, the concept of the development of the national economy could be used as a tool for implementing the Antimonopoly Law 2007 against foreign companies. This

⁸¹ OECD, *China in the World Economy: the Domestic Policy Challenges*, Paris: OECD, (2002), p. 718.

⁸² The Antimonopoly Law 2007, Art. 1.

⁸³ See, the American Bar Association's Sections of Antitrust Law and International Law and Practice, *Joint Submission of the American Bar Association's Sections of Antitrust Law and International Law and Practice on the Proposed Anti-Monopoly Law of the People's Republic of China*, (2003), pp. 2, 40-41, (noting that competition laws should follow US antitrust law in focusing on protecting the competitive process and not individual market participants), www.abanet.org/antitrust/comments/2003/jointsubmission.pdf. Also see *Brown Shoe Co. Inc v. United States*, 370 US 294, 320 (1962) (noting that the antitrust laws were enacted for 'the protection of competition, not competitors').

⁸⁴ H. Harris, 'An Overview of the Draft China Antimonopoly Law', *Georgia Journal of International and Comparative Law*, vol. 34, (2005), 131, p. 136.

could lead to complaints of a violation of the WTO national treatment principle.

Whether the concept of the term ‘development of the national economy’ is used as a means to protect domestic firms depends on how such concept is interpreted and applied by competition enforcement agencies and courts. It cannot be pre-judged that the inclusion of the development of the national economy as an objective is inconsistent with the national treatment principle under the WTO automatically. The term ‘development of the national economy’ is not inconsistent with the WTO national treatment principle as long as it is interpreted and applied in a way in which foreign firms are not treated less favourably than domestic firms. In practice, the interpretation and enforcement of Chinese laws is rarely grounded in the term ‘development of the national economy’, despite the fact that virtually every Chinese law includes such a term. Thus, it could be the case that the term ‘development of the national economy’ will not be applied in practice. However, the Chinese competition enforcement authorities should be aware of the potential risk of violating the WTO national treatment principle through applying the term ‘development of the national economy’. Further guidance or administrative rules are needed in order to make sure that this term is not interpreted and applied as a means to protect inefficient domestic companies.

2.2.2 Public Interest

The term ‘public interest’ is clearly mentioned in Article 1 of the 1999 Draft,⁸⁵ Article 1 of the February 2002 Draft,⁸⁶ Article 1 of the 2004 Submitted Draft,⁸⁷ Article 1 of the April 2005 Draft,⁸⁸ Article 1 of the July 2005 Draft,⁸⁹ Article 1 of

⁸⁵ This draft is only circulated in a limited scope. An outline of this draft can be seen from M. Williams, *Competition Policy and Law in China, Hong Kong and Taiwan*, Cambridge: Cambridge University Press, (2005), pp. 177-191; and X. Wang, ‘The Prospect of Antimonopoly Legislation in China’, *Washington University Global Studies Law Review*, vol. 1, (2002), 201, pp. 224-225.

⁸⁶ This draft is only circulated in a limited scope. An English edition is on the author’s file.

⁸⁷ An English edition is available at <http://www.ibanet.org/images/downloads/Questionnaire%20-%20final.pdf>.

⁸⁸ An English edition is available at <http://www.ibanet.org/images/downloads/China%20Antimonopoly%20Law%20April%208%202005%20Draft%20-%20English-v1.pdf>.

the November 2005 Draft,⁹⁰ Article 1 of the June 2006 Draft,⁹¹ and Article 1 of the June 2007 Draft.⁹² This illustrates that the term ‘public interest’ routinely appears in the drafts of China’s Antimonopoly Law. Therefore, it is not surprising that Article 1 of the Antimonopoly Law 2007 stipulates: ‘This Law is enacted for the purposes of... safeguarding ... public interest’.

Unlike the term ‘development of national economy’, the term ‘public interest’ has been interpreted and applied widely in practice in China. As Youngjin Jung and Qian Hao pointed out, “‘Public interest’, used as a Chinese legal term, is a catch-all routinely subject to wide interpretations to the fullest possible degree”.⁹³ Public interests could ‘be exploited to prevent inefficient local companies from deservedly winding up as “roadkill”’.⁹⁴ In a submission to the 2003 OECD Global Forum on Competition, the Chinese government indicated that ‘public interest’ could include the protection of employment and the preservation of the general ‘economic situation’.⁹⁵ As with the development of national economy, there is a lack of guidance in the drafts of the Antimonopoly Law 2007 on how public interest will be interpreted and implemented. However, it cannot be ruled out that public interest will not be used to protect inefficient domestic companies against foreign ones. Thus, the Antimonopoly Law 2007 could be interpreted and implemented by competition enforcement authorities

⁸⁹ An English edition is available at

<http://www.ibanet.org/images/downloads/Draft%20of%2027%20July%202005.pdf>.

⁹⁰ This draft is only circulated in a limited scope. An English edition of this draft is on the author’s file. For an overview of this draft, see H. Harris, ‘The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People’s Republic of China’, *Chicago Journal of International Law*, vol. 7, (2006), 169.

⁹¹ An English edition is available at <http://www.buyusa.gov/asianow/270.pdf>.

⁹² This draft is not available to public. However, the differences between this draft and the June 2006 Draft are highlighted on the NPC website. See, <http://www.npc.gov.cn/zgrdw/flzt/index.jsp?lmid=15&dm=1520&pdmc=ch>.

⁹³ Y. Jung and Q. Hao, ‘The New Economic Constitution in China: A Third Way for Competition Regime?’, *Northwest Journal of International Law & Business*, vol. 24, (2003), 107, p. 156.

⁹⁴ N. Bush, ‘Chinese Competition Policy: It Takes More than A Law’, *China Business Review*, (2005), <http://www.chinabusinessreview.com/public/0505/bush.html>.

⁹⁵ See, Contribution of China, ‘OECD Global Competition Forum’, held on 10-11 February 2003, CCNM/GF/COMP/WD(2003)1, (2003), p. 4.

and courts against foreign companies under the provision of protecting the 'public interest'. This could lead to the violation of the WTO national treatment principle. Thus, the Chinese competition enforcement authorities should be aware of such potential inconsistency to the national treatment principle when the Antimonopoly Law 2007 is interpreted and implemented. Further guidance or administrative rules are needed to make sure that this term is not interpreted and applied as a means to protect domestic firms.

2.3 The Impact of the WTO National Treatment Principle on the Formulation of the Exemption Provisions of the Antimonopoly Law 2007

As discussed above, exemption provisions in a competition law can be areas where the WTO national treatment principle could be violated. Thus, it is necessary to draft such exemption provisions carefully in order to avoid potential violations of the WTO national treatment principle. What follows examines to what extent the formulation of the exemption provisions of the Antimonopoly Law 2007 has been influenced by the WTO national treatment principle.

2.3.1 Sector Exemptions

Article 2 (Scope of Application) of the February 2002 Draft provides: 'Unless otherwise specifically provided by law, activities restricting competition in market transactions in the territory of the People's Republic of China shall be governed by this Law'. This article sends a worrying signal because many anticompetitive practices can be exempted through this article. It has the potential to violate national treatment where these exemptions are provided according to the nationality of the companies concerned. This provision was changed in the 2004 Submitted Draft. Article 2 of this draft provides: 'Monopolistic behaviours in market transactions in the territory of the People's Republic of China shall be governed by this Law'. Thus, this provision does not provide blank sector exemptions. It is an incredible change given the fact that many competition regimes do provide sector exemptions.⁹⁶

⁹⁶ See, Article 81 (3) EC.

However, this encouraging change did not last very long. In the April 2005 Draft, an article which is similar to Article 2 of the 1999 Draft was included. Article 55 (Inapplicability to Legitimate Conducts) of the April 2005 Draft provides: 'This law is not applicable to any conduct which is taken according to other laws and regulations'. Thus, Articles 2 and 55 together are similar to Article 2 of the February 2002 Draft.

Article 2 of the July 2005 Draft provides: 'This Law does not apply where other laws or administrative regulations provide for special regulation of an industry or a sector, but applies to the market competition conducted by undertakings'. It is very similar to Article 55 of the April 2005 Draft and Article 2 of the February 2002 Draft. Article 2 of the November 2005 Draft and Article 2 of the June 2006 follow this trend. Article 2 of the June 2006 Draft provides: 'As for monopolistic conduct prohibited by this Law, this Law does not apply where other laws or administrative regulations provide provisions'. This trend was confirmed by the Chinese government during China's first policy review in 2006 by stating: 'The current draft of the Antimonopoly Law does not explicitly provide the industries or areas that are exempt from its application. Therefore the law will be applicable to all industries and areas'.⁹⁷ However, such an exemption provision is like a blank cheque. It leaves the door open for future sector exemptions through sector legislation. Thus, this presents a risk that such an exemption provision may be resorted to as a means to protect domestic firms and discriminate against foreign firms through sector legislation. This could lead to the violation of the WTO national treatment principle.

It seems that the Chinese government was aware of such a potential violation because the Antimonopoly Law 2007 does not include such an exemption provision. Article 2 of the Antimonopoly Law 2007 stipulates:

This Law is applicable to monopolistic conduct in economic activities within the territory of the People's Republic of China; This Law is applicable to monopolistic conduct outside the territory of the People's Republic of China that have eliminative or restrictive effects on

⁹⁷ Trade Policy Review Body, *Trade Policy Review- People's Republic of China- Minutes of Meeting- Addendum*, WT/TPR/M/161/Add.2, 11th September 2006, p. 73.

competition in the domestic market of the People's Republic of China. This is remarkable because this provision does not provide sector exemptions through a blank provision and thus reduces the risk of violating the WTO national treatment. Therefore, this is a good example of recognising the relevance of the WTO national treatment principle and responding to it accordingly in the formulation of the Antimonopoly Law 2007.

2.3.2 Non-Sector Exemptions

In general, all drafts of the Antimonopoly Law 2007 include non-sector exemptions. However, the exemptions granted by the non-sector exemption provision under different drafts and the Antimonopoly Law 2007 are not exactly the same. What follows is to examine the impact of the WTO national treatment principle on the formulation of the exemption provisions of the Antimonopoly Law 2007 by analysing the changes of these provisions.

Article 11 of the 2004 Submission Draft grant exemptions from the application of Article 8 to:

- (1) Joint activities by operators to improve product quality, enhance efficiency, reduce cost, unify commodity specifications or models;
- (2) Joint activities by operators to prevent significant decline of sales or obvious overproduction in order to adapt themselves to economic distress;
- or (3) Joint activities by small and medium-sized enterprises to enhance operational efficiency and competitiveness;
- (4) Joint activities by operators to upgrade technology, improve product quality, develop new commodities and market;
- (5) Other activities that may eliminate or restrict competition, but are beneficial to the development of the national economy and the social and public interests.

This provision was criticised due to the broadness of these exemptions. Under Article 9 of the 2004 Submitted Draft, for instance, members of horizontal price-fixing conspiracy are exempted from the prohibitions of the law if such price fixing is 'beneficial to the development of the national economy and the social and public interests'. Such criteria for non-sector exemptions could be used to protect domestic firms against foreign firms. In addition, crisis cartels are exempted in this draft. It could be used by the competition authority and the courts to apply the exemption to favour domestic firms while denying the

benefit of the exemption to foreign companies if the law was implemented selectively.⁹⁸

Recognising the potential risk of violating the WTO national treatment principle by Article 11 of the 2004 Submitted Draft, some changes were made in Article 9 of the April 2005 Draft, which provides:

Agreements among undertakings with one of the following objectives shall be exempted from application of Article 8 if the agreements can enable consumers to share impartially the interests derived from the agreements, are necessary for achieving the objectives and will not substantially eliminate competition in the relevant market: (i) Agreements for the purpose of product quality upgrading, cost reduction and efficiency improvement; (ii) Agreements to cope with economic depression, to moderate serious decrease in sales volumes or distinct production surplus; (iii) Agreements by small and medium-sized enterprises to improve operational efficiency and to enhance their competitiveness; (iv) Agreements to enhance the competitiveness of exports in the global market; (v) Agreements to improve technology, develop new products or explore new markets.

From this provision, it can be seen that the April 2005 Draft has made improvements regarding the criteria for granting non-sector exemptions. This provision deletes broader national interest loopholes from the 2004 Submitted Draft. This change can be explained as a response to the WTO national treatment principle because this criterion is very broad and could be used easily as a means to discriminate against foreign firms in order to protect domestic firms. In addition, Article 9 of the April 2005 Draft limits the exemptions to anticompetitive actions that are intended and necessary for the achievement of the exempt objectives— ‘enable consumers to share fairly’ in the benefits of the agreement, and do not ‘substantially eliminate competition in the relevant market’. This will reduce the potential chance that this provision will be used as a means to protect inefficient domestic firms against efficient foreign ones. To some extent, thus, it illustrates the recognition of relevance of the WTO national treatment principle to the Antimonopoly Law.

⁹⁸ H. Harris, (2005), note 84, 131, p. 139.

Article 15 of the Antimonopoly Law 2007 stipulates:

If the undertakings can prove that the concluded agreements belong to one of the following situations, Article 13 and Article 14 shall not apply: (1) to improve technology, research and develop new product; (2) to upgrade the product quality, reduce cost, enhance efficiency, and unify the specifications and standards of product; (3) to improve operational efficiency and enhance competition capacity of small and medium-sized undertakings; (4) to realize the social public interests such as to save energy, protect environment, and contribute for disaster; (5) during the period of economic depression, to moderate serious decreases in sales volumes or distinct production surpluses; (6) to ensure the legitimate interests in foreign trade and economic cooperation; (7) the other situations provided by law or the State Council.

In addition, it requires that such agreements should enable consumers to share impartially the interests derived from the agreements and not substantially eliminate competition in order to qualify for exemption under Article 15(1)-(5).

The difference between Article 15 of the Antimonopoly Law 2007 and Article 9 of the April 2005 Draft is that the former includes a blanket provision for granting exemptions. Thus, Article 15 of the Antimonopoly Law 2007 is much broader than Article 9 of the April 2005 Draft. Although it does not violate the WTO national treatment principle automatically, Article 15(7) does present a risk of violating the WTO national treatment principle. In the future, thus, the Chinese government needs to be aware of the risk that Article 15 (7) of the Antimonopoly Law 2007 could violate the WTO national treatment principle if such a provision is applied in a way which foreign undertakings are treated less favourably than domestic ones. Any further administrative rules or guidelines regarding the interpretation and enforcement of this provision must be consistent with the WTO national treatment principle.

The rest of the exemptions granted under Article 15 are common practices among other competition regimes. Thus, it is highly unlikely that WTO Members will challenge the Antimonopoly Law 2007 because this Law adopts such exemptions. However, violations of the national treatment principle could arise if China applies these exemptions in a way which foreign companies are treated less favourably than domestic firms. But it will be far from easy to justify such

complaints. To date, there have been no such complaints under the WTO national treatment principle.⁹⁹ Nevertheless, the Chinese competition enforcement authorities need to be aware of such potential violations of the national treatment principle under the WTO and provide clear criteria in further administrative rules or guidelines for enforcing non-sector exemption provisions under the Antimonopoly Law 2007.

3 Conclusion

As a cornerstone of the WTO system, the WTO national treatment principle functions as a legal yardstick to scrutinize the appropriateness of a WTO Member's domestic legislation. It is applicable to WTO Members' competition laws insofar as such laws exist and the enforcement of such laws affects trade. Due to this significant role played by the WTO national treatment principle on WTO Members' competition laws, even the US, which arguably has the most advanced competition regime, has to defend how its antitrust laws are consistent with the WTO national treatment principle.¹⁰⁰ Particularly, violations of the WTO national treatment principle could be raised in regard to the interpretation and implementation of the objectives and the exemptions under a WTO Member's national competition law.

This chapter has showed that it was not easy for China to recognise the relevance of the WTO national treatment principle in the formulation of the Antimonopoly Law 2007 partly due to its previous unhappy experience regarding the national treatment principle. As a WTO Member, however, China has to make sure that the Antimonopoly Law 2007 is not inconsistent with the WTO national treatment principle. In particular, it would be hard for China to justify any *de jure* discrimination under the Antimonopoly Law 2007 without the risk of violating the WTO national treatment principle. During the formulation of the Antimonopoly Law 2007, certain provisions have been changed in order to be

⁹⁹ Although *Japan- Measures Affecting Consumer Photographic Film and Paper (Japan-Film)* is highly relevant to competition regulation and national treatment, the US did not complain that the provisions of Japanese Antimonopoly Law themselves were inconsistent with national treatment obligation. See, Panel Report, *Japan- Film*, WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179. More about this case, see Chapter One.

¹⁰⁰ See, WGTC, WT/WGTC/W/131, note 3, paras. 13-18, pp. 5-7.

consistent with the WTO national treatment provisions. In general, the Antimonopoly Law 2007 does not provide *de jure* discrimination against foreign firms. In particular, Article 2 of the Antimonopoly Law 2007 does not provide a blank exemption to protect domestic firms in particular sectors, as most previous drafts do. These changes reduce the risks that the Antimonopoly Law 2007 could violate the WTO national treatment principle.

However, it has to be borne in mind that the adoption of the Antimonopoly Law 2007 is only the start of this issue. Whether the Antimonopoly Law 2007 will be used as means to protect domestic firms against foreign firms depends on how such law is interpreted and applied. In particular, the interpretation and implementation of the concept of public interest under Article 1 of the Antimonopoly Law 2007 could present a risk of violating the WTO national treatment principle. Traditionally, both Chinese authorities and courts enjoy broad discretion to interpret and apply laws. Moreover, it is not the case that Chinese courts interfere with Chinese agencies' interpretations of laws. Therefore, the uncertainty of whether the Antimonopoly Law 2007 will be used as a tool to against foreign companies will be continued. In the future, thus, the Chinese competition enforcement authorities need to be aware of the risk of potential violations of the WTO national treatment principle and make sure that the Antimonopoly Law 2007 is interpreted and applied in a way in which is consistent with the WTO national treatment principle.

Chapter Four:

The Impact of Articles VIII and IX of the GATS, and Section 1.1 of the Reference Paper on the Formulation of the Antimonopoly Law 2007

This chapter examines the impact of Articles VIII and IX of the General Agreement on Trade in Services (GATS),¹ and Section 1.1 of the Telecommunications Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications (hereinafter the Reference Paper)² on the formulation of the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007).³ To this end, it is structured into two sections. The first section examines the impact of Articles VIII and IX of the GATS, while the second section focuses on the impact of Section 1.1 of the Reference Paper.

1 The Impact of Articles VIII and IX of the GATS on the Formulation of the Antimonopoly Law 2007

This section explores whether the enactment of a competition law could help China to implement the obligations under Articles VIII and IX of the GATS and, if so, to what extent the formulation of the Antimonopoly Law 2007 has been influenced by the possibility of helping China to implement such obligations.

¹ The GATS is available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

² The Reference Paper is available at http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm.

³ The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

1.1 Articles VIII and IX of the GATS

1.1.1 Article VIII of the GATS

As its title 'Monopolies and Exclusive Service Suppliers' illustrates, Article VIII of the GATS deals with monopolies. In particular, Article VIII:2 of the GATS clearly stipulates:

Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

The key term 'abuse' is not defined under the GATS. The Chief American GATS negotiator during the Uruguay Round noted: 'After considerable debate, "abuse" was left undefined'.⁴ It is not surprising that the term 'abuse' is left without definition since it is far from easy for negotiators to agree any such definition. However, further explanation of the term 'abuse' is still possible through Panels and the Appellate Body in the World Trade Organisation (WTO).

It is quite common, although less so now with privatisation, that one national company is invested with monopoly rights for services supply in one or several segments of the market. For example, the electricity sector is often divided into generation, transmission and distribution segments. The government often grants the monopoly of services supply in the transmission sector to one state-owned company or one private company. Normally, this company is also directly or indirectly the distributor or producer of electricity. When it competes outside the transmission sector, it can easily abuse its monopoly position. It can stop supplies for its competitors or supply insufficient quantities with poor quality and discriminatory prices. Another example is postal services. Many countries grant the monopoly of certain postal services, such as carrying addressed letter-mail, to one state-owned supplier. This supplier also competes in non-

⁴ R. Self, 'General Agreement on Trade in Services', in T. Stewart, ed., *The World Trade Organization: the Multilateral Trade Framework for the 21st Century and US Implementing Legislation*, Washington: the American Bar Association, (1996), 523, pp. 532-533.

monopolized markets, such as express parcel delivery. When it competes outside its monopoly areas, it can easily abuse its monopoly, for example by cross-subsidy. Article VIII is designed to deal with these situations. According to it, if a WTO Member's monopoly supplier acts in a manner inconsistent with its obligations in or outside the scope of its monopoly rights, other WTO Members can request information on these practices. It is also applicable when a WTO Member authorises or establishes a small number of services suppliers and prevents competition among them. Therefore, it imposes obligations on WTO Members regarding preventing certain monopolies in services.

So far, no complaint has been filed to a WTO Panel in regard to the issue of breaching Article VIII of the GATS. On the 2nd May 1997, however, the United States (US) did request consultations with Belgium in respect of certain measures governing the provision of commercial telephone directory services.⁵ These measures include the imposition of conditions for obtaining a license to publish commercial directories, and the regulation of the acts, policies, and practices of Belgacom N.V. with respect to telephone directory services. One of the allegations by the US in this case is that Belgium violated Article VIII of the GATS.⁶ In June 1997, the US held consultations with Belgium in order to address its concerns.⁷ However, the US decided not to proceed further because, after a change in ownership interests in the Belgian directory services industry, the American interests were no longer substantially affected.⁸ Consequently, there is no Panel report on it.

1.1.2 Article IX of the GATS

Not only does the GATS prohibit certain restrictive practices of monopoly service providers, but it also addresses restrictive business practices of non-monopoly

⁵ Request for Consultations by the United States on Belgium-Measures Affecting Commercial Telephone Directory Services, 13th May 1997, WT/DS80/1.

⁶ *Id.* The US claimed that Belgium violated Articles II, VI, VIII and XVII of the GATS.

⁷ Office of the United States Trade Representative (USTR), *Fact Sheet: Monitoring and Enforcing Trade Laws and Agreements*, Washington, D.C.: USTR, (2000), p. 18, http://hongkong.usconsulate.gov/uploads/images/_TGf6Rmt1lhGcTyxq_-HAg/usinfo_301_00-fact.pdf.

⁸ *Id.*

service suppliers. Article IX :1 of the GATS provides: ‘Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services’. Article IX:2 deals with the procedure where restrictive business practices of non-monopoly service suppliers exist. It requires WTO Members to enter into consultations at the request of any other WTO Member with a view to eliminating such practices referred to in Article IX:1. It is strict because it foresees the elimination of the trade constraints. However, it requires only ‘full and sympathetic consideration’ of requests for consultations, and supply of ‘publicly available non-confidential information’.⁹ It is not clear what will happen after the consultation if Members fail to reach an agreement. Is it possible for a WTO Member to file a complaint to a WTO Panel? This has to wait for clarification by WTO Panels or the Appellate Body in future WTO cases. To date, no such case has been filed. However, it is highly unlikely that no complaint is allowed to a WTO Panel if Members fail to reach an agreement during the consultation period because this is against the purpose of the establishment of the WTO dispute settlement system. Therefore, the potential risk of facing a complaint and possibly leading to a ruling by a WTO Panel or the Appellate Body exists. This implies that Article IX, like Article VIII, imposes obligations on WTO Members to address restrictive business practices by non-monopoly service suppliers.

1.1.3 Summary

In sum, Articles VIII and IX of the GATS recognize that certain business practices may restrain competition and thus trade in services. Therefore, Article VIII obliges WTO Members to ‘ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent’ with Article II (the most-favoured-nation principle) and specific commitments. Article IX addresses a broad range of anticompetitive practices across all service sectors by non-monopoly service providers and obliges WTO Members to enter into consultations at the request of other WTO Members where such a potential violation of Article IX exists with a view to eliminating such practices. To some extent, thus, Articles VIII and IX of the GATS establish obligations for WTO

⁹ *Id.*

Members to pro-actively create internally competitive markets in services. In addition, they also require WTO Members to take action or provide remedies against private operators engaging in the anticompetitive practices that affect the trade in services of other Members. This implies that, unlike the majority of the WTO rules which concern government measures, Articles VIII and IX of the GATS relate to private anticompetitive practices.

Conduct that is specially prohibited under Articles VIII and IX of the GATS is also normally subject to control under WTO Members' national competition laws, if they have already adopted competition laws. To some extent, for example, Articles VIII and IX of the GATS have similar functions to Articles 81 and 82 EC and Sections 1 and 2 of the Sherman Act, if we ignore the fact that Articles VIII and IX are only applicable to trade in services.

1.2 Impact on the Formulation of the Antimonopoly Law 2007

1.2.1 The Insufficiency of China's Competition-Related Legislation before the Adoption of the Antimonopoly Law 2007 Regarding the Implementation of Articles VIII and IX of the GATS¹⁰

What follows examines whether the Chinese competition-related legislation before the adoption of the Antimonopoly Law 2007 was sufficient for China to implement Articles VIII and IX of the GATS.

1.2.1.1 Abuse of A Dominant Position

Before the adoption of the Antimonopoly Law 2007, the Interim Rule on Prohibiting Monopolistic Pricing Behaviour 2003 was the major legislation which prohibits monopolistic behaviour through pricing.¹¹ Article 5 prohibits resale price setting. Article 6 prohibits exploitive pricing. Article 7 prohibits predatory

¹⁰ For more details on China competition-related legislation before the adoption of the Antimonopoly Law 2007, see Chapter Two.

¹¹ An unofficial English version is available at http://51trans.net/Article_Show.asp?ArticleID=618.

pricing and making price below costs through rebates, subsidies and rewards. Article 8 prohibits price discrimination under similar transaction situations. In addition, Article 14 (2) of the Price Law of the People's Republic of China (hereinafter the Price Law 1997) prohibits firms from selling products at below cost price in order to force out competitors or monopolise the market and disrupt the normal production and operation order to the great detriment of the interests of other companies.¹² Article 11 of the Anti Unfair Competition Law of the People's Republic of China (hereinafter the LAUC 1993) prohibits predatory pricing by stipulating that a business operator may not, for the purpose of forcing out his competitors, sell his commodities at prices lower than cost.¹³ However, neither Article 14(2) of the Price Law 1997 nor Article 11 of the LAUC 1993 is designed specially for the purpose of combating abuses of dominance. In other words, the enforcement authorities do not need to consider first whether a company has a dominant position in the relevant market in order to apply these two provisions.

Before the adoption of the Antimonopoly Law 2007, the LAUC 1993 was the major legislation which prohibits monopolistic behaviour through non-pricing practices. Article 6 of the LAUC 1993 prohibits a particular type of abuses by statutory monopolies. It stipulates:

Public utility enterprises or other operators having monopolistic status according to law shall not force others to buy the goods of the operators designated by [the public utility enterprises or other operators] so as to exclude other operators from competing fairly.

However, it is only applicable to statutory monopolies. There is no mention of abuses by monopolistic firms other than statutory monopolies.

Although Article VIII of the GATS does not define the term 'abuse', it seems that this term could refer to all abusive behaviours that are condemned in most competition regimes. It has to be acknowledged that it is not possible to give an exclusive list which includes all abusive practices. Nevertheless, it is still possible to agree that some abusive behaviour, such as price discrimination, is commonly recognised to be illegal under many competition regimes. Before the

¹² An English version is available at <http://www.chinagate.com.cn/english/430.htm>.

¹³ An English version is available at <http://en.chinacourt.org/public/detail.php?id=3306>.

adoption of the Antimonopoly Law 2007, there was no general ban on abuses of dominance in China's competition-related legislation. For example, there was no ban on cross-product subsidies in the non-telecommunications sector in China¹⁴, while such subsidies might be prohibited by Article VIII of the GATS. Put another way, some abusive behaviour could be legal under the Chinese competition-related legislation, but such a practice could breach Article VIII of the GATS. Before the adoption of the Antimonopoly Law 2007, therefore, China's legislation regarding abuses of dominance was insufficient for China to implement the obligation under Article VIII, which requires China to take action against the anticompetitive practices prohibited by Article VIII of the GATS. As a WTO Member, China should ensure that its monopoly service suppliers do not abuse their monopoly position to act in a manner inconsistent with Article VIII of the GATS. Otherwise it could face complaints from other WTO Members.

1.2.1.2 Anticompetitive Agreements

Article 14 (1) of the Price Law 1997 prohibits horizontal price fixing. It is further expanded by Article 4 of the Interim Rules on Prohibiting Monopolistic Price 2003. Article 32 of the Bid-Inviting and Submitting Law of the People's Republic of China (hereinafter the Bidding Law 1999) prohibits collusive tendering practices.¹⁵ Before the adoption of the Antimonopoly Law 2007, however, there was no general ban on anticompetitive agreements in China. Many types of restrictive agreements were not prohibited. For instance, there was no ban on anticompetitive agreements regarding market share, boycott, quotas and other restrictions on production. The lack of legislation prohibiting such anticompetitive agreements did not imply that there were no such anticompetitive practices in China. On the contrary, there were such restrictive practices in China. For instance, at the beginning of 1993, ten brickyards in a city reached an agreement after consultation to reduce 30% of their production and mutually determine a minimum selling price.¹⁶ In April 1999, under the

¹⁴ Article 42 (2) of the Telecommunications Regulation of the People's Republic of China (hereinafter the Telecommunications Regulation 2000) prohibits irrational cross-product subsidies in the telecommunications sector). An English edition of this regulation is available at <http://www.chinaitlaw.org/?p1=print&p2=040929235127>.

¹⁵ An English version is available at <http://www.sh360.net/law/law12/3398.html>.

¹⁶ See *Legal Daily*[法制日报, *Fazhi Ribao*], 31st May 1993.

pressure of more than ten trade competitors of Shandong Jinan Guangming Machinery Co., Ltd., the organizing committee of 99's China Exhibition of Tube and Panel Products and Machinery for Construction Doors and Windows was forced to refuse to provide Shandong Jinan Guangming Co., Ltd. the exhibition stand originally arranged for it.¹⁷ On the 23rd May 1999, eight colour picture tube manufacturers whose output exceeded 90% of the total amount of colour picture tubes in China jointly made a decision that from the 28th June 1999 they would stop production for a month and reduce the output by three million tubes.¹⁸ In regard to the problem of the lack of regulation of certain anticompetitive agreements in China, some scholars argued that China's existing competition regime was unable to prevent anticompetitive agreements. For instance, Chaowu Jin and Wei Luo claimed:

Legal regulation of conspired restrictive competition practices in China is far from orderly and comprehensive. The relevant legal provisions are scattered among laws, regulations and departmental rules. Most of them are simply principles rather than applicable legal provisions... the absence of appropriate regulation of conspired restrictive competition practices remains a critical problem in the competition law of China.¹⁹

In the same way that Article VIII of the GATS does not list monopolistic practices, Article IX of the GATS does not list anticompetitive agreements. However, it does not expressly exclude any special type of anticompetitive agreements. Thus, it seems that Article IX of the GATS could prohibit all types of anticompetitive agreements that are prohibited in major competition regimes. Before the adoption of the Antimonopoly Law 2007, China's competition-related legislation did not prohibit all types of anticompetitive agreements. For example, boycotting certain services was not clearly banned under the Chinese competition-related legislation, while it breaches Article IX of the GATS. Like the situation of abuses of dominant positions, therefore, some anticompetitive agreements could be legal under current Chinese competition-related legislation,

¹⁷ See *China Industrial and Commercial Newspaper* [中国工商报, *Zhongguo Gongshang Bao*], 3rd April 1999.

¹⁸ See *Beijing Youth Daily* [北京青年报, *Beijing Qingnian Bao*], 28th May 1999.

¹⁹ C. Jin and W. Luo, *Competition Law in China*, New York: William S. Hein & Co., (2002), pp. 90-91.

while they could breach Article IX of the GATS. If that happened, China could enter into consultations at the request of any other WTO Member with a view to eliminating the practices referred to in Article IX:1 of the GATS. It would be very difficult for China to do so due to its lack of legislation providing a general ban on such practices. This illustrates that Article IX imposes obligations on China regarding combating certain anticompetitive agreements.

1.2.1.3 The Insufficiency of China's Competition-Related Legislation

Thus far, not all anticompetitive practices prohibited under Articles VIII and IX of the GATS were illegal under the Chinese competition-related legislation before the adoption of the Antimonopoly Law 2007. For example, restrictive distribution systems and exclusionary boycotts were not illegal in China because there was no ban on such anticompetitive practices under the Chinese competition-related legislation. However, these anticompetitive practices could be banned under Articles VIII and IX of the GATS if they have impacts on trade in services. Therefore, China could face complaints from other WTO Members due to its lack of legislation prohibiting the anticompetitive practices which are banned under Articles VIII and IX of the GATS. It had two options to implement the obligations under Articles VIII and IX of the GATS.²⁰ The first option was that China could amend its existing competition-related legislation. However, it was not easy to insert a general ban on anticompetitive practices into the existing competition-related legislation because none of the existing legislation was specially designed to combat anticompetitive practices. Even if it had been provided in China's existing competition-related legislation, such a provision would not have been implemented efficiently due to the lack of systematic design of the competition-related legislation. Therefore, this option was not an ideal solution for China to implement Articles VIII and IX of the GATS, although there is no doubt that it would have been helpful. The second option was to adopt a new piece of legislation providing a general ban on anticompetitive practices. The new legislation could provide a systematic solution regarding Articles VIII and IX of the GATS.

²⁰ For the discussion on how China implements its WTO commitments, see Chapter One.

1.2.2 Impact on Formulating the Antimonopoly Law 2007

Enacting a comprehensive competition law belongs to the second option for China to implement its obligations under Articles VIII and IX of the GATS. If it provides a general ban on anticompetitive practices which include the practices prohibited by Articles VIII and IX of the GATS, a comprehensive competition law could help China to implement its obligations under Articles VIII and IX of the GATS.

As China's first comprehensive competition law, the Antimonopoly Law 2007 does provide a general ban on anticompetitive practices. Article 3 of the Antimonopoly Law 2007 refers to monopolistic conduct as: (i) 'undertakings concluding monopoly agreements' (monopoly agreements here means 'agreements, decisions or other concerted practices that eliminate or restrict competition'); (ii) 'abuse of dominant market positions by undertakings'; (iii) 'concentration of undertakings that have or are likely to have the effects of eliminating or restricting competition'. In fact, all the drafts included a similar provision on prohibiting anticompetitive practices during the process of formulating the Antimonopoly Law 2007. In particular, Article 3 of the Antimonopoly Law 2007 is exactly the same as Article 3 of the June 2006 Draft²¹ and Article 3 of the June 2007 Draft.²² From this, we can see that providing a general ban on anticompetitive practices was always included in the drafts through the process of drafting China's Antimonopoly Law. There was no controversy in regard to providing a general ban on anticompetitive practices. During the drafting process, therefore, there was no doubt that China's forthcoming competition law would provide a general ban on anticompetitive practices even without considering the impacts of Articles VIII and IX of the GATS.

However, China's WTO membership strengthened the expectation that China's forthcoming competition law needed to provide a general ban on anticompetitive practices because by doing so, such legislation could help China

²¹ An English edition is available at <http://www.buyusa.gov/asianow/270.pdf>.

²² This draft is not available to public. However, the differences between this draft and the June 2006 Draft are highlighted on the NPC website. See, <http://www.npc.gov.cn/zgrdw/flzt/index.jsp?lmid=15&dm=1520&pdmc=ch>.

to implement the obligations under Articles VIII and IX of the GATS. After China's accession to the WTO, Articles VIII and IX of the GATS are binding on China. Because the Chinese competition-related legislation did not ban all anticompetitive practices which are prohibited by Articles VIII and IX of the GATS, it became urgent for China to enact a national competition law that provided a general ban on anticompetitive practices in order to implement Articles VIII and IX of the GATS. During the process of formulating China's Antimonopoly Law, therefore, Articles VIII and IX of the GATS did positively have an impact on broadening the scope of China's forthcoming competition law, although they might not play a decisive role in this issue. In the future, it is important for the Chinese competition enforcement authorities to be aware of the need to implement the obligations under Articles VIII and IX of the GATS through enforcing the Antimonopoly Law 2007 in a way that such benefits are materialised.

2 The Impact of Section 1.1 of the Reference Paper on the Formulation of the Antimonopoly Law 2007

This section examines whether the enactment of an antimonopoly law could help China to implement the obligation under Section 1.1 of the Reference Paper, and if so, to what extent the formulation of the Antimonopoly Law 2007 has been influenced by the possibility of helping China to implement such an obligation.

2.1 Section 1.1 of the Reference Paper

2.1.1 *Background*

2.1.1.1 The Basic Telecommunications Agreement (BTA)

When the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter the Marrakesh Agreement) was signed in April 1994, no agreement was reached in regard to basic telecommunications.²³ In the telecommunications

²³ Basic telecommunications refer to voice telephone, telex, and telegraph, in contrast to enhanced or value-added telecommunications such as electronic mail, voice mail, on-line and data based information retrieval and data processing.

sector, however, a major issue is the abuse of a dominant position by existing suppliers, often in the public sector or legally sanctioned private monopolies, to block the entry of new competitors. Because it is costly and wasteful for each supplier to install its own wire network, one way in which an incumbent can block competition is to deny new entrants access (interconnection) to its pre-existing network. In respect of this issue, Article VIII of the GATS is limited in scope. Thus, negotiations on basic telecommunications were continued after the establishment of the WTO in order to ensure that monopolistic suppliers would not undermine market access commitments.²⁴ Andreas F. Lowenfeld claimed: 'The [telecoms] negotiations in the WTO were consistent with the general wave of privatisation and deregulation, which in turn was consistent with opening up of at least some competition within states and across national frontiers'.²⁵

On the 15th February 1997, sixty-nine WTO Members comprising more than 91 percent of global telecommunications revenues at that time reached the Basic Telecommunications Agreement (BTA).²⁶ The BTA governs the liberalization of basic telecommunications services among WTO Members that have signed it.²⁷ It took effect in February 1998.²⁸ It covers 'basic telecommunications', which

²⁴ For a brief introduction of the negotiations on basic telecommunications, see M. Bronckers and P. Larouche, 'Telecommunications Services and the World Trade Organization', *Journal of World Trade*, vol. 31(3), (1997), 5; also, L. Sherman, ' "Wildly Enthusiastic" about the First Multilateral Agreement on Trade in Telecommunications Services', *Federal Communications Law Journal*, vol. 51, (1998), 61.

²⁵ A. Lowenfeld, *International Economic Law*, Oxford: Oxford University Press, (2002), p. 126.

²⁶ This agreement takes the form of a protocol to be attached to the GATS, and officially designated as the Fourth Protocol to the GATS. See, http://www.wto.org/english/docs_e/legal_e/4prote_sl20_e.doc. For the background and negotiation process of the BTA, see, P. Spector, 'The World Trade Organisation Agreement on Telecommunications', *International Lawyers*, vol. 32, (1998), 217; P. Larouche and M. Bronckers, 'Telecommunications Services and the WTO', *Journal of World Trade*, vol. 31(3), (1997), 5; and L. Sherman, (1998), note 24, 61, pp. 64-71.

²⁷ For a comment on the BTA, see, L. Sherman, (1998), note 24, 61. For a more critical comment, see W. Drake and E. Noam, 'Assessing the WTO Agreement on Basic Telecommunications', in G. Hufbauer and E. Wada, eds., *Unfinished Business: Telecommunications after the Uruguay Round*, Washington, DC: Institute for International Economics, (1997), 27.

²⁸ The signatories had originally agreed to implement the BTA on the 1st January 1998. But the implementation date was delayed because fifteen of the signatories had not ratified the BTA by

includes local, long distance, and international services, for public and non public uses, offered through any technology, such as cable, satellite, wireless, on a facilities basis or by resale. It aims to provide an additional measure in the telecommunications sector within the GATS. This purpose is illustrated by the last sentence of § 1 of the BTA, which expressly stipulates: ‘this Annex provides notes and supplementary provisions to the Agreement [GATS]’. Thus, the BTA is not a free-standing WTO agreement but a series of commitments that compose part of the GATS.²⁹ It is only binding on the WTO Members who signed it.

2.1.1.2 The Reference Paper

During the early stage of the negotiations of the BTA, the negotiators recognised that it was necessary to set up competitive safeguards against anticompetitive practices.³⁰ The reason behind this recognition is that most telecommunication regulations and laws did not foster competitive markets and had been dominated by state-owned companies.³¹ The purpose of such competitive safeguards would be to ensure monopolies or former monopolies of basic telecommunications not to exploit their monopolistic position to impede the ability of competitors to supply networks or services for which commitments would be made. In addition, the negotiators also recognised the need for establishing independent regulators for telecommunications sectors whose function was separated from the basic telecommunications operators.³² Based on this recognition, the US convened a meeting of selected delegates to initiate a dialogue on regulatory objectives in December 1994. This group met regularly to draft what later became the Reference Paper. A draft of the Reference Paper was circulated to all participants of the Negotiating Group on Basic Telecommunications in December

the 30th November 1997, the target date established by the WTO. After further negotiations in January 1998, signatories agreed to implement the BTA on the 5th February 1998.

²⁹ L. Sherman, (1998), note 24, 61, p. 64.

³⁰ See, WTO, *Negotiating Group on Basic Telecommunications - Review of Outstanding Issues - Note by the Secretariat*, TS/NGBT/W/2, 8th July 1994, para. 15.

³¹ L. Sherman, (1998), note 24, 61, p. 80.

³² See, WTO, TS/NGBT/W/2, note 30, para. 16.

1995³³ and January 1996.³⁴

During the negotiations, a number of ways were considered in order to make the Reference Paper binding obligations and subject to WTO dispute settlement system. One of the options is to amend the text of the GATS to include the Reference Paper. However, it is far from easy to do that because such amendment needs ratification by two-thirds of WTO Members.³⁵ Thus, the most feasible way to ensure the Reference Paper to be binding is to include it as 'additional commitments' permitted by Article XVIII of the GATS. As a result, it was agreed to include the Reference Paper in their Schedules in the additional commitments column.³⁶ Consequently, the Reference Paper is only binding on the WTO Members which include the Reference Paper in their Schedules in the additional commitments column.

The purpose of the Reference Paper is: (i) to provide the requisite safeguards in domestic law for market access and foreign investment commitments to be truly effective; and (ii) to anchor these safeguards in the WTO system. It lays down six guiding principles: competitive safeguards, interconnection, universal services, public availability of licensing criteria, independent regulation, and allocation and use of scarce resources.³⁷ The principle of competitive safeguards aims to prevent anticompetitive practices in the telecommunications sector.³⁸ It is

³³ WTO, *Negotiating Group on Basic Telecommunications - Report on the Meeting of 15 December 1995*, S/NGBT/11, 22nd December 1995, para. 5.

³⁴ WTO, *Negotiating Group on Basic Telecommunications - Report on the Meeting of 26 January 1996*, S/NGBT/12, 14th February 1996, para. 6.

³⁵ See the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter the Marrakesh Agreement), Art. X. The Marrakesh Agreement is available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

³⁶ See, WTO, TS/NGBT/W/2, note 30, para. 15. For a brief description of the negotiation history of the reference paper, see, L. Sherman, (1998), note 24, 61, pp. 71-87. For the comments on the Reference Paper, see, M. Bronckers, 'The WTO Reference Paper on Telecommunications: A Model for WTO Competition Law?' in M. Bronckers and R. Quick, eds., *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, The Hague: Kluwer Law International, (2000), 371; M. Bronckers and P. Larouche, (1997), note 24, 5.

³⁷ The Reference Paper, Sections 1 to 6.

³⁸ The Reference Paper, Section 1.

designed to impose pro-competitive regulatory principles on some WTO members by being incorporated into WTO Members' special commitment schedules. In particular, Section 1 of the Reference Paper is designed to have a pro-competitive function, as illustrated by its title, 'Competitive Safeguards'.

2.1.2 Section 1.1 of the Reference Paper

Andreas F. Lowenfeld argues: 'because the history of telecommunication services had been heavily based on monopolies—indeed many thought of telephone and related services as natural monopolies—major attention had to be paid to the rules of competition'.³⁹ Thus, Section 1.1 of the Reference Paper aims to prevent anticompetitive practices in the telecommunications sector, which is clearly expressed in its title, 'Prevention of Anti-competitive Practices in Telecommunications'. It provides: 'Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices'. Section 1.2 of the Reference Paper gives a list of anticompetitive practices which includes: (a) engaging in anti-competitive cross-subsidization; (b) using information obtained from competitors with anti-competitive results; and (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which is necessary for them to provide services.

Compared to Section 1 of the Reference Paper, the original US proposal was a more detailed set of competitive safeguards.⁴⁰ According to the US proposal, dominant carriers were prohibited from cross-subsidizing non-regulated services. Certain dominant carriers were required to adopt structural separation or cost accounting safeguards. A dominant carrier was required to make publicly available network information which was necessary to facilitate interconnection or the supply of competitive telecommunications services. However, these proposals were not accepted and the idea underling the Reference Paper is to

³⁹ A. Lowenfeld, (2002), note 25, p. 126.

⁴⁰ For the original US proposal, see WTO, *Negotiating Group on Basic Telecommunications-Communication from the United States- Pro-competitive Regulatory and Other Measures for Effective Market Access in Basic Telecommunications Services*, S/NGBT/5, 9th February 1995.

establish broad principles to regulate telecommunications. Thus, the negotiating countries agreed to a general competitive principle rather than a fairly detailed set of competitive safeguards.⁴¹

In *Mexico-Measures Affecting Telecommunications Services (Mexico-Telecoms)*, the Panel claimed: ‘Section 1 is a voluntary, additional commitment to maintain certain “appropriate” measures, which reserves a degree of flexibility for Members in accepting and implementing such an additional commitment’.⁴² However, a Member will lose its certain regulatory autonomy in regard to the telecommunications sector, once it accepts the Reference Paper. The WTO Members which have accepted the Reference Paper must both enact competition-related legislation and effectively enforce such legislation in order to maintain ‘appropriate measures’ ‘for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices’ in telecommunications sectors. Laura Sherman, however, argued: ‘Failure to adopt or maintain measures that would prevent anticompetitive conduct could be cause for dispute settlement, but failure to enforce those measures would not’, because the language used in Section 1.1 of the Reference Paper was ‘very different from that used in other contexts in which positive measures have been required in order to ensure particular results’.⁴³ It is true that the language used in Section 1.1 is not exactly the same as other contexts in which positive measures have been required in order to ensure particular results, such as Section 2 of the Reference Paper which uses the language ‘will be ensured’. However, Section 1.1 clearly provides that the purpose of maintaining appropriate measures is to prevent ‘suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices’. In *Mexico-Telecoms*, the Panel reaffirmed that such appropriate measures should be ‘suitable for achieving their purpose’ of ‘preventing a major supplier from engaging in or continuing anti-competitive practices’.⁴⁴ If such measures were not effectively implemented, how could the purpose of

⁴¹ WTO, S/NGBT/11, note 33, para. 5.

⁴² Panel Report, *Mexico-Measures Affecting Telecommunications Services (Mexico-Telecoms)*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537, para. 7.267.

⁴³ L. Sherman, (1998), note 24, 61, p.77.

⁴⁴ Panel Report, *Mexico-Telecoms*, note 42, para. 7.265.

'preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices' be achieved? Moreover, failure to implement such measures will have the similar result of the lack of such measures. Thus, failure to enforce the measures that prevent anticompetitive practices could be cause for dispute settlement.

In sum, adopting appropriate measures is the first step to implement Section 1.1 of the Reference Paper. Without the existence of competition-related legislation, it would not be possible for WTO Members to maintain the appropriate measures to combat anticompetitive practices. For the WTO Members that have included the Reference Paper into their Schedules in the additional commitments column but have not adopted appropriate competition-related measures. Therefore, the first task is to enact competition-related legislation in order to fulfil their WTO commitments. Such legislation can be a general competition law which applies to the telecommunications sector or sector legislation in the telecommunications sector which prohibits anticompetitive practices. For the WTO Members that have included the Reference Paper into their Schedules in the additional commitments column and have adopted appropriate competition-related measures, the obligation is to enforce such measures effectively.

2.2 Case Study: Mexico-Telecoms⁴⁵

2.2.1 The Facts⁴⁶

Telmex, a Mexican telecommunications company, is the biggest basic telecommunications provider in Mexico. The Rules for the Provision of International Long-Distance Service To Be Applied by the Licensees of Public Telecommunications Networks Authorized to Provide this Service (ILD Rules) entered into force on the 12th December 1996. It grants Telmex, alone among

⁴⁵ For details of this case, see B. Wellenius, J. Galarza and B. Guermazi, 'Telecommunications and the WTO: the Case of Mexico', World Bank Policy Research Working Paper, No. 3759, November 2005.

⁴⁶ For a brief description of the background of this case, see, R. Rosenthal, 'United States v. Mexico: The First Telecommunications Challenge Confronting the World Trade Organisation', *CommLaw Conspectus: Journal of Communications Law and Policy*, vol. 10, (2001), 315, pp. 325-331.

Mexican basic telecommunications service suppliers, the authority to negotiate the charge that foreign basic telecommunications suppliers must pay their Mexican counterparts to interconnect telephone calls originating abroad. By law, all Mexican basic telecommunications suppliers must incorporate this connection rate in their interconnection agreements with foreign cross-border basic telecommunications service suppliers and therefore cannot make independent decisions on the rates they charge.

On the 17th August 2000, the US requested consultations with Mexico in respect of Mexico's commitments and obligations under the GATS with respect to basic and value-added telecommunications services. On the 17th April 2002, the Dispute Settlement Body established a Panel at the request of the US to resolve the dispute between the US and Mexico with regard to the dispute in the telecommunications sector. On the 26th August 2002, the Panel was composed. Australia, Brazil, Canada, Cuba, European Communities, Guatemala, Honduras, India, Japan, and Nicaragua joined as third parties in this case. The Panel Report of this case was circulated on the 2nd April 2004 and adopted on the 1st June 2004.

2.2.2 Key Arguments Regarding Section 1.1 of the Reference Paper

One of the main allegations in this case is whether Mexico's failure to maintain measures to prevent Telmex from engaging in anticompetitive practices was inconsistent with its obligations under Section 1.1 of the Reference Paper.⁴⁷

The US claimed that Section 1.1 of the Reference Paper provided for the maintenance of appropriate measures to prevent major suppliers from engaging in or continuing anticompetitive practices.⁴⁸ It recalled that the purpose of those appropriate measures was to prevent anticompetitive practices by suppliers who 'alone or together' are a major supplier.⁴⁹ It claimed that Mexico failed to

⁴⁷ Panel Report, *Mexico-Telecoms*, note 42, para. 3.1(b).

⁴⁸ See the United States' first written submission in *Mexico-Telecoms*, para. 191.

⁴⁹ Panel Report, *Mexico-Telecoms*, note 42, para. 4.257.

implement its commitments under Section 1.1 of the Reference Paper⁵⁰ because Mexico's ILD rules empowered Telmex to engage in monopolistic practices in respect of interconnection rates for basic telecom services supplied on a cross-border basis and to create an effective cartel dominated by Telmex to set rates for such interconnection.⁵¹

In response, Mexico argued that the obligation in Section 1.1 of the Reference Paper was to maintain 'suitable or proper' measures with the object or the intention of preventing Telmex from engaging in anti-competitive practices.⁵² Thus, it claimed that Section 1.1 should not be interpreted to mean that Mexico was required to prevent all suppliers from even engaging in or continuing anticompetitive practices.⁵³ Instead, Section 1.1 should be interpreted to allow Mexico a large measure of discretion in deciding what measures would be suitable or proper to accomplish the intended objectives.⁵⁴ It further argued that Section 1.1 created not an obligation of result, but an obligation of means.⁵⁵ This argument was supported by the EU.⁵⁶

In addition, Mexico also argued that its ILD Rules were domestic legislation. Section 1.1 of the Reference Paper should not apply to anticompetitive measures implemented or maintained by a WTO Member.⁵⁷ The EU supported this argument by claiming that it was not possible for a Member to restrict competition where competition is not allowed.⁵⁸ Thus, it argued that the fixing of a uniform price and revenue sharing system were not anti-competitive practices because they

⁵⁰ See the United States' first written submission in *Mexico-Telecoms*, para. 31.

⁵¹ *Id.*, para. 206.

⁵² See Mexico's first written submission in *Mexico-Telecoms*, para. 201.

⁵³ *Id.*, para. 202.

⁵⁴ *Id.*

⁵⁵ *Id.*, para. 203.

⁵⁶ See European Communities' third party written submission in *Mexico-Telecoms*, 22nd November 2002, para. 48, http://trade-info.cec.eu.int/doctlib/docs/2003/december/tradoc_115023.pdf.

⁵⁷ Panel Report, *Mexico-Telecoms*, note 42, para. 7.241.

⁵⁸ See European Communities' third party written submission in *Mexico-Telecoms*, note 56, para. 49.

were mandated by law.⁵⁹

2.2.3 Panel Finding in Regard to Section 1.1 of the Reference Paper

One of the key findings in the Panel Report was that Mexico had failed to maintain appropriate measures to prevent ‘anti-competitive practices’ in violation of Section 1.1 of the Reference Paper.⁶⁰

In regard to the argument that the ILD Rules were domestic legislation and thus not subject to Section 1.1 of the Reference Paper, the Panel reinforced a longstanding international legal principle stipulated in Article 27 of the Vienna Convention on the Law of Treaties that a government must bring its domestic laws and regulations into conformity with the treaty obligations it undertakes. It noted that Section 1.1 of the Reference Paper, along with other commitments under the GATS, was ‘designed to limit the domestic regulatory powers of WTO Members’.⁶¹ It continued:

In accordance with the principle established in Article 27 of the Vienna Convention, a requirement imposed by a Member under its internal law on a major supplier cannot unilaterally erode its international commitments made in its schedule to other WTO Members to prevent major suppliers from ‘continuing anti-competitive practices’. The pro-competitive obligations in Section 1 of the Reference Paper do not reserve any such unilateral right of WTO Members to maintain anticompetitive measures.⁶²

Thus, the Panel claimed that uniform settlement rates and proportional returns required Mexican operators to engage in practices that were tantamount to a cartel and hence were anticompetitive, despite the fact that they were mandated by Mexican law.⁶³ Therefore, the Panel found:

Mexico has failed, in violation of Section 1.1 of its Reference Paper, to maintain ‘appropriate measures’ to prevent anti-competitive practices by

⁵⁹ *Id.*, para. 53.

⁶⁰ For other findings, see, Panel Report, *Mexico-Telecoms*, note 42.

⁶¹ Panel Report, *Mexico-Telecoms*, note 42, para. 7.244.

⁶² *Id.*, para. 7.244.

⁶³ *Id.*, paras. 7.261-7.264.

maintaining measures that require anti-competitive practices among competing suppliers which, alone or together, are a major supplier of the services at issue.⁶⁴

2.2.4 Commentary

This is the first case that Section 1.1 of the Reference Paper has been examined. The Panel Report was criticised by some academics due to the way in which the Panel adopted the competition concepts in international trade.⁶⁵ However, neither Mexico nor the US disagreed with the Panel Report. They did not appeal to the Appellate Body. Consequently, the Panel Report was adopted on the 1st June 2004. In practice, therefore, the Panel Report is not as controversial as some academics argued. Ernst-Ulrich Petersmann summarised the potential impact of *Mexico-Telecoms* on competition issues by claiming that this case:

[C]ould trigger a large number of similar WTO disputes once the contested interpretation of the GATS commitments has been clarified through WTO jurisprudence. The pro-competitive obligations in the 'Reference Paper' accepted by more than 70 WTO Members include open-ended, general obligations to prevent 'anti-competitive practices' that are likely to lead—similar to the broad competition rules in the domestic competition laws of many WTO Members—to progressive judicial clarification of specific obligations to prevent price fixing, market sharing and other anticompetitive practices.⁶⁶

In respect of WTO Members' domestic competition law and policy, the most interesting and significant finding in this case is that the Panel reinforces that

⁶⁴ *Id.*, para. 7.269.

⁶⁵ See, e.g., P. Marsden, 'Trade and Competition: WTO Decides First Competition Case—With Disappointing Results', *Competition Law Insight*, May 2004 Issue, 3; J. G. Sidak and H. Singer, 'Überregulation Without Economics: The World Trade Organization's Decision in the U.S.-Mexico Arbitration on Telecommunications Services', *Federal Communications Law Journal*, vol. 57(1), (2004), 1; D. Neven and P. Mavroidis, 'El mess in Telmex: a Comment on Mexico—Measures Affecting Telecommunications Services', *World Trade Review*, vol. 5, (2006), 271.

⁶⁶ E.-U. Petersmann, 'WTO Core Principles and Trade/Competition Roundtable', in B. Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law 2003*, New York: Juris Publishing Inc., (2004), 669, pp. 673-674.

Section 1.1 of the Reference Paper imposes obligations on Members in respect of maintaining appropriate measures ‘for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices’ by concluding that Mexico had the obligation to maintain appropriate measures to prevent Telmex, a major supplier, from engaging in ‘ant-competitive practices’. As mentioned previously, the majority of the WTO rules focus on governmental measures rather than private activities. Like Articles VIII and IX of the GATS, however, Section 1.1 of the Reference Paper clearly requires WTO Members to take action against private activities. In this case, Mexico was required to prevent Telmex, which is a company, from engaging in anticompetitive practices.

2.3 Impact on the Formulation of the Antimonopoly Law 2007

When it joined the WTO in 2001, China accepted the principles of the Reference Paper by including the Reference Paper in its schedules of WTO commitments and thus made commitments to implement pro-competitive regulatory policy in the telecommunications sector.⁶⁷ In other words, the Reference Paper is binding on China.

2.3.1 2.3.1 Current Measures and Problems Regarding Preventing Anticompetitive Practices in China’s Telecommunications Sector

⁶⁷ See China’s WTO commitments in the Protocol on the Accession of the People’s Republic of China, WT/L/432, 10th November 2001; and the Report of the Working Party on the Accession of the People’s Republic of China, WT/ACC/CHN/49, (2001).

2.3.1.1 The Chinese Telecommunications Sector⁶⁸

Although general economic reforms had been started in China in 1978, the Chinese telecommunications sector remained almost untouched until the early 1990s. In 1993, the Ministry of Posts and Telecommunications (MPT), which was both the regulator and sole service provider, started to loosen its regulation by permitting the SOEs other than those under the MPT to provide a few value-added telecommunications services. In 1994, China Unicom, the second telecommunications company, was established in order to compete with China Telecom. It signalled the initial introduction of competition in the Chinese telecommunications sector. In 1997, the telecommunications and postal services were separated. In March 1998, the Ministry of Information Industry (MII) was established by merging the MPT and the Ministry of Electronics Industry (MEI). Consequently, the MII replaced the MPT as China's regulatory authority for the telecommunications sector. In 1999, China telecom was split into four companies: the New China Telecom, China Mobile, China Satellite and the Guoxin Paging Co., which was later merged into China Unicom. Again, the New China Telecom was split into two: China Telecom and China Netcom. In 2000, China Tietong was established. Among the six national basic telecom service providers, China Telecom, China Netcom and China Tietong are fixed-line service providers, China Mobile and China Unicom are licensed mobile communications service providers and China Satellite is the only company providing satellite-based services.

Upon its accession to the WTO in 2001, China agreed to a six-year schedule in direct foreign participation in value-added and basic telecommunications services, and to establish an independent and transparent regulatory authority and pro-competitive regulatory regime in the telecommunications sector. Under Section 1.1 of the Reference Paper, China should maintain appropriate measures for the purpose of preventing telecommunications suppliers in China with market power from engaging in anticompetitive practices, such as cross-subsidization,

⁶⁸ For the evolution of the Chinese telecommunications sector, see, A. Young, S. Rahaju and G. Li, 'Regulatory Multiplicities in Telecommunications Regulations Reform in Indonesia and China', *Macquarie Journal of Business Law*, vol. 2, (2005), 135, pp. 155-166; K. Rui and X. Feng, 'A Challenge to Emerging Economies: New Competition Patterns Required in the Telecommunications Industry- The Case of China after Its Entry into the WTO', *International Lawyers*, vol. 36, (2002), 1173, pp. 1174-1176.

concealing technical information and specifications about network and services.

2.3.1.2 Current Measures

On the 25th September 2000 just before China completed its negotiations to join the WTO, the Telecommunications Regulation of the People's Republic of China (hereinafter the Telecommunications Regulation 2000) became effective.⁶⁹ So far, it is the most important piece of legislation regarding the Chinese telecommunications sector. China has been drafting a telecommunications law for more than nine years.⁷⁰ But at the end of July 2007, the draft was still not sent to the Standing Committee of the National People's Congress (NPC).

Article 17 of the Telecommunications Regulation 2000 provides 'the dominant operator in telecommunication service shall not refuse requests for interconnection by other operators and the special-purpose net operators'. Article 41 of the Telecommunications Regulation 2000 provides:

Telecommunications operators shall not commit the following acts in the course of providing telecommunications services: (1) Restricting telecommunications subscribers in any manner in the use of services designated by them; (2) Restricting telecommunications subscribers to purchasing telecommunications terminal equipment designated by them or rejecting the use of telecommunications terminal equipment with which telecommunications subscribers have equipped themselves and for which network access licenses have been procured; (3) Altering without authorization or changing by means of disguise the fee rates, and increasing without authorization or increasing by means of disguise the fee rates in violation of the provisions of the State; (4) Rejecting, delaying or terminating the provision of telecommunications services to telecommunications subscribers without a proper reason; (5) Failing to perform undertakings made publicly to telecommunications subscribers or carrying out false promotion that is easily misleading; (6) Causing difficulties for telecommunications subscribers by improper means or retaliating against

⁶⁹ About this regulation see note 14.

⁷⁰ 'Lawmaker calls for Promulgating Telecommunications Law', *People's Daily* [人民日报, *Renmin Ribao*], 31st October 2000, http://english.people.com.cn/english/200010/31/eng20001031_54036.html.

telecommunications subscribers who lodge complaints.

Article 42 of the Telecommunications Regulation 2000 provides:

Telecommunications operators shall not commit the following acts in the course of conducting telecommunications businesses: (1) Restricting telecommunications subscribers in any manner in selecting telecommunications services run by other telecommunications operators in accordance with law; (2) Cross-subsidizing in an unreasonable manner the various businesses they conduct; (3) Engaging in improper competition by providing telecommunications businesses or services at a price lower than the cost.

From these provisions, we can see that the Telecommunications Regulation 2000 does include some pro-competitive provisions.

However, the Telecommunications Regulation 2000 has several shortcomings. First, some of its provisions are drafted loosely. For instance, Article 43.3 prohibits 'engaging in improper competition by providing telecommunications businesses or services at a price lower than the cost'. There are at least two problems with this provision. First, the term 'improper competition' is used without any further definition. This term is not common language that is used by any major competition regime. In its further administrative legislations, there is no explanation of the term. It could be partly because China had not adopted a competition law when this regulation was formulated and there was no standard term for anticompetitive practices. Second, it is notoriously difficult to decide when the price is lower than the cost. And it is not very convincing that this provision will benefit consumers directly. These loosely drafted provisions make it very difficult to use the Telecommunications Regulation 2000 to combat anticompetitive practices in the telecommunications sector.

Second, some provisions in the Telecommunications Regulation 2000 are not consistent with the Reference Paper. For instance, it contains a number of provisions which deal with the setting of telecommunications charges. Under the Regulation, telecommunications charges are divided into three types: market-decided price, government-guided price and government-fixed price.⁷¹ The government-guided price and government-fixed price could raise some concerns

⁷¹ The Telecommunications Regulation 2000, Art. 24.

from a competitive point of view. It is notoriously difficult for the government to decide when the price is fair. The price should be decided by the market rather than the government. Moreover, other WTO Members could bring some complaints regarding the government-guided price and government-fixed price under the BTA and the Reference Paper. Due to these reasons, from October 2005, the Chinese government does not set prices for each telecommunications service but sets ceiling prices for all telecommunications services and allow telecommunications carriers to set their own service prices.

Third, the Telecommunications Regulation 2000 lacks well designed, self-executing and reliable enforcement procedures and mechanisms.⁷² Like other existing competition-related legislation in China, the liabilities and punishments under the Telecommunications Regulation 2000 against anticompetitive practices are very light.⁷³ They range from condemnation by the competent regulating authority to the most severe measures, such as fines or suspension of operations. The maximum amount of fines is one million RMB, which is equal to about £70,000. This is even less than the annual salary of a Chief Executive Officer in a multinational company. Thus, these punishments are too light to prevent anticompetitive practices in the Chinese telecommunications sector.

2.3.1.3 Problems

China's telecommunications sector has experienced changes for the last decade. China has taken 'appropriate measures', such as dividing up the old China Telecom and adopting the Telecommunication Regulation 2000, to prevent 'suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices'. These measures have promoted competition in the telecommunications sector. Under Section 1.1 of the Reference Paper, the Chinese government should effectively prevent China's telecommunications carriers with market power from engaging in anticompetitive behaviour such as cross-subsidy. Now the question is whether these measures are enough to prevent suppliers who, alone or together, are a

⁷² Y. Wang and Q. Liu, 'A Thorough Review of the Splitting of China Telecom', *The Economic Observer*, 17th December 2001, p. 268, www.eobserver.com.cn/ReadNews.asp?NewsID=139.

⁷³ See, the Telecommunications Regulation 2000, Arts. 70-73. For the general discussion on light punishment in China's competition-related legislation, see Chapter Two.

major supplier from engaging in or continuing anticompetitive practices in the telecommunications sector.

Chinese telecommunications users had been subject to high telecommunications charges and a poor quality of service particularly during the time when China Telecom monopolized the telecommunications sector before it was broken up. In recent years, particularly after China's WTO accession in 2001, telecommunications charges (e.g., initial connection charges and rates for long distance telephone calls) have been significantly reduced and service quality has been improved by domestic telecommunications operators. In order to gain a larger share of the local market, however, some telecommunications operators have resorted to anticompetitive practices, such as cross-subsidy of different types of services by the dominant operators. In 1999, for example, a local branch of China Unicom in Chengdu City lowered the price in mobile service in order to expand its local market share. In response, a local branch of the old China Telecom in the same city cut the charges for mobile network access from RMB 800 yuan (US\$96) to RMB 10 yuan (US\$1.2).⁷⁴ In 1999, the old China Telecom and China Unicom were the only two suppliers for mobile services. And the former was far bigger than the latter. That is one of the reasons why the branch of the old China Telecom was able to respond to the price cut of China Unicom in an aggressive way. The adoption of the Telecommunications Regulation 2000 does help to address anticompetitive problems by prohibiting certain anticompetitive practices in the telecommunications sector. However, the Telecommunications Regulation 2000 alone is far from enough to effectively curtail all anticompetitive practices in the Chinese telecommunications sector due to its shortcomings. Currently, the telecommunications sector in China is still dominated by a few SOEs.

In sum, there has been no well-established and coherent competition legislation in the telecommunications sector to safeguard competition with the result that cross-subsidy, distorted tariffs, and highly concentrated markets are significant barriers to entry for potential foreign competitors. Thus, the existing legislation on the telecommunications sector in China is not enough to prevent 'suppliers

⁷⁴ It is reported that a local branch of China Telecom in Chengdu responded Unicom's price cuts in mobile service by cutting its mobile network access charges from RMB 800 yuan (US\$96) to RMB 10 yuan (US\$1.2). *China Daily*, 28th November 1999.

who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices' in the sector. A gap exists between the existing Chinese legislation on anticompetitive practices in the telecommunications sector and the obligation under 1.1 Section of the Reference Paper. Rui Kang and Xiaoju Feng argued:

[B]ecause China is still in a transitional period, moving from a central-planning mechanism towards a pro-competitive market orientation, it is not surprising that there exists a large gap between the present reality and the principles in the WTO Reference Paper.⁷⁵

2.3.2 Impact of Section 1.1 of the Reference Paper on the Formulation of the Antimonopoly Law 2007

As demonstrated above, the existing measures in the Chinese telecommunications sector, such as the Telecommunications Regulation 2000, are insufficient as appropriate measures 'for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices' in the Chinese telecommunications sector. Thus, further measures are needed for China to implement its obligation under Section 1.1 of the Reference Paper. To this end, one of the actions that China is taking is to adopt a national telecommunications law. Currently, however, the process of formulating the Telecommunications Law is very slow and no draft has been deliberated by the NPC Standing Committee. In fact, no plan has been set for the NPC Standing Committee to deliberate a draft telecommunications law.

Now the questions are whether a competition law could help China to implement the obligation under Section 1.1 of the Reference Paper, and if so, how the formulation of the Antimonopoly Law 2007 has been influenced by Section 1.1 of the Reference in order to accommodate such a purpose.

⁷⁵ K. Rui and X. Feng, (2002), note 68, 1173, p. 1179. For a similar opinion, also see, B. Zhang, *Assessing the WTO Agreements on China's Telecommunications Regulatory Reform and Industrial Liberalization*, p. 16, <http://www.tprc.org/abstracts00/assesswtopap.pdf>.

2.3.2.1 Could A Competition Law Help China to Implement the Obligation under Section 1.1 of the Reference Paper?

In *Mexico-Telecoms*, the Panel held:

The word ‘appropriate’, in its general dictionary sense, means ‘specially suitable, proper’. This suggests that ‘appropriate measures’ are those that are suitable for achieving their purpose - in this case that of ‘preventing a major supplier from engaging in or continuing anti-competitive practices’.⁷⁶

From the Panel’s view, thus, a WTO Member’s national competition law could be considered as an appropriate measure as long as it suitable and proper to prevent ‘suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices’ in the telecommunications sector. Moreover, in *Mexico-Telecoms*, Mexico’s Federal Law of Economic Competition (which is the Mexican national competition law) and Code of Regulations to Federal Law on Economic Competition were listed as factual aspects.⁷⁷ In addition, the Panel in *Mexico-Telecoms* explained the reason why Mexico’s Federal Law of Economic Competition was not examined. It held:

As Mexico has not claimed that its general competition law is applicable to the anti-competitive practices mandated by the ILD rules, we do not consider it necessary to examine the broader issue of whether Mexico’s competition laws are, in general, ‘appropriate measures’ in terms of Section 1.1.⁷⁸

From the view of the Panel in *Mexico-Telecoms*, therefore, a WTO Member’s national competition law could be considered as appropriate measures ‘for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices’, if such national competition law is applicable to anticompetitive practices in the telecommunications sector. Thus, an antimonopoly law could be an appropriate measure ‘for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices’ in the Chinese telecommunications sector. Therefore, the adoption of a competition

⁷⁶ Panel Report, *Mexico-Telecoms*, note 42, para. 7.265 (footnote in quotation is deleted).

⁷⁷ *Id.*, paras. 2.17-2.21.

⁷⁸ *Id.*, para. 7.266.

law could help China implement the obligation under Section 1.1 of the Reference Paper as long as such legislation is applicable to the telecommunications sector.

2.3.2.2 How Has the Formulation of the Antimonopoly Law 2007 Been Influenced by Section 1.1 of the Reference Paper?

The Telecommunications Regulation 2000 is an administrative regulation, while the forthcoming Antimonopoly Law will be a national law. Under the Legislation Law 2000, 'National law has higher legal authority than administrative regulations, local decrees and administrative or local rules'. Thus, the forthcoming Antimonopoly Law will overrule the Telecommunications Regulation 2000 if it is designed to be applicable to the telecommunications sector or does not provide clear exemption for the telecommunications sector. However, many WTO Members, such as Mexico, exempt their telecommunications sectors from the application of their national competition laws. Currently, China follows these practices and has a separate regulation in regard to its telecommunications sector. Against this background, thus, it is not easy for China to make its forthcoming Antimonopoly Law applicable to its telecommunications sector. It is not surprising that some Chinese telecommunications companies lobby strongly that the telecommunications sector should be exempted from the Antimonopoly Law due to the protection that they enjoy under the existing separate regulation. However, China has the obligation to maintain appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices under Section 1.1 of the Reference Paper. Although China could implement Section 1.1 of the Reference Paper through adopting new telecommunications legislation which provides some provisions combating anticompetitive behaviour in this sector, the current process of adopting a telecommunications law is behind the process of adopting the Antimonopoly Law. This leaves the Chinese government with no option but to make its Antimonopoly Law applicable to its telecommunications sector or silent on such matter, at least before the enactment of new telecommunications law. Otherwise, China could face complaints from other WTO Members in respect of the implementation of Section 1.1 of the Reference Paper. As happened in *Mexico-Telecoms*, the WTO could force China to enforce appropriate measures in order to prevent anticompetitive practices in the

telecommunications sector if China failed to do so itself. In fact, if that happened, China's argument would be weaker than Mexico since its existing measures are insufficient to prevent suppliers who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices. Thus, it is wise for China to consider combating anticompetitive practices in telecommunications sector through its forthcoming Antimonopoly Law in order to implement its obligation under Section 1.1 of the Reference Paper. In order to make sure that the enactment of China's Antimonopoly Law can help China to implement Section 1.1 of the Reference Paper, the Chinese government needs to be aware of the applicability of the forthcoming Antimonopoly Law to anticompetitive behaviour in the Chinese telecommunications sector. In *Mexico-Telecom*, Mexico's telecommunications sector is exempted from Mexico's national competition law. If China had followed Mexico's practice and exempted its telecommunications sector from its new Antimonopoly Law, the adoption of the Antimonopoly Law in China would not have helped China to implement the obligation under Section 1.1 of the Reference Paper. Therefore, China's forthcoming Antimonopoly Law has to be applicable to the telecommunications sector in China in order to help China to implement the obligation under Section 1.1 of the Reference Paper.

During the process of formulating the Antimonopoly Law 2007, most drafts did not clearly exempt the telecommunications sector. For example, Article 2 of the June 2006 Draft provides: 'As for monopolistic conduct prohibited by this Law, this Law does not apply where other laws or administrative regulations provide provisions'. On the one hand, this provision does not clearly exempt the Chinese telecommunications sector from the application of the Antimonopoly Law. On the other hand, it leaves such an opportunity open. China could still follow other WTO Members' practices and enact a separate telecommunications law to regulate anticompetitive practices in the telecommunications sector after the adoption of the Antimonopoly Law. Under the June 2006 Draft, thus, anticompetitive practices in the Chinese telecommunications sector could only be prohibited by the Antimonopoly Law when these practices were not prohibited by any future telecommunications law in China. Before it adopts a national telecommunications law which provides the exemption from the application of the Antimonopoly Law, therefore, China can argue that its competition law is a measure 'for preventing suppliers who, alone or together,

are a major supplier from engaging in or continuing anti-competitive practices' in the Chinese telecommunications sector, since the June 2006 Draft does not clearly provide the exemption for the telecommunications sector.

However, this provision changed in the Antimonopoly Law 2007. Article 2 of the Antimonopoly Law 2007 does not provide a blank exemption as some drafts do, such as Article 2 of the June 2006 Draft. It stipulates:

This Law is applicable to monopolistic conduct in economic activities within the territory of the People's Republic of China; This Law is applicable to monopolistic conduct outside the territory of the People's Republic of China that have eliminative or restrictive effects on competition in the domestic market of the People's Republic of China.

During the process of drafting the Antimonopoly Law 2007, similar provision only appeared in the 2004 Submitted Draft.⁷⁹ Article 2 of this draft provides: 'Monopolistic behaviours in market transactions in the territory of the People's Republic of China shall be governed by this Law'. Compared to previous drafts, thus, this is a great change. It makes it difficult for any further sector legislation in the telecommunications sector to exempt the telecommunications sector from the application of the Antimonopoly Law 2007. This change makes it possible that the Antimonopoly Law 2007 can help China to implement the obligation under Section 1.1 of the Reference Paper. Thus, this change illustrates the impact of Section 1.1 on the formulation of the Antimonopoly Law 2007.

3 Conclusion

This chapter has examined the WTO's impact on the formulation of the Antimonopoly Law 2007 from the second aspect of the WTO's impacts on the development of WTO Members' domestic legislation. In general, the WTO does not establish general obligations for its Members to create internally competitive markets, nor require them to take affirmative action or provide remedies against private operators engaging in restrictive practices that affect the trade of other Members. However, Articles VIII and IX of the GATS and Section 1.1 of the Reference Paper are exceptions of this general assumption. They establish

⁷⁹ An English edition of the 2004 Submitted Draft is available at <http://www.ibanet.org/images/downloads/Questionnaire%20-%20final.pdf>.

general obligations for Members to affirmatively create internally competitive markets and require them to take affirmative action or provide remedies against private operators engaging in restrictive practices that affect the trade of other Members.

As a Member, China needs to implement the obligations under Articles VIII and IX of the GATS and Section 1.1 of the Reference Paper. Before the adoption of the Antimonopoly Law 2007, the relevant legislation in China was far from enough to combat the anticompetitive practices which are prohibited under Articles VIII and IX of the GATS and Section 1.1 of the Reference Paper. The adoption of a competition law could help China to implement the obligations under Articles VIII and IX of the GATS, and Section 1.1 of the Reference Paper. The formulation of the Antimonopoly Law 2007 has been influenced by the possibility of helping China to implement such obligations. As a result, the Antimonopoly Law 2007 can be used to help China to implement the obligations under Articles VIII and IX of the GATS, and Section 1.1 of the Reference Paper. In the future, the Chinese competition enforcement authorities need to be fully aware of such potential benefits from adopting the Antimonopoly Law 2007 and make sure that this law is implemented in a way as to materialize such benefits.

Chapter Five:

The Impact of Articles 8.2, 40 and 31(k) of the TRIPS on the Formulation of the Antimonopoly Law 2007

This chapter examines the impact of Articles 8.2, 40, and 31(k) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS)¹ on the formulation of the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007).² It neither explores comprehensively the interaction between competition law and intellectual property rights³ nor argues whether it is justifiable for a country to prohibit intellectual property-related anticompetitive practices.⁴ Instead, it examines whether Articles 8.2, 40, and 31(k) of the TRIPS have enhanced the case for China seeking to combat abuses of intellectual property rights through the Antimonopoly Law 2007.

¹ The TRIPS is available at http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

² The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

³ For such discussions, see, e.g., OECD Committee on Competition Law and Policy, *Competition Policy and Intellectual Property Rights*, Paris: OECD, (1989); T. Jorde and D. Teece, eds., *Antitrust, Innovation and Competitiveness*, New York: Oxford University Press, (1992); R. Anderson and N. Gallini, eds., *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy*, Calgary: University of Calgary Press for the Industry Canada Research Series, (1998); F. Martinez, 'Competition Policy and TRIPS', (2001), <http://www.euronet.be/ceps/Pubs/2001/Trips.pdf>; US Federal Trade Commission, 'To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy', (2003), www.ftc.gov/os/2003/10/innovationrpt.pdf; T.-L. Hwang, C. Chen, Z. Huang and J. Chen, eds., *The Future of Development of Competition Framework*, The Hague and London: Kluwer Law International, (2004), pp. 107 ff; and S. Anderman, ed., *The Interface between Intellectual Property Rights and Competition Policy*, Cambridge: Cambridge University Press, (2007) (examining the experiences of a number of countries in grappling with the problems of reconciling the two fields of competition policy and intellectual property rights).

⁴ For such an argument, see, e.g., M. Khor, *Intellectual Property, Competition and Development*, Singapore: Third World Network, (2005), <http://www.twinside.org/title2/par/mk002.doc>.

1 Articles 8.2, 40 and 31(k) of the TRIPS⁵

The TRIPS was negotiated at the end of the Uruguay Round of trade negotiations (1986-1994).⁶ It sets down minimum standards for many forms of intellectual property regulation while allowing each Member to conduct its own internal policy and implementation procedures. In particular, it contains requirements that domestic law must meet in the area of copyright, patents and trademarks. It is the 'largest and most ambitious attempt to harmonize intellectual property rights on a world scale'.⁷

1.1 Competition and Intellectual Property Rights

The interaction between intellectual property rights and competition has been widely debated.⁸ The discussion is legend, and it is not intended to add any substance to it at this point. However, it is still necessary to provide a brief introduction of this interaction in order to explore the impacts of Articles 8.2, 40 and 31(k) of the TRIPS on the formulation of the Antimonopoly Law 2007.

Competition concerns arise in respect of intellectual property rights because

⁵ For a discussion of intellectual property rights, competition policy and international trade, see, R. Anderson, 'Intellectual Property Rights, Competition Policy and International Trade: Reflections on the Work of the WTO Working Group on the Interaction Between Trade and Competition Policy', in T. Cottier and P. Mavroidis, eds., *Intellectual Property: Trade, Competition and Sustainable Development*, Ann Arbor, MI: University of Michigan Press, (2003), 235. For a skeptical view of the significance for developing countries of the competition-related clauses in the TRIPS, see, H. Ullrich, 'Expansionist Intellectual Property Protection and Reductionist Competition Rules: A TRIPS Perspective', *Journal of International Economic Law*, vol. 7, (2004), 401; and F. Abbott, 'Are the Competition Rules in the WTO TRIPS Agreement Adequate?', *Journal of International Economic Law*, vol. 7, (2004), 687.

⁶ For the drafting history of the TRIPS, see, D. Gervais, *The TRIPS Agreement: Drafting History and Analysis*, 2nd ed., London: Sweet & Maxwell, (2003). For a historical overview of the TRIPS agreement, see M. Harris, 'TRIPS: Historical Overview and Basic Principles', *Journal of Contemporary Legal Issues*, vol. 12, (2001), 454.

⁷ P. Demaret, 'The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organisation', *Columbia Journal of Transnational Law*, vol. 34, (1995), 123, p. 162.

⁸ There are plenty literatures of applying competition policy vis-à-vis intellectual property rights. For such literatures, see note 1.

intellectual property rights grant right holders the right to exclude others from using the intellectual property without permission. They could arise in all forms of intellectual property rights, including patents, trademarks, and copyrights. An abuse of a dominant position could occur where intellectual property right holders are in a position to exert substantial market power. In *Magill TV Guide/ITP, BBC and RTE*,⁹ for instance, the BBC, IPT and RTE,¹⁰ which held the copyright in the collection of their own television programme listings, denied Magill's request to license the listings to prepare a weekly guide. Magill complained that this was an abuse of a dominant position. The European Commission and the European Court of Justice ruled in favour of Magill. The BBC, IPT and RTE, were ordered to license the listings to Magill for a reasonable royalty.

Apart from these abusive practices, competition concerns could also arise in respect of restrictive conditions imposed when the patented technology or product is licensed to others. These conditions may restrict the licensee's pricing of the product, marketing outside a designated area and sub-licensing of the patent. Firms could cross-license their patents to each other with such conditions, effectively creating cartel-type arrangements without an actual cartel agreement.¹¹ Other competition-restricting clauses in patent licenses include conditions requiring the licensee to purchase another product from the patent holder (tying), not to deal in rivals' products or to use their technologies or to 'grant back' any improvements in the patented technology or product exclusively to the original right holder.

1.2 Articles 8.2, 40 and 31 (k) of the TRIPS

The debates on the relationship between intellectual property rights and competition can go back to the First International Congress for the Consideration of Patent Protection held in Vienna in 1872, which stated:

⁹ Cases T-69-/89 etc *RTE v Commission* [1991] ECR II-485, [1991] 4 CMLR 586, upheld by the ECJ Cases 241/91 P etc *RTE and ITP v Commission* [1995] ECR I-734, [1995] 4 CMLR 718.

¹⁰ BBC is Britain's national television and radio broadcaster. RTE is Ireland's national television and radio broadcaster.

¹¹ See, *infra* DVD case.

We live no longer in the day of industrial action, which is strictly confined and is removed from foreign competition, and where slow communication prevents or delays the utilization of inventions. We live at a time of liberal Customs policy; Steam and Electricity have newly united once isolated seats of industry in a way undreamt of; and the mutual exchange of goods shows today a magnitude which a generation ago one could not have imagined. Under such altered relations the Patent granted for an invention in one country becomes in fact a restriction unprofitable and obstructive, if the same invention without limitation or increase in price, becomes in an adjoining country common property.¹²

Such debates were also at the heart of the negotiations during the Uruguay Round.¹³ During the negotiations, developing countries expressed their concerns in respect of the potential anticompetitive effects of intellectual property rights.¹⁴ Thus, they proposed to incorporate provisions addressing these potential anticompetitive effects. As a result, the TRIPS includes at least three provisions which expressly address intellectual property-related anticompetitive practices.¹⁵

Article 8 of the TRIPS setting out the principles of applying the TRIPS clearly recognises the necessity of applying competition rules to anticompetitive practices in the area of intellectual property rights.¹⁶ As one of these principles, Article 8.2 of the TRIPS provides:

¹² Quoted in A. Yusuf, 'TRIPS: Background, Principles and General Provisions', in C. Correa and A. Yusuf, eds., *Intellectual Property and International Trade: The TRIPS Agreement*, (1998), 3, p. 7.

¹³ The Working Group on the Interaction between Trade and Competition Policy (WGTC), *Communication from the European Community and its Member States*, WT/WGTC/W/99, (1999), para. 1. For the drafting history of the TRIPS, see, D. Gervais, note 6, (2003).

¹⁴ See, e.g., Communication from India of 10 July 1989 MTN.GNG./NG11/W/37 sub.2 and VI.

¹⁵ Most commentators agree that the TRIPS provisions dealing with competition issues refer to Articles 8.2, 40, and 31(k). See, e.g., H. Ullrich, (2004), note 5, 401, pp. 404-405; F. Abbott, (2004), note 5, 687, pp. 689-691. However, Marco Ricolfi argued that Articles 67 and possibly 66(2) were also competition-related provisions. See, M. Ricolfi, 'Is There An Antitrust Antidote Against IP Overprotection within TRIPS?', *Marquette Intellectual Property Law Review*, vol. 10(2), (2006), 305, pp. 310-313.

¹⁶ Article 8 of the TRIPS entitles 'Principles'.

Appropriate measures, provided that they are consistent with the provision of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Thus, it expressly recognises the legitimacy of invoking national competition laws by WTO Members in order to combat intellectual property-related anticompetitive practices. In other words, it clearly allows a WTO Member to take appropriate measures in order to ‘prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the transfer of technology’, provided that such measures are consistent with the other provisions of the TRIPS. Marco Ricolfi claimed:

There is no question that this provision enables the prevention and control not only of bilateral and multilateral dealings—agreements between two or more parties—but also of unilateral behaviour, including refusals to deal and other forms of exercising IP [intellectual property] that may be deemed to constitute abuse.¹⁷

Article 8.2 of the TRIPS does not define the measures which are appropriate in order to prevent intellectual property-related anticompetitive practices. However, it seems clear that national competition law cannot be considered as inappropriate measures for the purpose of preventing intellectual property-related anticompetitive practices.

The ‘Principle’ provided in Article 8.2 is given greater specificity in Part II of the TRIPS, entitled ‘Standards Concerning the Availability, Scope and Use of Intellectual Property Rights’, in which Section 8 deals with ‘Control of Anti-Competitive Practices in Contractual Licenses’. Section 8 of Part II of the TRIPS consists of only one provision, Article 40, which is addressed to anticompetitive licensing practices or conditions. Articles 40.1 and 40.2 cover matters of substance, while Articles 40.3 and 40.4 deal with matters of procedure. This manner closely parallels paragraphs 1 and 2 of Article IX of the General Agreement on Trade in Services (GATS).¹⁸

¹⁷ M. Ricolfi, (2006), note 15, 305, p. 311.

¹⁸ The GATS is available at http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm.

Article 40.1 recognizes that the terms of a licensing contract could restrict competition or impede technology transfer. It provides: 'Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology'. It does not describe the behaviour that may be subject to competition law. Instead, it clarifies the rationale under which the WTO may approve of its Members' legal intervention to restore competition. Thus, it 'is strikingly philosophical'.¹⁹

Article 40.2, entitled 'appropriate measures to prevent or control such practices', expressly envisions that WTO Members have the right to specify their licensing practices or conditions in their legislation that may in particular cases constitute an abuse of intellectual property rights that has adverse effects on competition in the relevant market. In addition, it contains a non-exhaustive list of practices that may be outlawed or controlled by Members' legislation. Such anticompetitive practices may include exclusive grantback conditions, conditions preventing challenges to validity and coercive package licensing, in the light of the relevant laws and regulations of that Member.²⁰ This list is drawn from clauses usually found in domestic legislation, such as in the EU technology transfer regulation.²¹ This list implies that WTO Members appear free to opt for *per se* rules.

Articles 40.1 and 40.2 are concerned with the abusive exercise of intellectual property rights and with certain licensing practices and conditions. Unlike Article 8.2, thus, Articles 40.1 and 40.2 cannot encompass unilateral behaviour, such as a refusal to deal or discriminatory behaviour because the control and prevention are limited to licensing practices and conditions. In addition, they are viewed narrowly in scope. From the legislative history and the examples given in Article 40.2, they focus primarily on the licensing and transfer of technology rather than

¹⁹ M. Ricolfi, (2006), note 15, 305, p. 310.

²⁰ The TRIPS, Art. 40.2.

²¹ Such as, Commission Regulation (EC) No 240/96 of 31 January 1996 on the application of Article 85(3) of the Treaty to Certain Categories of Technology Transfer Agreements (EC Commission Regulation on Technology 1996), OJ L 031, 9 February 1996 P. 0002-0013 (reference to unadjusted EC Treaty numbering).

on trademark or copyright licensing.²²

Article 31 of the TRIPS, entitled ‘Other Use Without Authorization of Right Holder’, lays down the conditions for compulsory licensing. It recognises anticompetitive practices as one of the grounds for compulsory licensing. Article 31 (k) of the TRIPS clearly acknowledges that compulsory licensing is a remedy available to combat abuses of patents. Article 31 provides:

Where the law of a Member allows for other use²³ of the subject matter of a patent without the authorization of the right holder, including use by the government or third parties authorized by the government, the following provisions shall be respected: (k) Members are not obliged to apply the conditions set forth in subparagraphs (b) and (f) where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive. The need to correct anticompetitive practices may be taken into account in determining the amount of remuneration in such cases. Competent authorities shall have the authority to refuse termination of authorization if and when the conditions which led to such authorization are likely to recur.

This provision illustrates that the TRIPS ‘clearly permits the use of compulsory licensing as a legal remedy for practices that are deemed to be anti-competitive in the context of the Agreement’.²⁴ It ‘does not define the basis on which a practice might be held to be anticompetitive- a situation which possibly calls for further guidance, in some form, at an appropriate stage’.²⁵ Unilateral anticompetitive behaviour can be prohibited by the WTO Members’ rules that have been adopted in conformity with Article 31(k). However, Article 31 (k) can only apply to anticompetitive practices in patents rather than the whole intellectual property area.

From the above examination, it can be seen that, first, Articles 8.2, 40 and 31 (k)

²² However, Hanns Ullrich argues that Articles 40.1 and 40.2, together with Article 8.2, are ‘broadly applicable to restrictive practices relating to all the different intellectual property rights that the TRIPS Agreement covers’. See, H. Ullrich, (2004), note 5, 401, p. 405.

²³ ‘Other use’ refers to use other than that allowed under Article 30.

²⁴ R. Anderson, (2003), note 5, 235, p. 241.

²⁵ *Id.*

of the TRIPS are not competition rules themselves in their natures. They do not introduce their own rules of competition law. They do not define measures which could be treated as abuses or set out standards that could be used in evaluating particular anticompetitive practices.²⁶ As Debra Valentine claimed, the TRIPS was ‘not a competition rule, but simply an acknowledgement of each country’s right to use its competition laws to protect against anticompetitive practices involving the use of intellectual property’.²⁷

Second, Articles 8.2, 40 and 31(k) of the TRIPS are not mandatory because WTO Members are by no means under a legal obligation to adopt them.²⁸ Instead, they are enabling clauses that expressly recognize the legitimacy of invoking competition law to curtail intellectual property-related anticompetitive practices by adopting relevant domestic legislation. In other words, they provide WTO Members with discretion in the development and the application of their national competition laws to combat intellectual property-related anticompetitive practices.²⁹ Thus, they do not oblige WTO Members to take actions against abuses of intellectual property rights. This is very different from the WTO rules examined in Chapter Four, such as Section 1.1 of the Reference Paper, which require WTO Members to take action against anticompetitive

²⁶ Except Article 40.2 which lists some anticompetitive practices.

²⁷ D. Valentine, speech, ‘WTO Core Principles and Trade Competition Policies’, in Barry Hawk, ed., *International Antitrust Law & Policy: Fordham Corporate Law (2003)*, New York: Juris Publishing Inc., (2004), pp. 712-713.

²⁸ It has to be clear that express refusal or unjustified failure to enter into the consultations provided for by Articles 40.3 and 40.4 may constitute a breach under the WTO Dispute Settlement System. But they are not directly relevant to the purpose of this chapter.

²⁹ Frederick Abbott claimed: ‘the TRIPS Agreement in its present form provides substantial discretion to WTO Members in the formulation and application of competition rules regulating intellectual property’. See, F. Abbott, (2004), note 5, 687, p. 687; also see, F. Abbott, ‘Are the Competition Rules in the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights Adequate?’, in E.-U. Petersmann, ed., *Reforming The World Trading System: Legitimacy, Efficiency, and Democratic Governance*, Oxford: Oxford University Press, (2005), 317, p. 322. However, Aditya Bhattacharjea argued that the current competition-related provisions in the TRIPS were not enough to prevent anticompetitive practices in the area of intellectual property rights, see, A. Bhattacharjea, ‘The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective’, *Journal of International Economic Law*, vol. 9, (2006), 293, pp. 301-303, particularly p. 302.

practices.

1.3 Could Articles 8.2, 40 and 31 (k) Enhance the Case for A WTO Member Seeking to Combat Abuses of Intellectual Property Rights?

As enabling clauses, Articles 8.2, 40 and 31(k) expressly recognize the legitimacy of invoking national competition law to curtail intellectual property-related anticompetitive practices by employing domestic legislation. It is entirely at the discretion of an individual WTO Member to decide whether or not it adopts the measures permitted in Articles 8.2, 40 and 31(k) of the TRIPS. Now, the question is whether Articles 8.2, 40 and 31 (k) could enhance the case for WTO Members seeking to combat intellectual property-related anticompetitive practices.

Marco Ricolfi claimed: 'if a Member abstains from enacting provisions providing for the prohibition and control of IP-related anti-competitive practices, this legislative option is, in principle, unobjectionable and cannot lead to a complaint' under the WTO Dispute Settlement System.³⁰ Hanns Ullrich argued that the TRIPS promoted 'a globally harmonized intellectual property regime while leaving competition policy to the sovereign determination of Members'.³¹ Robert Anderson claimed that Articles 8.2, 40 and 31(k) of the TRIPS provided 'clear but qualified international legal authority for countries that wish to take measures to protect themselves against anti-competitive abuses of specific types of intellectual property rights'.³² From a legal point of view, their arguments are correct due to the nature of Articles 8.2, 40, and 31(k) as enabling clauses. In practice, however, under what circumstance could a WTO Member act in a way permitted in these articles?

The EU argued:

In general, the TRIPS Agreement would appear to enhance the case for countries seeking to protect themselves against anticompetitive abuses of

³⁰ M. Ricolfi, (2006), note 15, 305, p. 316.

³¹ H. Ullrich, (2004), note 5, 401, p. 404.

³² R. Anderson, (2003), note 5, 235, p. 241.

intellectual property rights, to enact a competition law and establish an independent and effective competition authority.³³

Marco Ricolfi also expressed a similar opinion by claiming: ‘the enabling character of TRIPs is apt to expand rather than to restrict the lawmaking powers retained by Members at the intersection between IP [intellectual property] and antitrust’.³⁴ These arguments might be true if we only look at the practices by a few rich and powerful WTO Members, such as Canada, the EU, Japan, and the US.³⁵ So far, most developed WTO Members have adopted legislation in respect of dealing with intellectual property-related anticompetitive practices. In this sense, therefore, Articles 8.2, 40, and 31(k) of the TRIPS could have and in fact have already enhanced ‘the case for countries seeking to protect themselves against anticompetitive abuses of intellectual property rights’.

However, other WTO Members, particularly poor WTO Members have not used the discretion given by Articles 8.2, 40 and 31(k) of the TRIPS and adopted legislation prohibiting intellectual property-related anticompetitive practices. The reasons for this fact can vary across those WTO Members. Some could argue that this was because it was neither necessary nor urgent for those Members to have such legislation due to the lack of abuses of intellectual property rights in their domestic markets. It could be the case for some of these WTO Members. However, it cannot be the reason for all the WTO Members which have not adopted some measures for combating abuses of intellectual property rights. As mentioned before, some developing countries expressly raised concerns about the adverse effects of intellectual property-related anticompetitive practices during the negotiations of the Uruguay Round. And that is why Articles 8.2, 40 and 31(k) were brought into the TRIPS. If they did not feel that it was necessary and urgent to combat intellectual property-related anticompetitive practices in their markets, some poor countries would not propose such articles during the

³³ WGTCP, WT/WGTCP/W/99, note 10, para. 6.

³⁴ M. Ricolfi, (2006), note 15, 305, p. 316.

³⁵ For a review of the role of competition law vis-à-vis intellectual property rights in Canada, the EU, Japan and the US, see, R. Anderson, ‘The Interface Between Competition Policy and Intellectual Property in the Context of the International Trading System’, *Journal of International Economic Law*, vol. 1(4), 655, (1998). For the study on EU experience on the application of competition law in relation to the exercise of intellectual property rights, see, WGTCP, WT/WGTCP/W/99, note 11, paras. 26-42.

Uruguay Round. Thus, there must be other reasons why some WTO Members choose not to act in ways permitted under Articles 8.2, 40 and 31(k) of the TRIPS.

Frederick Abbott argued:

The presence of discretion from a legal standpoint does not assure that developing Members will not come under pressure from developed Members should they choose to exercise it. Developed Members with some regularity assert political and economic pressure on developing Members not to act in ways permitted under WTO agreements.³⁶

This argument unveils one of the most significant reasons why some WTO Members have not adopted the measures prohibiting abuses of intellectual property rights, although they are permitted to do so under the TRIPS.

The TRIPS was proposed by some developed countries, particularly the US. Peter Gerhart argued that developing countries agreed to the TRIPS not 'because they could gain from intellectual property rights but because of their overriding interest in continued access to the United States market'.³⁷ Abdulgawi Yusuf also expressed a similar opinion by claiming that the reason why developing countries entered the TRIPS was not due to 'a conviction that the strengthening of IPR protection would continue to the liberalization of international trade, but as a bargaining chip for the access of developing countries' products to the markets of industrialized countries'.³⁸ Carlos Correa claimed that the TRIPS was a product of the pressure the developed countries placed upon developing countries to negotiate an agreement with 'the clear objective of universalizing the standards of IPRs protection that [the] former had incorporated in their legislation'.³⁹ These arguments were proved by a recent study by the World Bank, which concluded that the developed WTO Members would be the major beneficiaries of the enhanced intellectual property rights under the TRIPS, while

³⁶ F. Abbott, (2004), note 5, 687, p. 693.

³⁷ P. Gerhart, 'Reflections: Beyond Compliance Theory- TRIPS as A Substantive Issue', *Case Western Reserve Journal of International Law*, vol. 32, (2000), 357, p. 368.

³⁸ A. Yusuf, (1998), note 12, 3, p. 8.

³⁹ C. Correa, *Intellectual Property Rights, the WTO and Developing Countries: the TRIPS Agreement and Policy Options*, London and New York: Zed Books, (2000), pp. 7-8.

the developing WTO Members would be the 'net-loser'.⁴⁰

Although developing countries concerned about the adverse impact of abuses of intellectual property rights on trade, developed countries championed by the US tried hard to make sure that the purpose of protecting intellectual property rights was not diluted during the negotiations of the Uruguay Round. Thus, developed countries agreed to add Articles 8.2, 40, and 31 (k) into the TRIPS as *enabling* clauses rather than *mandatory* clauses, like the rest of provisions of the TRIPS. Hanns Ullrich claimed:

'This reservation in favour of Members' sovereign competition policy represents a concession that the industrialized countries made in response to an earlier effort by developing countries to enact a Code of Conduct for the Transfer of Technology.'⁴¹

One of the reasons why these rich countries were in favour of enabling clauses rather than mandatory ones was that they could put pressure on the countries which wished to act in ways permitted in such enabling clauses. For example, Article 40.2 of the TRIPS expressly states that 'nothing in the Agreement shall prevent member countries from specifying in their national legislation licensing practices that may constitute an abuse and prevent such anti-competitive practices'. In practice, however, WTO Members that act in ways permitted by Article 40.2 are often subject to unilateral pressure, when their rules displease large trading partners. Such pressures are felt by developed as well as developing WTO Members. However, developing WTO Members could feel more difficult to resist such pressures due to their weak trading position.

In practice, therefore, Articles 8.2, 40 and 31(k) of the TRIPS have not always enhanced the case for a WTO Member seeking to combat intellectual property-related anticompetitive practices. They could only enhance the case for a WTO

⁴⁰ *Integrating Intellectual Property Rights and Development Policy*, Report of Common Intellectual Property Rights, September 2002, p. 32, www.iprcommission.org/papers/text/final_report/reportwebfinal.htm.

⁴¹ H. Ullrich, (2004), note 5, 401, p. 404. For a similar opinion, also see, T. Cottier, 'The Prospects for Intellectual Property in GATT', *Common Market Law Review*, vol. 28, (1991), 383, pp. 409 ff.; P. Roffe, 'Control of Anticompetitive Practices in Contractual Licenses under the TRIPs Agreement', in C. Correa and A. Yusuf, eds., (1998), note 12, 261, pp. 278 ff; and D. Gervais, (2003), note 6, sub. 2.48, 2.182 et seq.

Member seeking to combat abuses of intellectual property rights if it is strong enough to resist pressures from other WTO Members.

1.4 Limitation of the Discretion under Articles 8.2, 40 and 31 (k) of the TRIPS

Under Article 8.2 of the TRIPS, WTO Members are authorized to develop their own competition policy regarding intellectual property-related restrictive practices, only if this is done consistently with the TRIPS. This provision is different from Article 8.2 of the Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter the Brussels Ministerial Text),⁴² which provided:

Appropriate measures, provided that they do not derogate from the obligations arising under this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Thus, it can be seen that Article 8.2 of the Brussels Ministerial Text uses a ‘do not derogate from the obligations’ text, while the final Article 8.2 adopts ‘consistent with the provisions of’ text as the control mechanism. This change illustrates that the restriction on Members’ discretion regarding intellectual property-related anticompetitive practices has been relaxed. Despite this relaxation, WTO Members’ discretion is not open-ended but restricted. Article 8.2 of the TRIPS limits WTO Members’ sovereign power to prescribe national competition law and policy by requiring that measures adopted to control abusive or anticompetitive practices must be ‘consistent with the provisions of this Agreement’. Hanns Ullrich claimed:

This requirement of TRIPS-consistency represents more than a mere limitation on remedial action, which is always subject to a principle of proportionality. Rather, the consistency requirement concerns the

⁴² Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, MTN.TNC/W/35/Rev.1, 3rd December 1990.

substantive scope of IPR-related competition rules.⁴³

He continued:

[T]his provision must be read as a caveat against an excessive exercise of competition policy, which the TRIPS Agreement, by its purpose and express wording, otherwise leaves Members free to define. It means that they may not use antitrust regulation as a pretext to undermine the protection of IPRs as guaranteed by the TRIPS Agreement.⁴⁴

This constraint implies that ‘competition policy must remain true to its purpose and keep within the bounds of safeguarding competition’ and ‘may not outlaw uses and forms of intellectual property that the TRIPS Agreement seeks to safeguard’.⁴⁵

Like Article 8.2 of the TRIPS, Article 40.2 of the TRIPS also requires that appropriate measures adopted by Members for the purpose of combating intellectual property-related anticompetitive practices must be consistent with the other provisions of the TRIPS. In addition, the ‘in particular cases’ language in Article 40.2 is also intended to limit the discretion provided by Article 40.2, although it is acknowledged to represent less than ideal drafting.⁴⁶ It implies that Members shall define intellectual property-related anticompetitive practices on the basis of competitive merits, rather than in an overly abstract manner.

In sum, the discretion provided by Articles 8.2, and 40 of the TRIPS is constrained by the requirement that relevant provisions in national competition laws must be consistent with the TRIPS. These restrictions are mandatory components of the TRIPS, and thus, must be taken seriously.⁴⁷ This implies that the flexibility of WTO Members in connection with the shaping of their laws in regard to combating intellectual property-related anticompetitive practices is far from being unfettered.

⁴³ H. Ullrich, (2004), note 5, 401, p. 410.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See UNCTAD-ICTSD, *Resource Book on TRIPS and Development: An Authoritative and Practical Guide to the TRIPS Agreement*, Cambridge: University of Cambridge, (2005), p. 558.

⁴⁷ M. Ricolfi, (2006), note 15, 305, p. 319.

2 The Status of China's Legislation on Abuses of Intellectual Property Rights before the Adoption of the Antimonopoly Law 2007 and Articles 8.2, 40 and 31(k) of the TRIPS

As a WTO Member, China is authorized to adopt measures for the purpose of combating abuses of intellectual property rights under Articles 8.2, 40 and 31(k) of the TRIPS. However, did China use this discretion fully before the adoption of the Antimonopoly Law 2007?

2.1 The Status of China's Legislation on Abuses of Intellectual Property Rights

The Chinese system of protecting intellectual property rights did not re-emerge until the early 1980s.⁴⁸ Internationally, China has acceded to a number of international conventions on the protection of intellectual property rights.⁴⁹ Domestically, legislation on the protection of intellectual property rights has also been adopted in the areas of trademark, copyright and patent. This has led to the creation of a comprehensive legal framework to protect both domestic and foreign intellectual property rights. Prior to and immediately after its accession to the WTO, China made conscientious efforts to amend its copyright, patent, and trademark laws while introducing new implementing regulations and judicial interpretations.⁵⁰ Although there are still some provisions in the Chinese

⁴⁸ After the establishment of the Communist government in China in 1949, intellectual property rights were not protected.

⁴⁹ China became a member of the World Intellectual Property Organisation in 1980, an official member of the Paris Convention for the Protection of Industrial Property in 1985, and a member of the Madrid Agreement for the International Registration of Trademarks in 1989.

⁵⁰ Between 2000 and 2002, China amended its major pieces of national intellectual property rights legislation and their implementing rules. For highlights of such amendments, see, Y. Li, 'The Wolf Has Come: Are China's Intellectual Property Industries Prepared for the WTO', *UCLA Pacific Basin Law Journal*, vol. 20, (2002), 77, pp. 84-86.

intellectual property legislation which are not in line with the TRIPS,⁵¹ ‘most of the laws required under the TRIPS are already on the books’.⁵²

Currently, China’s legal framework for protecting intellectual property rights is built on three national laws passed by the Standing Committee of the National People’s Congress (NPC): the Patent Law of the People’s Republic of China (hereinafter the Patent Law 2000),⁵³ the Trademark Law of the People’s Republic of China (hereafter the Trademark Law 2001),⁵⁴ and the Copyright Law of the People’s Republic of China (hereinafter the Copyright Law 2001).⁵⁵ A great number of regulations, rules, measures and policies have been made by the NPC Standing Committee, the State Council and various ministries, bureaux and commissions. The circulars, opinions and notices of the Supreme People’s Court (SPC) also form part of the legal framework of protecting intellectual property rights.

Article 48 of the Patent Law 2000 prohibits one type of intellectual property-related anticompetitive practices. It provides:

Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time, the patent administrative organ under the State Council may, upon the application of that entity, grant a compulsory license to exploit the patent for invention or utility model.

It is the only provision within the three major pieces of intellectual property rights legislation which prohibits any type of abuse of intellectual property rights.

⁵¹ Y. Li, (2002), note 50, 77, p. 88.

⁵² P. Yu, ‘Still Dissatisfied after All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility’, *Georgia Journal of International and Comparative Law*, vol. 34, (2005), 143, p. 146.

⁵³ The Patent Law of the People’s Republic of China, amended on the 25th August 2000, an English edition is available at <http://www.chinaiprllaw.com/english/laws/laws4.htm>.

⁵⁴ The Trademark Law of the People’s Republic of China, amended on the 27th October 2001, an English edition is available at <http://www.chinaiprllaw.com/english/laws/laws11.htm>.

⁵⁵ The Copyright Law of the People’s Republic of China, amended on the 27th October 2001, an English edition is available at <http://www.chinaiprllaw.com/english/laws/laws10.htm>.

On the 30th November 2004, the SPC issued the Interpretation of the Supreme People's Court on Certain Issues of Application of Law in Cases Involving Technology Contract Disputes (hereinafter the Interpretation of Technology Contract 2004).⁵⁶ The Interpretation of Technology Contract 2004 came into force on the 1st January 2005. It is based on the Contract Law of the People's Republic of China (hereinafter the Contract Law 1999),⁵⁷ the Patent Law 2000, and the Civil Procedure Law of the People's Republic of China.⁵⁸ Under the Interpretation of Technology Contract 2004, a clause in the technology contract is invalid if the following all situations exist:

1. Restraining the other contracting party from conducting research and development on the basis of the contractual technology or restraining that party from using improvements of the technology, or creating non-reciprocal conditions for exchange of improvements, such as requiring the other party to share improvements that result solely from the efforts of the other party, or transferring improvements to the supplying party on non-reciprocal basis, or exclusively or jointly holding the intellectual property rights to the improvements without compensation.
2. Restraining the other party from acquiring technologies similar to or in competition with that of the supplying party.
3. Preventing the other party from actualizing the contractual technology in a reasonable manner as demanded by the market, including unreasonably restricting quantity, variety, price, distribution channels, and export markets of products produced or services provided.
4. Requiring the technology transferee to accept additional conditions, which are unnecessary for utilizing or applying the technology, including purchasing unnecessary technology, raw materials, products, equipment, services, or accepting unnecessary personnel.
5. Unreasonably restraining the technology transferee's channels or sources of procuring raw materials, accessories, products, or

⁵⁶ The Interpretation on Certain Issues of Application of Law in Cases Involving Technology Contract Disputes, a Chinese edition is available at http://www.law-lib.com/law/law_view.asp?id=87711.

⁵⁷ The Contract Law of the People's Republic of China, an English edition is available at <http://www.chinaiplaw.com/english/laws/laws2.htm>.

⁵⁸ The Civil Procedure Law of the People's Republic of China, an English edition is available at <http://www.newsgd.com/business/laws/200305220025.htm>.

equipment. 6. Prohibiting the technology transferee from filing opposition on the validity of the intellectual property rights to the contractual technology, or imposing additional conditions on those who files such an opposition.⁵⁹

Before the adoption of the Antimonopoly Law, the Interpretation of Technology Contract 2004 was the most comprehensive legislation regarding certain types of abuses of intellectual property rights. It played a significant role in preventing anticompetitive practices in technology development and technology transfer, and the maintenance of competition in the technology market and optimal allocation of technology resources.

2.2 Did China Fully Use the Discretion under Articles 8.2, 40 and 31 (k) of the TRIPS before the Adoption of the Antimonopoly Law 2007?

Since the start of China's intellectual property legislation, the purpose of such legislation has always been to protect intellectual property rights rather than combat intellectual property-related anticompetitive practices. This trend was continued when China applied to join the WTO. The protection of intellectual property rights was one of the major concerns of other WTO Members during the negotiations of China's accession to the WTO.⁶⁰ After China's accession to the WTO, the protection of intellectual property rights is high on the policy agenda of the Chinese government. China has strengthened its legal system to protect intellectual property rights since its accession to the WTO.

The adverse effects of intellectual property-related anticompetitive practices were not fully recognised or addressed in the Chinese legal system until recent years. Before the adoption of the Antimonopoly Law 2007, therefore, very few provisions in the Chinese legislation prohibited abuses of intellectual property rights. Except refusing to grant a patent licence under reasonable conditions,⁶¹

⁵⁹ The Interpretation of Technology Contract 2004, Art. 10.

⁶⁰ For examinations on how China amended its intellectual property right laws according to the TRIPS, see, C. Zheng, 'The TRIPS Agreement and Intellectual Property Protection in China', *Duke Journal of Comparative & International Law*, vol. 9, (1998), 219.

⁶¹ The Patent Law 2000, Art. 48.

abuses of intellectual property rights are not prohibited under the Patent Law 2000, the Trademark Law 2001 and the Copyright Law 2001. As the major piece of competition-related legislation at the national level before the adoption of the Antimonopoly Law 2007, the Anti Unfair Competition Law of the People's Republic of China (hereinafter the LAUC 1993) made no mention of intellectual property-related anticompetitive practices.⁶² Thus, it is not clear whether the LAUC 1993 is applicable to intellectual property-related anticompetitive practices. Since it came into force on the 1st December 1993, however, the LAUC 1993 has not been applied to any abuse of intellectual property rights. Before the adoption of the Antimonopoly Law 2007, therefore, China's legislation was insufficient to combat abuses of intellectual property rights. This inadequacy was exposed in the following case.

On the 28th December 2004, two Chinese DVD manufacturers, Wuxi Multimedia Ltd and Orient Power (Wuxi) Technology Ltd, filed a lawsuit against the 3C Patent Group (including the Sony Corporation, Philips Electronics, LG Electronics and the Pioneer Corporation) in the US (the *DVD* case). They accused 3C Patent Group of price fixing, unlawful tying of essential and non-essential patents together, group boycott and conspiracy to monopolize in violation of Sections 1 and 2 of the Sherman Act.⁶³ China had no legislation dealing with this abuse when this dispute emerged. Thus, these two Chinese companies were unable to bring a complaint to a Chinese court in 2004. This clearly demonstrated the inadequacy of the Chinese legislation regarding certain types of abuses of intellectual property rights.

The adoption of the Interpretation of Technology Contract 2004 was certainly helpful to deal with restrictive conditions attached to licensing agreements regarding intellectual property rights. However, it only partially addressed the problem of the lack of legislation on abuses of intellectual property rights in China because it is only applicable to six types of anticompetitive practices in the area of patent rights. It could not be used to prevent anticompetitive

⁶² An English version is available at <http://en.chinacourt.org/public/detail.php?id=3306>.

⁶³ 'Chinese Firms File Lawsuit on DVD Patent', *China Daily*, 20th January 2005. http://www.chinadaily.com.cn/english/doc/2005-01/20/content_410667.htm; also 'Chinese DVD Player Manufacturers Take Patent Owners to Court', 20th January 2005, <http://www.afterdawn.com/news/archive/5979.cfm>.

practices in the areas of trademarks and copyrights. Moreover, its legal effect is much lower than national laws.⁶⁴ Most developed countries, such as the US, use their national competition laws to combat abuses of intellectual property rights. Thus, the Interpretation of Technology Contract 2004 was not an ideal solution for China to combat abuses of intellectual property rights.

Despite its shortcomings, the Interpretation of Technology Contract 2004 was the only national legislation which prohibits six types of anticompetitive practices in regard to technical contracts before the adoption of the Antimonopoly Law 2007. Its significance was illustrated in the following case. Dongjin Telecom Technology Co. Ltd, a Chinese company, sued the American company, Intel Corporation (*Dongjin v. Intel*).⁶⁵ This was heard before the Beijing First Intermediate Court on 28 July 2006. It has been described as China's first competition law case. It involved the issue of a software license. Dongjin Telecom Technology Co. Ltd acquired hardware and software from Intel Corporation. The software was subject to a licensing agreement, which specified that Dongjin Telecom Technology Co. Ltd could only use the software in combination with the purchased hardware from Intel Corporation. Dong Jin Telecom Technology Co. Ltd argued that the licence created an illegal monopoly in respect of technology and, as a result, was void under the Contract Law and Article 10 of the Interpretation of Technology Contract 2004.

This case could not be argued under competition law, because the Antimonopoly Law 2007 did not exist when this case was filed. Nevertheless, it has still been referred to as the first Chinese competition case. This case had been widely read in legal and academic circles in China as one having profound competition law

⁶⁴ Judicial interpretations issued by the SPC aims to clarify laws and bind all courts. An interpretation by the SPC may be provided in response to a specific question asked by a lower court, or it may be provided as a general explanation of the law. Once issued, an SPC interpretation becomes part of China's law. Under Articles 78 and 79 of the Legislation Law of the People's Republic of China (hereinafter the Legislation Law 2000), national laws are only second to the Chinese Constitution 1982. Thus, the SPC's interpretations have lower legal effects than national laws.

⁶⁵ This case was settled outside the court and consequently the court approved the request of withdrawing this case on 11th May 2007. The Chinese version of the court decision is available on the Beijing Courts website, http://bjgy.chinacourt.org/public/detail.php?id=51987&k_w=东进.

implications. It has to be mentioned, however, without the Interpretation of Technology Contract 2004, this case would not be possible to be filed in a Chinese court.

This case illustrated that more and more people in business and legal circles in China were aware of the possibility of defending against, or bringing suit against anticompetitive practices in the area of intellectual property rights. Moreover, it also demonstrated the inadequacy of the Chinese legislation regarding abuses of intellectual property rights since it had to rely on a SPC's interpretation rather than a national competition law.

In sum, there were a few provisions in China prohibiting certain types of abuses of intellectual property rights before the adoption of the Antimonopoly Law 2007. As demonstrated in the *DVD* case and *Dongjin v. Intel*, however, China's legislation on prohibiting abuses of intellectual property rights were insufficient. This insufficiency illustrated that, before the adoption of the Antimonopoly Law 2007, China did not fully use the discretion under Articles 8.2, 40 and 31 (k) of the TRIPS.

3 Have Articles 8.2, 40 and 31 (k) of the TRIPS Enhanced the Case for China Seeking to Combat Abuses of Intellectual Property Rights through the Antimonopoly Law 2007?

As discussed above, some WTO Members with experience in the implementation of intellectual property rights have long used their national competition laws to combat intellectual property-related anticompetitive practices. They maintain vigorous competition law agencies with broad and effective enforcement powers. Thus, it is not surprising that the Antimonopoly Law 2007 will be applicable to anticompetitive practices in the area of intellectual property once it comes into force on the 1st August 2008.⁶⁶ However, it has not been an easy journey for China to finally include such a provision in the Antimonopoly Law 2007. China

⁶⁶ See, the Antimonopoly Law 2007, Art. 55.

only started to protect intellectual property rights in the 1980s. Its record of protecting intellectual properties rights is still subject to intense complaints from some WTO Members. For example, the US has placed China on its ‘priority watch list’ of countries failing to give adequate protection to intellectual property rights.⁶⁷ The EU has also issued a similar warning on China’s intellectual property rights.⁶⁸ In April 2007, the US filed a case to the WTO against China regarding China’s measures affecting the protection and enforcement of intellectual property rights.⁶⁹ Therefore, China’s attempting to regulate intellectual property-related anticompetitive practices through its competition law during the process of formulating the Antimonopoly Law 2007 has raised concerns from other WTO Members due to China’s poor record of protecting intellectual rights.

Against this background, what follows examines whether Articles 8.2, 40 and 31(k) of the TRIPS have enhanced the case for China seeking to combat abuses of intellectual property rights through the Antimonopoly Law 2007 by analysing the changes of relevant provisions during the process of formulating China’s first comprehensive competition law.

3.1 Stage One (Before China’s Accession to the WTO): No Mention of Intellectual Property-Related Anticompetitive Practices

During this stage, the drafts of China’s Antimonopoly Law made no mention of abuses of intellectual property rights. For instance, the 1999 Draft omitted mention of whether the Law would be applicable to intellectual property rights.⁷⁰ There are two reasons for this omission. First, during that period

⁶⁷ ‘U.S.: China Has High Rate of Intellectual Property Infringement’, April 2005, <http://usinfo.state.gov/usinfo/Archive/2005/Apr/29-580129.html>.

⁶⁸ ‘EU Takes Tough Line with China on Trade’, *Financial Times*, 25th October 2006, p. 5.

⁶⁹ The Panel was established on the 25th September 2007 and Panel Report is pending. Japan, Mexico, the EC, Chinese Taipei and Argentina joined as third party in this case. See, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362.

⁷⁰ An English version of this draft was prepared for an OECD-sponsored seminar held in Shanghai late in 1999.

intellectual property-related anticompetitive practices were not as serious as they are now in China. In fact, anticompetitive practices in intellectual property rights were rarely heard of in China before China's accession to the WTO, given the fact that competition-related regulation itself was a new topic in China and the legal protection of intellectual property rights had only been recognised for just more than a decade during that time.⁷¹ From the Chinese government view, thus, it was not very urgent to regulate intellectual property-related anticompetitive practices. The majority of Chinese scholars were also unaware of the adverse effects of intellectual property-related anticompetitive practices on competition.

Second, China was still in the process of negotiating its WTO membership during this period. One of the major concerns from the major players of the WTO, such as the US, was the protection of intellectual property rights. Thus, all the concerns of the Chinese government were focused on how to reform its regime on intellectual property rights in order to improve the protection of intellectual property rights. Combating abuses of intellectual property rights could be considered to weaken the legal protection of intellectual property rights in China and thus upset some major WTO Members, although they applied their competition laws to intellectual property-related anticompetitive practices for a long period. In order to join the WTO, China had to negotiate bilateral agreements before it started multilateral negotiations regarding China's application for WTO membership.⁷² Thus, it was very important for China to secure the key players' agreements in order to become a WTO Member.

3.2 Stage Two (Between 2001 and 2005): Starting to Include a Provision Prohibiting Abuses of Intellectual Property Rights in the Drafts of China's Antimonopoly Law

Since it joined the WTO in 2001, China started to regulate abuses of intellectual

⁷¹ All the three major pieces of intellectual property right legislation were first adopted in early 1980s.

⁷² In regard to the procedure of joining the WTO, see Chapter One.

property rights. The Interpretation of Technology Contract 2004 was an example. This changed attitude led China to include a provision prohibiting abuses of intellectual property rights in some drafts of the Antimonopoly Law. The February 2002 Draft,⁷³ which was drafted just after China's accession to the WTO, added a special provision entitled 'Acts of Exercising Intellectual Property Rights'. Article 56 of this draft provides:

The reasonable acts of an operator of exercising rights in accordance with the laws protecting intellectual property rights such as the copyright law, the trademark law and the patent law shall not be restricted by this law. However, if the abuse of intellectual property rights results or may result in material restriction or exclusion of competition, this law shall apply.

It is the first provision which shows China's desire to regulate abuses of intellectual property rights through its competition law. On the one hand, it exempts intellectual property rights from the application of the Antimonopoly Law. On the other hand, it emphasises that the Antimonopoly Law is applicable if abuses of intellectual property rights exist. Similar language to Article 56 of the February 2002 Draft was maintained in Article 66 of the 2004 Submitted Draft⁷⁴ and Article 56 of the April 2005 Draft.⁷⁵

As foreign companies expand their investment in China,⁷⁶ the ability of Chinese legislation to protect intellectual property rights is a major topic of discussions even after China's accession to the WTO. Therefore, it was not surprising that the draft provision regarding abuses of intellectual property rights 'received

⁷³ This draft is only circulated in a limited scope. An English edition is on the author's file.

⁷⁴ An English edition of the 2004 Submitted Draft is available at <http://www.ibanet.org/images/downloads/Questionnaire%20-%20final.pdf>.

⁷⁵ An English edition of the April 2005 Draft is available at <http://www.ibanet.org/images/downloads/China%20Antimonopoly%20Law%20April%2008%2005%20Draft%20-%20English-v1.pdf>.

⁷⁶ China attracts more foreign direct investment than any other developing country. And foreign direct investment in China has continually grown. The latest example is that foreign direct investment in China was increased more than 10 percent during the first half of 2007. See, 'Foreign direct investment in China up 12% in first half', *The Economic Times*, 13th July 2007, http://economictimes.indiatimes.com/International__Business/Foreign_direct_investment_in_China_up_12_in_first_half/articleshow/2199329.cms.

more attention from the foreign business community than any other provision'.⁷⁷ Such a provision raised significant concerns for multinationals over the protection of their intellectual property rights and, in particular, whether the mere act of refusing to license intellectual property rights could trigger an abuse of intellectual property rights and lead to compulsory licensing or inefficient licensing negotiations under fear of compulsory licensing. These concerns are understandable particularly given the fact that China's record of protecting property rights is arguably not good.⁷⁸

In sum, China started to introduce a provision prohibiting abuses of intellectual property rights in the drafts of the Antimonopoly Law during this period. There are three reasons for this change. First, during that period abuses of intellectual property rights were emerging in China. Cases related to such practices became high profile in the media's view and the public were aware of such practices. Moreover, these abuses of intellectual property rights also demonstrated the insufficiency of the existing Chinese legislation dealing with such practices. For example, the Chinese companies involved in the *DVD* case had to file a case in the US rather than China due to the lack of relevant legislation dealing with intellectual property-related anticompetitive practices in China during that time.

Second, both the Chinese government and Chinese scholars started to realise the adverse effects of abuses of intellectual property rights on competition. After a year of investigation, for example, the State Administration for Industry and Commerce (SAIC) published a report 'The Competition-restricting Behaviour of Multinational Companies in China and Counter Measures' in 2004.⁷⁹ This report

⁷⁷ G. Masoudi, 'Key Issues Regarding China's Antimonopoly Legislation', presented to the International Seminar on Review of Antimonopoly Law, Hangzhou, China, 19th May 2006, p. 10, <http://www.usdoj.gov/atr/public/speeches/217612.pdf>.

⁷⁸ For example, the American Bar Association claims that 'poor enforcement, combined with weak punishments, mean that intellectual property violations are still rampant', despite the fact that many improvements have been made to the 'paper' legal framework. See, the American Bar Association's China Law Committee, *Written Comments on Rule of Law Issues Related to the People's Republic of China's Accession to the World Trade Organization*, Washington D.C.: USTR, (2002), p. 16.

⁷⁹ SAIC, 'The Competition-restricting Behaviour of Multinational Companies in China and Counter Measures' [*在华跨国公司限制竞争行为表现及对策*, *Zaihua Kuaguo Gongsi Xianzhi Jingzheng Xingwei*

indicated that companies that owned rights to advanced technology or other intellectual properties squeezed the market by refusing to sell their services or products to Chinese companies.⁸⁰ Thus, this report demonstrated that the Chinese government was expressly concerned that some multilateral companies might abuse their intellectual property rights in order to force out their Chinese competitors.

Third, the Chinese government was encouraged by Articles 8.2, 40 and 31 (k) of the TRIPS, which authorize WTO Members to adopt legislation to combat intellectual property-related anticompetitive practices. Before China joined the WTO, Articles 8.2, 40 and 31 (k) of the TRIPS were not applicable to China. The enabling character of Articles 8.2, 40 and 31 (k) of the TRIPS had impacts on the inclusion of a provision prohibiting abuses of intellectual property rights.

However, the impact of Articles 8.2, 40 and 31 (k) of the TRIPS on the formulation of China's competition law was limited during this period due to two reasons. First, as a new WTO Member, China was still 'learning the rules' during this period, while old members were 'playing the rules'.⁸¹ Yongtu Long, the chief negotiator for China's accession to the WTO, described the Chinese situation as 'a blind man riding a blind horse'.⁸² Thus, it would take time for China to understand the WTO rules and exploit them. Due to the lack of relevant expertises, it was difficult for the Chinese government to be fully aware of the discretion under Articles 8.2, 40 and 31 (k) of the TRIPS during this period. Second, China's ability of resisting the pressure from other WTO Members in order to act in the way permitted under Articles 8.2, 40 and 31 (k) of the TRIPS was not very strong. In 2001, China was only the sixth biggest trading power with

Biaoxian Ji Duice], *Journal of the State Administration of Industry and Commerce* [工商管理杂志 *Gongshang Guanli Zazhi*], vol. 5, (2004), 42.

⁸⁰ 'Antimonopoly Law to Benefit All', <http://www.china.org.cn/english/government/97133.htm>.

⁸¹ 'Big Changes over the Past Half Year Since China's WTO Entry', *People's Daily* [人民日报, *Remin Ribao*], 11th July 2002, www.china.org.cn/english/36714.htm.

⁸² V. Chan, 'Chinese Economists Fear Favored West May Threaten Sovereignty', *South China Morning Post*, 13th November 2001.

the WTO.⁸³ This relatively weak position limited the impact of Articles 8.2, 40 and 31 (k) of the TRIPS on the formulation of China's Antimonopoly Law.

3.3 Stage Three (From 2005 to Present): Including a Provisions Prohibiting Abuses of Intellectual Property Rights in the Antimonopoly Law 2007

The language used in the February 2002 Draft, the 2004 Submitted Draft and the April 2005 Draft was changed in the July 2005 Draft.⁸⁴ This can be seen from the changes of the titles of the relevant provisions. While Article 56 of the February 2002 Draft is called 'Acts of Exercising Intellectual Property Rights', Article 52 of the July 2005 Draft is called 'Applicability to Abuse of Intellectual Property Rights'. Article 52 of the July 2005 Draft provides: 'This Law is applicable to undertakings which eliminate or restrict market competition beyond the laws and administrative regulations on intellectual property rights'. This change makes the purpose of this provision more specific than previous draft provisions by stipulating that China's forthcoming competition law will be applicable to anticompetitive practices in the field of intellectual property rights. Some WTO Members and foreign companies were concerned that this change would allow trumped-up anticompetitive charges to chip away at their profitable patents.⁸⁵

Article 52 of the July 2005 Draft is still loosely drafted due to the words 'beyond the laws and administrative regulations on intellectual property rights'. This was improved in the November 2005 Draft.⁸⁶ Article 48 of the November 2005 Draft provides: 'This Law is applicable to the conduct by the undertakings eliminating

⁸³ See, Trade Policy Review Body, *Trade Policy Review –People's Republic of China- Report by the Secretariat*, WT/TPR/S/161/Rev.1, 26th June 2006, p. 1.

⁸⁴ An English edition of the July 2005 Draft is available at <http://www.ibanet.org/images/downloads/Draft%20of%2027%20July%202005.pdf>.

⁸⁵ See, 'China Antitrust Law Worries Foreign Interests', *The Wall Street Journal Europe*, 26th January 2006.

⁸⁶ The November 2005 Draft is only circulated in a limited scope. An English edition is on the author's file. For an overview of this draft, see H. Harris, 'The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China', *Chicago Journal of International Law*, vol. 7, (2006), 169.

or restricting competition by the abuse of the rights stipulated by the Intellectual Property Right Laws or administrative regulations'. It further improves the clarification of Article 52 of the July 2005 Draft by changing the words 'beyond the laws and administrative regulations on intellectual property rights' into the language 'the abuse of the rights stipulated by the Intellectual Property Right Laws or administrative regulations'.

Like its equivalent provisions in previous drafts, Article 48 of the November 2005 Draft was criticised by foreign governments and companies. In fact, some WTO Members and foreign companies were even more worried about this provision than the provisions in previous drafts because, unlike previous drafts, this provision does not provide that this law protects intellectual property rights at all. It only focuses on intellectual property-related anticompetitive practices. Like the previous drafts, Article 48 of the November 2005 was criticised by some foreign experts. H. Stephen Harris, for example, criticised Article 48 as being inconsistent with the international norm of competition law.⁸⁷ He continued:

The absence of any definition of what conduct may constitute such an abuse of IP [Intellectual Property] rights, and the possible imposition of compulsory licensing as a remedy, have engendered expressions of great concern, especially from foreign high technology companies with substantial operations or sales in China.⁸⁸

Despite the criticism that China faced from abroad in respect of its intention to include a provision prohibiting abuses of intellectual property rights in its competition law, this issue was not raised during China's first trade policy review under the Trade Policy Review Mechanism (TPRM) in 2006.⁸⁹ This clearly illustrates that after many years of criticising China's intention of prohibiting abuses of intellectual property rights, finally WTO Members accepted that China had the legitimate right to regulate abuses of intellectual property rights under Articles 8.2, 40 and 31(k) of the TRIPS. At least, they did not think it was wise to criticise China's intention of combating such abuses during China's first trade policy review due to the discretion under Articles 8.2, 40 and 31(k) of the TRIPS.

⁸⁷ H. Harris, (2006), note 86, 169, p. 171.

⁸⁸ *Id.*

⁸⁹ For the discussion of China's first trade policy review under the TPRM, see Chapter Six.

To some extent, this has encouraged China to use such discretion fully and include a general ban on abuses of intellectual property rights in its first competition law.

Article 48 of the December 2005 Draft was changed in the June 2006 Draft.⁹⁰

Article 54 of the June 2006 Draft provides:

Undertakings exercise intellectual property rights according to laws, administrative regulations related intellectual property rights, shall not be applied to this law; however, undertakings abuse the intellectual property rights to eliminate or restrict competition, shall be applied to this law.⁹¹

Unlike Article 48 of the December 2005 Draft, Article 54 of the June 2006 Draft does not define the term 'abuse of intellectual property rights' according to the legislation on intellectual property rights. Instead, it provides that this law applies to 'abuse of intellectual property rights that eliminates or restricts competition'. This change is necessary because none of the existing legislation on intellectual property rights provides a general ban on abuses of intellectual property rights. In addition, this article re-introduced the words of protecting intellectual property rights, which were used in the February 2002 Draft, the 2004 Submitted Draft and the April 2005 Draft. This reintroduction aims to reassure other WTO Members and foreign companies that intellectual property rights will be protected in China's Antimonopoly Law and only abuses of intellectual property rights are prohibited.

Articles 8.2, 40 and 31 (k) of the TRIPS helped to strengthen the argument of Chinese law-makers who were in favour of regulating abuses of intellectual property rights through China's Antimonopoly Law. During the 22nd session of the 10th NPC Standing Committee held from the 24th to the 29th June 2006, for instance, Shiwei Cheng, vice-Chairman of the 10th NPC Standing Committee, argued that the inclusion of prohibiting abuses of intellectual property rights in

⁹⁰ An English edition of the June 2006 Draft is available at <http://www.buyusa.gov/asianow/270.pdf>.

⁹¹ This is my own translation. Article 54 according to the translation at <http://www.buyusa.gov/asianow/270.pdf> is inconsistent with the official Chinese edition of the draft Antimonopoly Law. Thus, I use my own translation in order to reflect the true meaning of the Chinese edition of this draft.

China's Antimonopoly Law was of significance.⁹² He recommended further studying this issue.⁹³ During this meeting, no members of the 10th NPC Standing Committee expressed any objection in regard to including a provision prohibiting abuses of intellectual property rights. Thus, it seemed that all members attending the meeting of the 10th NPC Standing Committee in June 2006 agreed to prohibit abuses of intellectual property rights through China's forthcoming Antimonopoly Law. Article 54 of the June 2006 Draft is retained in the Antimonopoly Law 2007. Article 55 of the Antimonopoly Law 2007 clearly provides that the law will apply to undertakings which abuse intellectual property rights to eliminate or restrict competition.

China finally included a provision prohibiting abuses of intellectual property rights into the Antimonopoly Law 2007 during this period. There are several reasons for this. From the view of the TRIPS, the role played by Articles 8.2, 40 and 31 (k) of the TRIPS should not be underestimated. Several conditions contribute to the role played by Articles 8.2, 40 and 31 (k) of the TRIPS. First, China is increasingly gaining confidence to exploit WTO rules. By 2005, China had been a WTO Member for about four years. During these four years, China used its massive human resources to master WTO rules. In May 2002, for instance, the Chinese government set up a national training project to introduce WTO rules to provincial trade officials as well as management staff in companies.⁹⁴

Second, with the increasing significance of its economy and trade in the world, China is in a stronger position than before to resist the pressure from some WTO Members. Since its accession to the WTO, China has dramatically increased its trading power. Now it is the third biggest trading member in the WTO after the EU and the US, while it was only the sixth-biggest trading power when it joined

⁹² See, 'Digest of Speaking on The Draft of Antimonopoly Law', 30th June 2006, [http://www.npc.gov.cn/was40/detail?record=1&channelid=20179&searchword=%20\(%20%D6%D0%BB%AA%C8%CB%C3%F1%B9%B2%BA%CD%B9%FA%B7%B4%C2%A2%B6%CF%B7%A8%A3%A8%B2%DD%B0%B8%A3%A9+%29+and+%28+IDS%3D%27350218'%20\)#1](http://www.npc.gov.cn/was40/detail?record=1&channelid=20179&searchword=%20(%20%D6%D0%BB%AA%C8%CB%C3%F1%B9%B2%BA%CD%B9%FA%B7%B4%C2%A2%B6%CF%B7%A8%A3%A8%B2%DD%B0%B8%A3%A9+%29+and+%28+IDS%3D%27350218'%20)#1).

⁹³ *Id.*

⁹⁴ See, 'Managers to Undergo WTO Training', *China Daily*, 29th May 2002, www.china.org.cn/english/33488.htm.

the WTO in 2001.⁹⁵ This change means that China is in a better position to resist pressures from some WTO Members when it is intended to act in ways permitted under Articles 8.2, 40, and 31(k) of the TRIPS. With the increase of Chinese economic and trading power in the world, Articles 8.2, 40 and 31(k) of the TRIPS have enhanced the case for China seeking to protect itself against abuses of intellectual property rights.

However, it has to be borne in mind that it is far from easy to define the borderline between the reasonable exercise of intellectual property rights and abuses of such rights. Further administrative rules or guidance in respect of implementing Article 55 is needed. The Chinese competition enforcement authorities need to be aware of the discretion under Articles 8.2, 40 and 31 (k) of the TRIPS when they formulate such rules or guidance.

4 Conclusion

This chapter has explored the impact of Articles 8.2, 40 and 31(k) of the TRIPS on the formulation of the Antimonopoly Law 2007. As enabling clauses, Articles 8.2, 40 and 31(k) of the TRIPS expressly recognize the legitimacy of invoking WTO Members' national competition laws to combat abuses of intellectual property rights. They do not impose obligations on WTO Members in respect of combating abuses of intellectual property rights. Whether an individual WTO Member chooses to act in ways permitted by these articles depends on various conditions. Put another way, these articles do not guarantee that WTO Members will adopt legislation dealing with intellectual property-related anticompetitive practices in reality. WTO Members might choose not to act in ways permitted in Articles 8.2, 40 and 31(k) of the TRIPS due to the pressure from other WTO Members. Articles 8.2, 40 and 31 (k) of the TRIPS could only enhance the case for a WTO Member seeking to combat abuses of intellectual property rights, when it is strong enough to resist the pressures from other WTO Members.

China faced huge criticisms regarding its attempt to prohibit abuses of

⁹⁵ In 2004, China's share of world trade was 6.7%. Thus, it has become the third largest trader (after the European Union (14.5%) and the United States (13.6%)). See, Trade Policy Review Body, WT/TPR/S/161/Rev.1, note 83, p. 1.

intellectual property rights through its competition law. Against this background, Articles 8.2, 40, and 31(k) of the TRIPS have enhanced the case for China seeking to prohibit abuses of intellectual property rights through the Antimonopoly Law 2007, with the increasing significance of China's economy and trade in the world. There is no doubt that these articles are not the reasons why China needs to combat abuses of intellectual property rights through the Antimonopoly Law 2007. However, these enabling clauses have enhanced the case for China seeking to prohibit such abuses through the Antimonopoly Law 2007. Without these enabling clauses, it would be very difficult for China to include a provision prohibiting abuses of intellectual property rights in the Antimonopoly Law 2007 particularly considering the fact that some WTO Members, such as the US, do not think China's record of protecting intellectual property rights is good. The changes of the provision prohibiting abuses of intellectual property rights in the drafts and the Antimonopoly Law 2007 illustrate how Articles 8.2, 40 and 31 (k) of the TRIPS have enhanced the case for China seeking to combat intellectual property-related anticompetitive practices through its competition law.

Under the Antimonopoly Law 2007, only Article 55 prohibits abuses of intellectual property rights. Therefore, further guidance on this provision is needed. In order to formulate such guidance, the Chinese competition enforcement authorities need to be aware of the discretion under Articles 8.2, 40 and 31 (k) of the TRIPS.

Chapter Six:

The Impact of the Peer Review in the WTO— the Trade Policy Review Mechanism (TPRM) on the Formulation of the Antimonopoly Law 2007

Peer review refers to the method ‘by which countries can assess the quality and effectiveness of their policies, legislation, policy environments and key institutions’.¹ It provides ‘a forum where policies can be explained and discussed, where information can be sought and concerns expressed, on a non-confrontational and non-adversarial basis’.² Peer review can be used in a broad range of areas. Currently, there are several peer reviews in international organisations, such as the peer review of Individual Action Plans in the Asia-Pacific Economic Cooperation (APEC) System, the Organisation for Economic Co-operation and Development (OECD) Country Reviews of Regulatory Reform (specifically the Competition Policy Reviews), the International Monetary Fund (IMF) Country Surveillance Mechanism (Article IV Reports)³, the IMF-World Bank Financial Sector Assessment Program, and the TPRM.

The TPRM is at the centre of the surveillance of national trade-related policies which is a fundamentally important activity running throughout the work of the World Trade Organisation (WTO).⁴ It ‘is a unique element in the range of WTO

¹ The Organisation for Economic Co-operation and Development (OECD), *Peer Review: Merits and Approaches in A Trade and Competition Context*, 6th June 2002, Paris: OECD, COM/DAFFE/TD(2002)4/FINAL, (2002), para. 2, p. 4.

² *Id.*

³ For a brief description of the IMF Country Surveillance Mechanism, see, IMF, *IMF Annual Report 2001*, Washington, D.C.: IMF, (2002).

⁴ For a brief description of the TPRM, see, WTO, *Trade Policy Reviews: Brief Introduction*, http://www.wto.org/english/tratop_e/tpr_e/tp_int_e.htm.

activities'.⁵ The reviews take place in the Trade Policy Review Body which comprises all WTO Members. The reviews are therefore essentially peer-group assessments, despite the fact that much of the fact finding work is done by the WTO Secretariat. This means that the TPRM is 'the only focus for peer review of the full range of trade policies'.⁶

In general, literature on peer review is scarce.⁷ It is even scarcer in the case of the TPRM.⁸ In particular, there is no literature on the impact of the TPRM on the development of domestic competition law and policy in WTO Members. Against this background, this chapter examines the impacts of the TPRM on the formulation of the Antimonopoly Law of People's Republic of China (hereinafter the Antimonopoly Law 2007)⁹. It explores whether, and if so, how the TPRM could have contributed to the formulation of the Antimonopoly Law 2007, and to what extent its formulation has reflected such contributions.

1 General Issues

As an early result of the Uruguay Round (1986-1994), the TPRM was established on a provisional basis at the Montreal Ministerial Meeting in December 1988.¹⁰ The first review took place in 1989. Australia, Morocco and the United States (US)

⁵ WTO, *Trade Policy Review Mechanism- Report to the Singapore Ministerial Conference*, WT/TPR/27, (1996), para. 19.

⁶ *Id.*

⁷ F. Pagani, 'Peer Review as A Tool for Co-operation and Change: An Analysis of an OECD Working Method', *African Security Review*, vol. 11(4), (2002), 15, p. 23.

⁸ The WTO website has listed most of the studies (in English) in regard to the TPRM, see, http://www.wto.org/english/tratop_e/tpr_e/tppubs_e.htm.

⁹ The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

¹⁰ For the evolution of the trade policy review system in the GATT/WTO, see, D. Keesing, *Improving Trade Policy Reviews in the World Trade Organisation*, Washington D.C.: Institute for International Economics, (1998), pp. 3 ff; P. Mavroidis, 'Surveillance Schemes: the GATT's New Trade Policy Review Mechanism', *Michigan Journal of International Law*, vol. 13, (1991), 374, pp. 376-378; A. Qureshi, 'The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?', *Journal of World Trade*, vol. 24(3), (1990), 147, pp. 147-149.

were the first countries reviewed under the TPRM.¹¹ Subsequently, the TPRM was incorporated into the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter the Marrakesh Agreement)¹², and placed on a permanent footing as one of the WTO's basic functions. The latest appraisal of the TPRM by the Trade Policy Review Body reaffirmed 'the great importance that Members attached to the mission and objectives defined in Annex 3 of the Marrakesh Agreement for the TPRM, this being the only multilateral, comprehensive evaluation of trade policies'.¹³ The significance of the TPRM is reflected in the seniority of the Trade Policy Review Body – it is the WTO General Council by another name. Despite the significance of the TPRM, there are fewer research papers and books in the area of the TPRM than other areas within the WTO framework, such as the WTO dispute settlement system.¹⁴ This could be the reason why Donald B. Keating claimed: the TPRM is 'a little-known ... activity' of the WTO.¹⁵

1.1 Purpose and Procedure

1.1.1 Purpose

The TPRM provides the regular collective appreciation and evaluation of the full range of individual WTO Members' trade policies and practices and their impact on the functioning of the multilateral trading system. The purpose of the TPRM is to:

contribute to improved adherence by all Members to rules, disciplines and commitments made under the Multilateral Trade Agreements and, where applicable, the Plurilateral Trade Agreements, and hence to the smoother

¹¹ They were reviewed on the 12th, 13th and 14th December 1989 respectively, soon after the TPRM had been established.

¹² See Annex 3 of the Marrakesh Agreement Establishing the World Trade Organisation (hereinafter the Marrakesh Agreement). The Marrakesh Agreement is available at http://www.wto.org/english/docs_e/legal_e/04-wto.pdf.

¹³ WTO, *Ministerial Conference - Sixth Session - Hong Kong, 13 - 18 December 2005 - Second Appraisal of the Operation of the Trade Policy Review Mechanism - Report to Ministers*, WT/MIN(05)/1, 21st September 2005, para. 5.

¹⁴ See note 8.

¹⁵ D. Keating, (1998), note 10, p. 1.

functioning of the multilateral trading system, by achieving greater transparency in, and understanding of, the trade policies and practices of Members. Accordingly, the review mechanism will enable the regular collective appreciation and evaluation by the Ministerial Conference of the full range of individual Members' trade policies and practices and their impact on the functioning of the multilateral trading system.¹⁶

Thus, the purpose of the TPRM can be said:

- (a) to increase the transparency and understanding of countries' trade policies and practices, through regular monitoring
- (b) to improve the quality of public and intergovernmental debate on the issues
- (c) to enable a multilateral assessment of the effects of policies on the world trading system.¹⁷

Susan Hainsworth claimed that the TPRM, as a peer review, had a 'secondary normative objective: it aims to promote domestic trade policy transparency, in recognition of its inherent importance to the furtherance of rule development and compliance'.¹⁸

1.1.2 Procedure¹⁹

All WTO Members are subject to trade policy review under the TPRM.²⁰ The frequency of trade policy review for a WTO Member increases with the overall amount of that Member's trade in the world. The four largest trading WTO Members are reviewed every two years.²¹ Trading states ranking from 5th to 20th are reviewed every four years.²² The remaining WTO Members are reviewed every six years.²³ The least-developed WTO Members can have even a longer

¹⁶ The Marrakesh Agreement, Annex 3, Art. A(i).

¹⁷ WTO, *Understanding the WTO: The Agreements*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm11_e.htm.

¹⁸ S. Hainsworth, 'Sovereignty, Economic Integration, and the World Trade Organisation', *Osgoode Hall Law Journal*, vol. 33, (1995), 583, p. 607.

¹⁹ See, the Marrakesh Agreement, Annex 3, Arts. C and D.

²⁰ *Id.*, Art. C (ii).

²¹ *Id.*

²² *Id.*

²³ *Id.*

interim period.²⁴ Once a WTO Member is included in the process, its next review takes place according to this cycle, except that a leeway of six months may be allowed. The procedure of trade policy review can be divided into three stages.

1.1.2.1 Stage One: The Investigation Stage

In the investigation stage, two investigation reports are produced. The first is the Government Report which is supplied by the WTO Member whose trade policies are under review. The second is the Secretariat Report which is prepared by the Secretariat within the Trade Policy Review Body. In general, the Secretariat Report is more substantial than the Government Report. It assembles information provided by the WTO Member under review in response to a questionnaire from the Secretariat. It also obtains information from interviews and consultations which are conducted when the Secretariat staff visit the WTO Member. In addition, it also gets information from a number of other sources, including publications of the government and organisations like the World Bank and the IMF. The Secretariat also has the discretion to consult reports of private agencies in the WTO Member. Then, the Secretariat submits its draft report to the WTO Member for verification and factual content. The Secretariat then revises its text in light of the comments of the WTO Member under review and finalises the report on its own authority. In order to preserve the independence of its evaluation, however, the summary observations are not subject to the same checking process. In general, the Secretariat Report has evolved from 'largely descriptive catalogues of countries' protectionist measures into more thorough, incisive and analytical surveys of trade policies and practices'.²⁵

The structure of the Secretariat Report has evolved over time on the basis of some experimentation. Currently, the Secretariat Report contains a summary of observation and four chapters. Chapter I, Economic Environment, covers the major features of the economy, recent economic developments, trade patterns in goods and services, evolution of foreign investment, and trade-related aspects of the foreign exchange regime. Chapter II, Trade and Investment Regimes, covers institutional aspects of trade and investment policy making, including

²⁴ *Id.*

²⁵ D. Keating, (1998), note 10.

participation in multilateral and regional arrangements, as well as trade disputes and consultations. Chapter III, Trade Policies and Practices by Measures, deals with measures directly affecting imports, exports and production, while Chapter IV, Trade Policy by Sectors, looks at measures by sector. As Sam Laird pointed out, this standardised form helps to ensure consistency of treatment, and delegates have been found to value being able to find topics in the expected places across reports.²⁶

1.1.2.2 Stage Two: The Examination Stage

In the examination stage, the Trade Policy Review Body discusses the Secretariat Report and the Government Report. This process lasts about 10 months or even longer if one takes into account the time for preparation. But the review meeting is usually held over two days in Geneva. It occupies two morning sessions with a day for preparation in between. The WTO Member under review makes an introductory statement on the first morning. Then the two discussants chosen from the membership to act on their own responsibility rather than as representatives of their governments stimulate debate by comments. Typically, in advance of the meeting they circulate an outline of the main issues they intend to raise. Subsequent to the discussants' statements, other WTO Members may make statements and raise questions. These statements and questions from the participating WTO Members reflect concerns and challenges highlighted in the reports. This gives the participating WTO Members a rare opportunity to question the WTO Member under review about its policies and practices directly affecting them. At the end of the first morning, the Chairperson draws an outline of the main themes raised at the meeting in order to assist the WTO Member under review with its preparation for the next session. The intervening day is spent preparing responses to the questions and comments posed on the first day. On the second morning, the WTO Member under review answers the questions raised on the first morning. These answers should be arranged along the lines of the main themes identified by the Chairperson and preferably be in writing. At the end of the meeting the Chair presents concluding remarks which aim at giving an assessment of the issues raised in the review. The Chair's concluding

²⁶ S. Laird, 'The WTO's Trade Policy Review Mechanism—From Through the Looking Glass', *The World Economy*, vol. 22(6), (1999), 741, p. 751. Sam Laird has acted as counselor for the WTO Trade Policies Review Division as well as the WTO Development Division.

remarks formally end the review process.

1.1.2.3 Stage Three: The Dissemination Stage

In the dissemination stage, the following documents are published and are made available on the WTO website: the Secretariat Report, the Government Report, the minutes of the meeting of the Trade Policy Review Body, a first press release based on the Secretariat Report including a summary of the Secretariat Report and parts of the Government Report, and a second press release containing the conclusions of the Chairman of the Trade Policy Review Body. There are no formal recommendations on actions to be taken by the WTO Member under review.

1.2 Soft Persuasion Character of the TPRM and China's Approach to International Matters

1.2.1 Soft Persuasion Character of the TPRM

1.2.1.1 Soft Persuasion Character

Peer review does not have legal binding power. Instead, it functions through peer pressure which is a means of soft persuasion. As a peer review, the TPRM is no exception. Article A(i) of Annex 3 of the Marrakesh Agreement explicitly provides that the TPRM 'is not intended to serve as a basis for the enforcement of specific obligations under the [WTO] Agreements or for dispute settlement purposes, or to impose new policy commitments on Members'. Thus, the TPRM is separated from the WTO dispute settlement system.²⁷ As Victoria C. Price summarized, the TPRM 'reflects a diplomatic and peer-pressure approach to the enforcement

²⁷ More about the WTO dispute settlement system, see, P. Van den Bossche, *The Law and Policy of the World Trade Organisation: Text, Cases and Materials*, Cambridge: Cambridge University Press, (2005), pp. 172-306; E.-U. Petersmann, *The GATT/WTO Dispute Settlement System*, London, The Hague and Boston: Kluwer Law International, (1997); E.-U. Petersmann, 'The Dispute Settlement System of the World Trade Organisation and the Evolution of the GATT Dispute Settlement System Since 1948', *Common Market Law Review*, vol. 31, (1997), 1157, pp. 1163-1165; M. Moore, 'WTO's Unique System of Settling Disputes Nears 200 Cases in 2000', Press/180, Geneva: WTO, (2000).

problem’, while the WTO dispute settlement system is ‘a rule-based approach to the problem of the “judge and bailiff”’.²⁸ This has been recognised in the Report to the Singapore Ministerial meeting, which noted that the TPRM’s specific de-linkage from dispute settlement procedures was an essential feature which must be safeguarded.²⁹ The second appraisal of the Trade Policy Review by the Trade Policy Review Body in 2005 also reconfirmed:

The TPRM had been conceived as a policy exercise and it was therefore not intended to serve as a basis for the enforcement of specific WTO obligations or for dispute settlement procedures, or to impose new policy commitments on Members.³⁰

Similar words have also appeared in every annual report of the Trade Policy Review Body.

Thus, it is clear that the TPRM functions through peer pressure rather than sanctions. Secretariat Reports and questions raised by other WTO Members do not have similar legal status that the rulings by the Panel and the Appellate Body have. Thus, a WTO Member is not obliged to carry out reforms of the policies which were exposed during the trade policy review. Similarly, it has no legal obligation to adopt advisory opinions in the Secretariat Report.

Because it is up to individual WTO Members to decide whether or not they accept the advisory opinions from the Secretariat Reports and address other WTO Members’ concerns during their trade policy reviews, the effectiveness of the TPRM, as a peer review, relies on the influence of the persuasion exercised by the peers.³¹ As Donald B. Keasing argued, the TPRM uses ‘sweet reason, not

²⁸ V. Price, ‘New Institutional Developments in GATT’, *Minnesota Journal of Global Trade*, vol. 1, (1992), 87, pp. 100-101. It has to mention that in her article, Victoria C. Price referred to the improved dispute settlement system under the GATT rather than the WTO dispute settlement system.

²⁹ WTO, WT/TPR/27, note 5, para. 10.

³⁰ WTO, WT/MIN(05)/1, note 12, para. 4. Similar words can also be found in WTO, *Ministerial Meeting-Appraisal of the Operation of the Trade Policy Review Mechanism-Report to Ministers*, WT/MIN(99)/2, 8th October 1999.

³¹ United Nations Economic Commission for Africa, ‘The African Peer Review Mechanism: Process and Procedures’, *African Security Review*, vol. 11(4), (2002), 7, p. 8; also see, F. Pagani, (2002), note 7, 15, p. 16.

the threat of retaliation or the empowerment of some quasi-judicial authority, to induce countries to liberalize' their trade-related policies.³² Thus, the sweeter the reasons are, the more the WTO Member under review is willing to accept the recommendations from the Secretariat Report and address the concerns from other WTO Members. The TPRM can give rise to peer pressure through such Secretariat Reports, discussions during trade policy reviews, public scrutiny, the impact of the foregoing on domestic public opinion, policy makers, and other stakeholders.

1.2.1.2 Merits of the TPRM's Soft Persuasion Character

There is no doubt that the TPRM, like other peer review, has a soft persuasion character because it functions through peer pressure. However, scholars differ in their views of the merits of the TPRM's soft persuasion character. Some scholars have criticised the TPRM's peer-pressure approach. For example, John Jackson argued that such a peer-pressure approach was a backward step for the rule-oriented development of the General Agreement on Tariffs and Trade (GATT). He argued:

these reviews are not likely to have a significant impact on the implementation or effectiveness of the legal obligations contained in the variety of GATT treaties and protocols, including those that will come into effect at the end of the Uruguay Round. Indeed there are some risks that this review mechanism will divert attention from the legal norms in such a way as actually to decrease the pressure on Contracting Practices to observe those norms. To some degree, the [TPRM] is a concession to the view that GATT is primarily a 'negotiating' or 'consulting' organization, rather than one which tries to define and implement reasonably precise norms to help the standardization of world trading activities.³³

Despite this criticism, he did recognise: 'These reviews could indeed be an important addition to the GATT, providing information to many GATT members about the trade policies of particular Contracting Parties, and offering an

³² D. Keesing, (1998), note 10, p. 6.

³³ J. Jackson, *Restructuring the GATT System*, New York: Council on Foreign Relations for the Royal Institute of International, (1990), p. 80

opportunity for criticism of those policies'.³⁴

Other scholars applauded the TPRM's soft persuasion character. For example, Sam Laird pointed out: 'one of the strengths of the TPRM is its role as a forum where policies can be explained and discussed, where information can be sought and concerns can be expressed on a non-confrontational and non-legalistic basis.'³⁵ Fabricio Pagani argued that the soft persuasion character of peer review could be 'an important driving force to stimulate the state to change, achieve goals and meet standards'.³⁶

The soft persuasion nature of the TPRM proves better suited to encouraging and enhancing policy co-operation and convergence than a traditional enforcement mechanism. Particularly, unlike the WTO Panels and the Appellate Body, the TPRM has the flexibility to take into account a WTO Member's policy objectives, and to look at its performance in a historical and political context. Therefore, the TPRM assesses and encourages trends toward trade-related liberalization even among relatively poorly performing WTO Members, while noting negative trends in the WTO Members that may presently have a higher performance record. Susan Hainsworth pointed out:

Consisting of a pragmatic peer review with a focus on discussion and negotiation, it [the TPRM] has the added effect of casting light on domestic policies and practices, and providing an opportunity for their appraisal in relation to the contextual international norms. While ostensibly leaving state sovereignty untouched, the principle of submitting to peer review and criticism of policies does indeed smack of acknowledgement of an advanced degree of economic interdependence, and the consequent importance of channelling state policy-making toward the development of common, accepted approaches in the trade policy arena. Through exposure of unacceptable domestic policies, the TPRM sets parameters within which it encourages adherence to accepted international norms.³⁷

³⁴ *Id.*, pp. 79-80.

³⁵ S. Laird, (1999), note 26, 741, p. 743.

³⁶ F. Pagani, (2002), note 7, 15, p. 16.

³⁷ S. Hainsworth, (1995), note 18, 583, pp. 608-609.

In response to John Jackson's criticism of the TPRM, Victoria C. Price argued:

The question really boils down to an assessment of whether the peer pressure and increased transparency generated by the TPRM will have more than a marginal effect on the trade system, and whether the TPRM is complementary to, rather than in competition with, the dispute-settlement regime. Time will tell.³⁸

After about 20 years of enforcement, what John Jackson was worried about the TPRM did not materialize. The TPRM has not diverted attention from the legal norms in such a way as actually to decrease the pressure on WTO Members to observe those norms, as predicted by Jackson. In fact, it has been praised by WTO Members through the Trade Policy Review Body.³⁹ The Report to the Singapore Ministerial Conference, which was held in Singapore in December 1996, noted: 'The TPRM occupies a unique place within the WTO in promoting non-confrontational discussion of key trade policy issues'.⁴⁰

1.2.2 China's Approach to International Issues

For about two thousand years, Chinese society was not ruled through laws as the ideal but an 'order of traditional manners and customs' based on Confucianism. Confucianism advocates the state of non-disputes, non-litigation and seeking harmony. The ideal society was to be created around the model of ethically exemplary individuals, and not through perfect laws. Even nowadays, the prototype of an ideal Chinese personality is highlighted, as in the case of a particularly faithful bus conductor in Beijing.⁴¹ In contrast to the high numbers of lawyers in the US and the strong tendency of Americans to resort to the law and courts to resolve conflicts, Chinese prefer arbitration and compromise to direct confrontation.

³⁸ V. Price, (1992), note 28, 87, p. 101.

³⁹ See, e.g., WTO, *Trade Policy Review Mechanism-Report of the Trade Policy Review Body for 2006*, WT/TPR/192, (2006), para. 10.

⁴⁰ WTO, WT/TPR/27, note 5, para. 10.

⁴¹ The bus conductor is called Shuli Li. The government promotes her as a role model of Chinese citizenship, see, <http://www.people.com.cn/GB/33831/33841/2558043.html>.

This traditional philosophy also affects China's approach to international issues. Traditionally, China advocates bilateral consultation and negotiation. It has taken a sceptical, sometimes even negative, attitude towards dispute settlement mechanisms of international judicial and semi-judicial bodies. To date, for instance, China has not submitted any dispute to the International Court of Justice (ICJ), despite the fact that China, as one of the five permanent members of the Security Council of the United Nations, has the power to appoint one Chinese national as one of the fifteen judges of the ICJ.⁴²

This attitude has not changed since China joined the WTO. Article 16.5 of the Marrakesh Agreement clearly provides that no reservations may be made in respect of any provision of the agreement. As a WTO Member, thus, China has subjected itself to an international judicial body, the WTO dispute settlement system, for the first time.⁴³ China has been involved in very few cases as either

⁴² The ICJ is composed of 15 judges elected to nine-year terms of office by the United Nations General Assembly and the Security Council. The judges of the ICJ do not represent their own governments but are independent magistrates. See, <http://www.icj-cij.org/icjwww/igeneralinformation/inotice.pdf>. Traditionally, candidates from five permanent members of the Security Council have always been elected. After the United Nations passed Resolution No. 2958 to restore the seat of China in the UN in 1971, China claimed that it would not accept the declaration by the former Chinese Government ruled by the Nationalist Party of accepting the mandatory jurisdiction of the ICJ.

⁴³ The WTO Dispute Settlement System is modeled on domestic courts, despite that it is not even called as a court.

complainant⁴⁴ or as respondent⁴⁵ since its accession to the WTO, though it has been involved in many cases as a third party.⁴⁶ This is contrast to most other frequent users of the WTO dispute settlement system. Under the WTO dispute settlement system, for example, the US and the EU complained 242 times which accounted for 28.3% of all bilateral disputes between 1995 and 2004.⁴⁷ During the same period, they were involved as respondents in 481 cases which accounted for 56.2% of all bilateral disputes.⁴⁸ Even when it is involved in a dispute, China tries to solve the dispute at the consultation period and avoid bringing the dispute to a WTO Panel. On the 18th March 2004, for instance, the US requested consultations in regard to China's policy on refund of value added tax to domestic industry producing integrated circuits.⁴⁹ Through a series of consultations, China and the US finally came to an agreement. On the 14th July

⁴⁴ By the end of September 2007, China was involved as complaint in two cases: *United States-Definitive Safeguard Measures on Imports of Certain Steel Products (US-Steel Safeguards)*, WT/DS252; and *United States- Preliminary Anti-Dumping and Countervailing Duty Determinations on Coated Free Sheet Paper from China*, WT/DS368.

⁴⁵ By the end of September 2007, China was involved as respondent in eight cases: *China—Value-Added Tax on Integrated Circuits*, WT/DS309; *China—Measures Affecting Imports of Automobile Parts*, WT/DS339; *China—Measures Affecting Imports of Automobile Parts*, WT/DS340; *China—Measures Affecting Imports of Automobile Parts*, WT/DS342; *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS358; *China—Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, WT/DS359; *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WT/DS362; and *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363.

⁴⁶ China has been an active third party participant in every dispute but one since it joined the WTO. The only dispute in which China did not participate is *European Communities—Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246. One of the possible reasons why China has involved in many WTO cases as a third party is that China considers this approach as the best way of understanding the WTO rules and the WTO dispute settlement system.

⁴⁷ See, H. Horn and P. Mavroidis, 'The WTO Dispute Settlement System 1995-2004: Some Descriptive Statistics', 31st January 2006, p. 5, <http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/HornMavroidisWTODSUDatabaseOverview.pdf>.

⁴⁸ *Id.*

⁴⁹ *China-Value-Added Tax on Integrated Circuits*, WT/DS309.

2004, they signed the Memorandum of Understanding between China and the US Regarding China's Value-Added Tax on Integrated Circuits, which was notified to the WTO soon afterwards.⁵⁰ Thus, the four-month-long dispute was settled during the phase of consultation. This illustrates that, after its accession to the WTO, China still follows its traditional approach to international matters and prefers to solve disputes through arbitration and compromise than direct confrontation. The soft persuasion character of the TPRM is suited to China's traditional approach to international disputes. China is apt to feel more confident to use the TPRM than the WTO dispute settlement system due to the TPRM's non-confrontational and non-legalistic characteristics.

2 The Impact of the TPRM on the Formulation of the Antimonopoly Law 2007

Originally, the issues in respect of national competition law and policy were not officially part of the content of trade policy review when the TPRM was first established under the GATT in 1988. Initially, they were not part of trade policy review when the WTO was established in 1995. Increasingly, however, the WTO Secretariat and reviewed WTO Members were choosing to report their national competition laws and policies because they thought that their national competition laws and policies were relevant to trade in goods and services and regulatory reform. Moreover, other WTO Members were also very keen to ask questions related to national competition law and policy. In 2001, the Trade Policy Review Body formally recognised that a WTO Member's national competition law and policy was one of the common themes of the Secretariat Reports of trade policy review of WTO Members.⁵¹ Since then, a WTO Member's national competition law and policy has always been examined in Chapter III 'Trade Policies and Practices by Measures' of the Secretariat Report.

When it joined the WTO in 2001, China was the seventh largest trading state in

⁵⁰ *Id.*

⁵¹ WTO, *Trade Policy Review Mechanism-Report of the Trade Policy Review Body for 2001*, WT/TPR/101, (2001), para. 12.

the world.⁵² Thus, it would be reviewed every four years by the WTO Trade Policy Review Body.⁵³ Since 2004, however, it has become the third largest trader after the European Union (EU) and the US.⁵⁴ Consequently, the WTO decided to review China's trade policy every two years rather than every four years.⁵⁵ China's first WTO trade policy review was carried out in late 2005. The Government Report and the Secretariat Report were published on the WTO website in early 2006. There are 12 paragraphs regarding China's competition law and policy in the Secretariat Report of China's first trade policy review. What follows examines the impacts of the TPRM on the formulation of the Antimonopoly Law 2007 by exploring several functions performed by the TPRM.

Before doing so, it has to be accepted that the TPRM has limitations in respect of reviewing WTO Members' domestic competition law and policy due to the fact that the TPRM is not designed for the purpose of reviewing national competition law and policy only. The content in regard to national competition law and policy is limited in the Secretariat Report because it is not the only issue that the Secretariat Report deals with. The TPRM covers a wide range of trade-related issues in addition to national competition law and policy and does not allow the necessary time and degree of detail which an effective competition-specific peer review warrants. Thus, the TPRM is only able to deal with the general issues related to WTO Members' competition law and policy under the current WTO framework. In other words, the TPRM is unable to deeply and comprehensively examine the WTO Members' national competition laws under the existing system. Compared to competition-specific peer reviews, such as the one undertaken in the Competition Law and Policy Committee of the OECD,⁵⁶

⁵² See, WTO, *International Trade Statistics 2002*, (2002), available at www.wto.org.

⁵³ The Marrakesh Agreement, Annex 3, Art. C (ii).

⁵⁴ In 2004, China's share of world trade was increased to 6.7%. Thus, China overtook Japan (5.9) and became the third largest trader after the EU (14.5%) and the US (13.6%) in 2004. See, WTO, *International Trade Statistics 2005*, (2005), available at www.wto.org.

⁵⁵ 'WTO to Review China's Trade Policy Every Two Years', Ministry of Commerce, <http://english.mofcom.gov.cn/aarticle/newsrelease/significantnews/200410/20041000297431.html>.

⁵⁶ Since 1998 the OECD has produced a number of reviews of national competition policies as part of a larger project on regulatory reform. Participation in these regulatory reform reviews is entirely voluntary. Each review has the same format and is based on background reports

therefore, the contribution of the TPRM to the development of a WTO Member's domestic competition law and policy is limited. This is the reason why WTO Members spent seven years discussing the possibility of setting up a separate peer review system which will be specially designed for reviewing WTO Members' national competition law and policy.⁵⁷ Due to this limitation, the possible contribution from the TPRM to the development of China's Antimonopoly Law is limited. It is not possible for the TPRM to provide a comprehensive review of China's competition law and policy due to the nature of the TPRM. Nevertheless, the TPRM provides the only official review, at the international level, of Chinese competition law and policy. Thus, it is very significant to examine the impacts of the TPRM on the formulation of the Antimonopoly Law 2007.

prepared by experts from five different OECD directorates. One chapter assesses the macroeconomic context for regulatory reform, the strengths and challenges of regulatory reform, and the challenges confronting future regulatory performance. Three thematic chapters examine the quality of regulatory institutions and government processes, competition policy and enforcement, and the enhancement of market openness through regulatory reform. Each review also contains chapters on particular sectors such as electricity and telecommunications. The chapter on competition policy and enforcement covers: (i) the competition policy's historical foundations; (ii) substantive issues including content of the competition law; (iii) institutional issues such as enforcement structures and practices; (iv) limits of competition policy including exemptions and special regulatory regimes; (v) competition advocacy for regulatory reform; and (vi) conclusions and policy options.

⁵⁷ During the first WTO Ministerial Meeting which was held in Singapore in 1996, the WTO Members agreed to set up the Working Group on the Interaction between Trade and Competition Policy (WGTCP), see, Singapore Ministerial Declaration, WT/MIN(96)/DEC, (1996), para. 20, http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm. The WGTCP has provided a forum for WTO Members to discuss the possibility to set up a competition-specific peer review system in the WTO Competition Context. See, e.g., WGTCP, *Communication from the European Community and its Member States - Dispute Settlement and Peer Review: Options for a WTO Agreement on Competition Policy*, WT/WGTCP/W/229, (2003); WGTCP, *Communication from the United States - The Benefits of Peer Review in the WTO Competition Context*, WT/WGTCP/W/233, (2003); WGTCP, *Communication from Korea - Peer Review in the Multilateral Framework on Competition Policy*, WT/WGTCP/W/235, (2003); WGTCP, *Communication from Japan - Introducing a Model of Peer Review*, WT/WGTCP/W/236, (2003); WGTCP, *Practical Modalities of Peer Review in a Multilateral Framework on Competition-Communication from the OECD*, WT/WGTCP/W/243, (2003); and WGTCP, *Peer Review: Merits and Approaches in a Trade and Competition Context - Communication from the OECD*, WT/WGTCP/244, (2003).

2.1 Providing Policy Advice

In a study, the OECD claimed: ‘Peer review may offer advice and proposals on the relevant policy dilemmas of the country under review’.⁵⁸ By doing so, ‘peer review may disseminate the prevailing consensus and best practice to government and policymakers worldwide’.⁵⁹ As a peer review, the TPRM is no exception. In its first appraisal in 1999, the Trade Policy Review Body noted: ‘the TPRM can provide a valuable input into national policy making, serving as an independent, objective assessment of trade and economic policies’.⁶⁰ It continued: ‘The TPRM...is of significant value in providing authoritative, well founded analyses of developments in trade policies and practices.’⁶¹ In its 2006 annual report of trade policy review, the Trade Policy Review Body noted: By providing an overall picture of the institutional interaction in trade policy formulation and implementation and the effect of policies on different sectors, the reports have also served as an input to trade policy formulation in some cases.⁶²

Sam Laird also argued: Trade Policy Review ‘as an independent and objective analysis of trade policies... has ... contributed to the development of national policies’.⁶³ Thus, it seems clear that the TPRM could contribute to the development of WTO Members’ domestic policies by providing policy advice. Since national competition law and policy is one of the common themes of the TPRM, the TPRM could contribute to the development of WTO Members’ competition law and policy through providing policy advice.

There are many associations, such as the American Bar Association, and

⁵⁸ WGTCP, WT/WGTCP/W/243, note 57, para. 5.

⁵⁹ *Id.* See also, OECD, (2002), note 1, paras. 6-23.

⁶⁰ WTO, WT/TPR/27, note 5, para. 7. Similar words can also be found at the WTO, *Trade Policy Review Mechanism-Report of the Trade Policy Review Body for 1998*, WT/TPR/59, (1998), para. 10.

⁶¹ WTO, WT/TPR/27, note 5, para. 19.

⁶² WTO, WT/TPR/192, note 39, para. 10. Similar words can also be found in previous annual reports of the Trade Policy Review Body, such as the WTO, *Trade Policy Review Mechanism-Report of the Trade Policy Review Body for 2005*, WT/TPR/173, (2005), para. 10.

⁶³ S. Laird, (1999), note 26, 741, p. 760.

organisations, such as the OECD have provided considerable advice during the process of the formulation of the Antimonopoly Law 2007.⁶⁴ For China, however, none of them can rival the advisory role played by the TPRM due to its significance. China was advised during China's first trade policy review that it needed to adopt a comprehensive competition law. The TPRM stated that China lacked 'a modern, comprehensive competition law incorporating broad provisions to deal with cartels, anticompetitive mergers, and abuses of a dominant position'.⁶⁵ In addition, it also recommended that China's Antimonopoly Law (1) ensured 'non-discriminatory treatment of private enterprises versus state-owned enterprises throughout China'; (2) addressed 'the challenges posed by administrative and state monopolies and other anti-competitive arrangements'; and (3) ensured 'continuing non-discriminatory treatment of foreign corporations operating in China'.⁶⁶

These recommendations have been accepted by China. This can be seen from the adoption and the content of the Antimonopoly Law 2007. Before its first trade policy review, China had spent nearly 20 years on formulating its Antimonopoly Law. However, no draft was deliberated by the Standing Committee of the National People's Congress (NPC). After China's first trade policy review, the State Council approved in principle the June 2006 Draft on the 8th June 2006 for the first time.⁶⁷ At its 22nd session, which was held from the 24th to the 29th June 2006, the 10th NPC Standing Committee deliberated the June 2006 Draft for the first time.⁶⁸ One year later, it deliberated the June 2007

⁶⁴ See Chapter Two.

⁶⁵ Trade Policy Review Body, *Trade Policy Review –People's Republic of China- Report by the Secretariat-Revision*, WT/TPR/S/161/Rev.1, 26th June 2006, p. 139.

⁶⁶ *Id.*

⁶⁷ M. Dickie, 'Chinese Cabinet approves anti-monopoly law', *Financial Times*, 9th June 2006, p. 9; 'Chinese government approves draft of anti-monopoly law', 7th June 2006, http://news.xinhuanet.com/english/2006-06/07/content_4659507.htm. An English edition of the June 2006 Draft is available at <http://www.buyusa.gov/asianow/270.pdf>.

⁶⁸ 'China Parliament to Mull Anti-monopoly Law', 25th June 2006, <http://www.forbes.com/markets/feeds/afx/2006/06/25/afx2838352.html>. For a Chinese edition of this draft, see, <http://www.jingshilawyer.com/d/cn/Print.asp?ArticleID=229>, for an English edition of this draft, see, <http://www.buyusa.gov/asianow/270.pdf>.

Draft.⁶⁹ Two month later, it adopted the Antimonopoly Law 2007.⁷⁰ These events clearly illustrated that the process of formulating the Antimonopoly Law 2007 was dramatically hastened after China's first trade policy review. To some extent, therefore, they demonstrate the influence of the TPRM on the formulation of the Antimonopoly Law 2007 through providing policy advice.

In addition, the content of the Antimonopoly Law 2007 also demonstrates the influence of the TPRM on its formulation through providing policy advice. In particular, Article 7 could be seen as a response to the opinion on ensuring non-discriminatory treatment of private enterprises versus State Owned Enterprises (SOEs) throughout China. It did not appear in the drafts before China's first trade policy review. It was first proposed in the June 2007 Draft about one year after China's first trade policy review. And it was finally included in the Antimonopoly Law 2007. Chapter V of the Antimonopoly Law 2007 could be seen as a response to the opinion on addressing the challenge posed by administrative monopolies.⁷¹ Some previous drafts, such as the 2004 Submitted Draft⁷² and the July 2005 Draft⁷³, include one chapter which prohibits administrative monopolies. Under the November 2005 Draft⁷⁴, however, such a chapter was deleted and only one provision prohibits administrative monopolies. In response to the opinion on this issue in the Secretariat Report of China's first trade policy review, the

⁶⁹ This draft is not available to public. However, the differences between this draft and the June 2006 Draft have been listed on the NPC website. See, <http://www.npc.gov.cn/zgrdw/flzt/index.jsp?lmid=15&dm=1520&pdmc=ch>.

⁷⁰ 'China adopts anti-monopoly law', *China Daily*, 30th August 2007, http://www.chinadaily.com.cn/bizchina/2007-08/30/content_6069370.htm.

⁷¹ Professor Eleanor M. Fox provided an excellent discussion on China's administrative monopolies with comparisons of the relevant rules in the US, the EU and the WTO rules. See, E. M. Fox, 'An Antimonopoly Law for China- Scaling the Walls of Protectionist Government Restraints', *Antitrust Law Journal*, vol. 74, (2007), available at SSRN: <http://ssrn.com/abstract=1003162>.

⁷² An English edition is available at <http://www.ibanet.org/images/downloads/Questionnaire%20-%20final.pdf>.

⁷³ An English edition is available at <http://www.ibanet.org/images/downloads/Draft%20of%2027%20July%202005.pdf>.

⁷⁴ This draft is only circulated in a limited scope. An English edition of this draft is on the author's file. For an overview of this draft, see H. Harris, 'The Making of An Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China', *Chicago Journal of International Law*, vol. 7, (2006), 169.

Antimonopoly Law 2007 finally includes a whole chapter and six provisions in total prohibiting administrative monopolies.⁷⁵

2.2 Lending Intellectual and Moral Support

To some extent, the function of lending intellectual and moral support is an extension of the function of providing policy advice. By providing policy advice to the WTO Member under review, the TPRM can also lend intellectual and moral support to those who argue for similar policies. In its 2005 annual report, the Trade Policy Review Body noted that the Secretariat Reports ‘provide a factual and independent review of the trade policies and practices of individual Members under review’.⁷⁶ In doing so, the TPRM lends intellectual and moral support to those within the WTO Member who favour liberalization.⁷⁷ This has been recognised by the WTO. In its Report to the Singapore Ministerial Meeting, for instance, the Trade Policy Review Body noted:

Members have appreciated that such reviews help them take stock of their policies on the basis of independent objective assessment, have strengthened the hand of domestic agencies promoting liberalisation and helped strengthen inter-agency discussion and co-operation in their own countries.⁷⁸

Similar words can also be found in the 1998 annual report of the Trade Policy Review Body.⁷⁹ Therefore, the TPRM ‘can sometimes assist governments in pursuing desirable trade policy reforms’ by lending intellectual and moral support.⁸⁰

In the case of adopting China’s Antimonopoly Law, the Secretariat Report of China’s first trade policy review stated:

Adoption of China’s pending new Antimonopoly Law will fill a significant

⁷⁵ The Antimonopoly Law 2007, Arts. 32 to 37.

⁷⁶ WTO, WT/TPR/173, note 62, paras. 10-11.

⁷⁷ D. Keesing, (1998), note 10, pp. 6-7.

⁷⁸ WTO, WT/TPR/27, note 5, para. 7.

⁷⁹ WTO, WT/TPR/59, note 60, para. 10.

⁸⁰ WTO, WT/TPR/27, note 5, para. 7. Similar words can also be found at WTO, WT/TPR/59, note 60, para. 10.

existing gap in the legislative framework for the establishment of a market economy. Competition in the economy is at present enforced through a number of related laws, and appears not to be very effective.⁸¹

There is no doubt that these words provided a timely needed intellectual and moral support to those who argued that China needed a competition law.⁸² Such a support would not be available if China were not a WTO Member. As mentioned above, the process of formulating the Antimonopoly Law 2007 was dramatically hastened after China's first trade policy review. This illustrates the impact of the TPRM on the formulation of the Antimonopoly Law 2007 through lending intellectual and moral support because important legislation usually can be adopted through the legislative process very quickly in China, once the leadership reaches consensus on such legislation, and there is no doubt that the intellectual and moral support provided through the TPRM helped the Chinese leadership to reach such consensus.

2.3 Improving Transparency

The significance of transparency in a peer review is clearly summarised by the OECD. It argued:

One of the main assets of peer review is as a transparency mechanism. Transparency is key to the adoption of good economic policies. The concept of transparency can be traced back to the literature of public choice, which sets out the basic line of argument that elected officials and civil servants may become influenced by vested interests ('rent seekers') to take decisions that help such groups and run counter to the promotion of general public welfare. Transparency is said to lead to better decision-making by alerting the public at home to the potential costs and benefits of policies as well as signalling potentially harmful changes to trading partners.⁸³

In another document, it expressed a similar opinion by arguing that peer review could 'improve policy-making through heightened transparency'.⁸⁴ The significance of transparency to the TPRM is emphasised in the Marrakesh Agreement. Article A of Annex 3 of the Marrakesh Agreement clearly provides the objectives of the TPRM as being to contribute to improved adherence by all Members to the WTO Agreements and hence to the smoother functioning of the multilateral trading system, 'by achieving greater transparency in, and understanding of, the trade policies and practices of Members'.

⁸¹ Trade Policy Review Body, WT/TPR/S/161/Rev.1, note 65, p. 61.

⁸² About the arguments among academics and officials on whether China needed an antimonopoly law during the drafting process, see Chapter Two.

⁸³ OECD, (2002), note 1, para. 10, p. 7.

⁸⁴ WGTCP, WT/WGTCP/W/243, note 57, para. 5.

In practice, improving transparency has proved to be one of the most appreciated functions of the TPRM. An appraisal of the TPRM by the Trade Policy Review Body placed special emphasis on this role by concluding that the TPRM ‘had a valuable public good aspect, particularly in its contribution to transparency’.⁸⁵ In its annual reports of the TPRM, the Trade Policy Review Body also recognised the role played by the TPRM in improving transparency regarding WTO Members’ trade-related policies. In its 2006 annual report of trade policy review, for instance, the Trade Policy Review Body noted:

As envisaged in Annex 3, the TPRM continues to be a valuable forum for achieving transparency in, and understanding of, the trade policies and practices of Members, thus contributing to the smoother functioning of the multilateral trading system.⁸⁶

During the trade policy review, the WTO Member under review has the chance to present and clarify national rules, practices and procedures, and explain their rationale. All of these are documented and available on the WTO website. In addition, the Secretariat Reports are also published on the WTO website. The combination of these two levels of enhanced transparency—toward WTO Members and toward public opinion—contributes to the effectiveness of the TPRM. Therefore, the TPRM could help improve transparency and thus raise public awareness of WTO Members’ trade-related policies. The World Bank and the IMF claimed: ‘the TPRM has contributed to increased transparency of trade regimes and through the publication of the reviews to better awareness of the issues among wider audiences.’⁸⁷

Traditionally, Chinese legislation was considered as a national secret. This was changed when the Legislation Law of the People’s Republic of China (hereinafter the Legislation Law 2000) came into effect in July 2000.⁸⁸ It provides that, when drafting legislation, apart from laws enacted or amended by the NPC, opinions from organizations and the public must be solicited, through, *inter alia*, seminars, appraisal meetings, and hearings. Since China joined the WTO, transparency in the process of legislation appears ‘to have been improved’.⁸⁹ In the case of the formulation of the Antimonopoly Law 2007, the drafting process was even more transparent than previous Chinese legislation.⁹⁰ A few drafts were available not only in Chinese but also in English.⁹¹ It was a welcome

⁸⁵ WTO, WT/MIN(99)/2, note 30, para. 4.

⁸⁶ WTO, WT/TPR/192, note 39, para. 10. Similar words can also be found in previous annual reports of the Trade Policy Review Body.

⁸⁷ World Bank/IMF Staffs, ‘Progress Report on Trade Policy Developments’, prepared for the Development Committee Meeting, 21st September 1992.

⁸⁸ See, Chapter Five ‘Scope of Application and Filing’, the Legislation Law of People’s Republic of China, adopted by the 3rd Session of the 9th NPC in 2000. An English translation is available at http://www.novexcn.com/legislat_law_00.html.

⁸⁹ See, Trade Policy Review Body, WT/TPR/S/161/Rev.1, note 65, p. 38.

⁹⁰ See, Chapter Two.

⁹¹ But these drafts, such as the June 2006 Draft, are normally published to the public several months later than they are first discussed by the officials.

improvement. However, officials were still reluctant to openly express their opinions regarding the Antimonopoly Law during the drafting process. Thus, the TPRM provided a rare opportunity for outsiders to view the process of drafting the Antimonopoly Law 2007. The Secretariat Report, the Government Report and questions asked by other WTO Members are openly available to the public and can be found on the WTO website.

Due to the improved transparency brought by the TPRM, the process of formulating the Antimonopoly Law 2007 is very different from previous legislation when China was not a member of the WTO. For example, the formulation of the Anti Unfair Competition Law of the People's Republic of China (hereinafter the LAUC 1993)⁹² was not an open process. The public had little involvement in the process of formulating the LAUC 1993 due to the lack of relevant information. Moreover, China was not obliged to open the process of drafting the LAUC 1993. Since it joined the WTO, the process of formulating the Antimonopoly Law 2007 was under the spotlight particularly through the TPRM.

Achieving transparency is particularly valuable in the formulation of the Antimonopoly Law 2007. One of the main difficulties China faced in the process of drafting the Antimonopoly Law 2007 was the lobby by some industries against the adoption of an antimonopoly law. The disparity in industries and lobbying power between those who benefited from anticompetitive environments and those who would benefit from competitive environments delayed the adoption of an antimonopoly law.⁹³ As the Eminent Persons Group argued, an 'essential first step in developing support for better trade policies is public awareness'.⁹⁴ Therefore, the TPRM has helped China to mitigate the influence of these vested interests due to the public awareness raised through improved transparency. This can be seen from the changes of some provisions of China's Antimonopoly Law during the drafting process. For example, Article 2 of the June 2006 Draft provides: 'As for monopolistic conduct prohibited by this Law, this Law does not apply where other laws or administrative regulations provide provisions'. In fact, this provision routinely appeared in most of the previous drafts as well. Under this provision, the industries and sectors which have more lobbying power than others can pursue exemption from the application of antimonopoly law and thus their interests would be protected. Therefore, this provision is helpful to maintain the interests of the powerful industries and sectors which benefit from the lack of competition legislation in China. However, Article 2 of the Antimonopoly Law 2007 does not provide that the Law is not applicable where other laws or administrative regulations provide provisions. Thus, no industries can be granted exemptions under Article 2 of the Antimonopoly Law 2007. This change illustrates the impact of the TPRM on the formulation of the Antimonopoly Law 2007 through improving transparency.

⁹² An English version is available at <http://en.chinacourt.org/public/detail.php?id=3306>.

⁹³ See Chapter Two.

⁹⁴ Eminent Persons Group, *Trade Policies for A Better Future: Proposals for Action*, Geneva: GATT, (1985), p. 36. Eminent Persons Group was set up by the Director-General of the GATT to study and report on problems facing the international trading system in 1983.

2.4 Providing A Chanel of Learning Experiences

Canada argued that peer review could offer ‘an ongoing, long-term education and information-sharing experience... across legal cultures, developmental levels and different institutional or historical settings’.⁹⁵ The OECD claimed: ‘one major benefit of the TPRM process has been the development of an extensive source of material on trade policies.’⁹⁶ Sam Laird also argued: ‘the reviews [under the TPRM]... provide all countries with an independent source of learning experiences with trade policy at all levels of development’.⁹⁷ He then argued:

One aspect of the reviews [under the TPRM] has been a learning process about trade reforms and the linkages between trade and other policies. Thus, the lessons of trade reforms are being passed on to other countries within the WTO system.⁹⁸

A report by the OECD also claimed that peer review aimed to ‘improve policy-making through ... sharing of information and experience’.⁹⁹

In particular, the inclusion of national competition law and policy descriptions in the TPRM has been identified as a valuable educative process. A US delegate in the Working Group on the Interaction between Trade and Competition Policy (WGTCP) stated that during the TPRM process the Secretariat had invested a fair amount of interest and resources in asking the US what was being done in the antitrust area. Thus, he argued that the TPRM had been a useful learning experience for the US because it highlighted differences in approaches and perspectives with other jurisdictions.¹⁰⁰

It is necessary for China to learn from other WTO Members in respect of the development of competition law and policy due to its lack of experience in this area. This necessity was recognised and put into practices during the process of

⁹⁵ WGTCP, *Report on the Meeting of 5-6 July 2001- Note by the Secretariat*, WT/WGTCP/M/15, 14th August 2001, para. 65.

⁹⁶ OECD, (2002), note 1, para. 14, p. 8.

⁹⁷ S. Laird, (1999), note 26, 741, p. 751.

⁹⁸ *Id.*, 741, p. 755.

⁹⁹ WGTCP, WT/WGTCP/W/243, note 57, para. 5.

¹⁰⁰ See, WGTCP, WT/WGTCP/M/15, note 95, para. 80.

drafting the Antimonopoly Law. In order to learn about their experience on competition legislation, for instance, China sent numerous officials to other countries and translated many pieces of competition legislation in other countries during the process of drafting its Antimonopoly Law. During the meeting of the Trade Policy Review Body which was held on the 19th and the 21st April 2006, the Brazilian delegate asked: ‘In which aspects of anti-trust regulations is China taking into account the experience of other countries in terms of setting up its own competition policy?’¹⁰¹ In response to this question, the Chinese government stated:

In the drafting, MOFCOM [Ministry of Commerce], the Legislative Affairs Office of the State Council and other departments held many seminars with anti-monopoly law enforcement officials, experts on anti-monopoly laws from the US, the EU and Japan, and domestic and foreign enterprises. On those occasions, relevant issues relating to China’s anti-monopoly legal regime were discussed, and opinions from foreign experts were taken to the largest possible extent.¹⁰²

The TPRM provides another channel for China to learn the experiences of other competition regimes. China could learn experiences from its own trade policy review under the TPRM. It could also learn experiences through participating in other WTO Members’ trade policy reviews. In regard to competition law, it could benefit enormously from other WTO Members’ trade policy reviews. First, some WTO Members, such as the US and the EU, have a long history and rich experience in regard to competition legislation and enforcement. Hence, China could learn from them through participating in their trade policy reviews under the TPRM. Second, some transitional and developing WTO Members which face similar economic difficulties to China could also provide valuable experiences to China on competition legislation, although their competition regimes are also relatively new.

Through providing a channel of learning experiences, the TPRM has helped China to formulate some provisions in the Antimonopoly Law 2007. For example,

¹⁰¹ Trade Policy Review Body, *Trade Policy Review of People’s Republic of China-Minutes-Addendum*, WT/TPR/M/161/Add.1, 15th June 2006, p. 241.

¹⁰² *Id.*

Article 15 of the Antimonopoly Law 2007 provides exemptions to anticompetitive agreements prohibited by Articles 13 and 14. The criteria adopted in Article 15 are in line with practice under German and EU competition regimes. However such criteria were changed several times during the process of drafting China's Antimonopoly Law. This illustrates the contribution of the TPRM to the formulation of the Antimonopoly Law 2007 through providing learning experiences. Moreover, in the future, the implementation of the Antimonopoly Law 2007 could also benefit from the TPRM through its function of providing a channel of learning experiences.

2.5 Providing A Forum for Policy Dialogue

Peer review provides a forum for policy dialogue. During the process of peer review, the country under review and peer countries systematically exchange information, attitudes and views on policy decisions and their application. As one study claims: 'This dialogue can be the basis for further co-operation, through, for example, the adoption of new policy guidelines, recommendations or even the negotiation of legal undertakings'.¹⁰³

As a peer review, the TPRM provides a forum for policy dialogue. Through the TPRM, WTO Members can raise their concerns, while the WTO Member under review can explain its policies. According to Sam Laird, 'one of the strengths of the TPRM is its role as a forum where policies can be explained and discussed, where information can be sought and concerns can be expressed on a non-confrontational and non-legalistic basis'.¹⁰⁴ In other words, the TPRM, as a forum for policy dialogue, provides two functions. First, the TPRM provides chances for WTO Members to raise their concerns on the policies of the WTO Member under review. During peer review, '[t]he reactions of the group engaging in peer review may provide a measure of the effectiveness or acceptability of a particular idea, opinion, or point of view.'¹⁰⁵ This implies that concerns raised by other WTO Members during the WTO trade policy review could have impacts on

¹⁰³ On peer review as a tool for convergence and convergence vs. negotiations, see OECD, (2002), note 1.

¹⁰⁴ S. Laird, (1999), note 26, 741, p. 743.

¹⁰⁵ WGTC, WT/WGTCP/W/243, note 57, para. 5.

the development of new policies of the WTO Member under review. At least these concerns raise the awareness of the WTO Member on relevant issues.

Second, the TPRM provides chances for the WTO Member under review to explain its policies that raise concerns from other WTO Members, address the concerns from other WTO Members, and defend its policies where necessary. In its report to the Singapore Ministerial Meeting, the Trade Policy Review Body noted: '[i]n many cases... review meetings can provide a useful forum for governments to explain the development of policies'.¹⁰⁶ During the trade policy review, the WTO Member under review needs to address the concerns raised by other WTO Members and sometimes reassure them on these issues. However, this does not imply that it has to agree with other WTO Members in regard to its policies. In the case where it disagrees with other WTO Members in respect of certain of its policies, it can defend them through the TPRM. As Donald B. Keesing claimed, 'in cases where a country remains convinced of the correctness of its policies, the TPRM provides a forum where it can respond to critics and advance its own more favourable interpretation of its trade regime.'¹⁰⁷

Through policy dialogue, the TPRM can 'help Members to anticipate and defuse potential trade-related conflicts', although it is not intended to serve as a basis for the enforcement of specific obligations under the WTO Agreements or for dispute settlement procedures.¹⁰⁸ In other words, any potential complaints can be discussed and could be addressed through the policy dialogue provided by the TPRM. Sungjoon Cho pointed out:

Trade disputes are not brewed overnight. Rather, trade frictions usually precede the outbreak of full-fledged disputes. Once a dispute is announced, registered, and adjudicated, it is very easy for it to escalate beyond the control of the parties. Therefore, if frictions can be diffused before they reach the level of disputes, much time, energy and expense will be saved.¹⁰⁹

¹⁰⁶ WTO, WT/TPR/27, note 5, para. 8.

¹⁰⁷ D. Keesing, (1998), note 10, pp. 6-7.

¹⁰⁸ S. Hainsworth, (1995), note 37, 583, p. 607.

¹⁰⁹ S. Cho, 'Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma', *Chicago Journal of International Law*, vol. 5, (2004), 625, p. 665.

Economically, therefore, the policy dialogue function provided through the TPRM could reduce the costs of litigation. It also provides the chance to avoid direct political conflict and thus save face for the WTO Members involved. In addition, it provides the chance for WTO Members to avoid domestic political pressure caused by losing a WTO case. Thus, these economic and political benefits from the policy dialogue under the TPRM are attractive for China. This policy dialogue function by the TPRM is also consistent with China's traditional approach to international matters.

China organised and participated in numerous seminars and conferences in regard to its Antimonopoly Law during the drafting process. Compared to these seminars and conferences, the policy dialogue forum provided by the TPRM is unique due to the following reasons. First, many WTO Members participated in the discussions in regard to China's competition law during China's first trade policy review. Such large scale participation in China's domestic legislation is unprecedented in China's legislation history. Second, it is first time that China discussed its domestic legislation with other nations on a mandatory basis. In other words, it was China's duty to discuss its competition law during China's trade policy review. Third, the TPRM provided a rare opportunity for other WTO Members to get explanations regarding China's competition law from high-level officials in the Chinese government. Without the TPRM, it would not be easy to get such explanations.

During China's trade policy review, several WTO Members raised their concerns regarding China's Antimonopoly Law. For example, Chinese Taipei¹¹⁰, Japan¹¹¹, and Turkey¹¹² asked about the drafting progress of China's Antimonopoly Law. In response, the Chinese government stated that the Antimonopoly Law had been put on the legislation agenda of the 10th NPC Standing Committee for 2006 and would be reviewed in August 2006.¹¹³ In fact, the 10th NPC Standing Committee deliberated the draft Antimonopoly Law in June 2006, two months earlier than

¹¹⁰ Trade Policy Review Body, *Trade Policy Review-People's Republic of China-Minutes of Meeting-Addendum*, WT/TPR/M/161/Add.2, 11th September 2006, p. 72.

¹¹¹ *Id.*

¹¹² *Id.*, p. 73.

¹¹³ *Id.*, p. 74.

the time it told the Trade Policy Review Body. This illustrated that China took the concerns seriously.

The US asked how the most recent draft of China's Antimonopoly Law ensured non-discriminatory treatment for foreign companies.¹¹⁴ In response, the Chinese representative stated:

The Antimonopoly Law will also observe the national treatment principle, imposing no discriminatory treatment to foreign enterprises. The rights of all market entities to participate in fair competition in China will be effectively protected by this competition legislation system.¹¹⁵

The term 'public interest' routinely appeared in the drafts of China's Antimonopoly Law during the drafting process.¹¹⁶ For example, Article 1 of the November 2005 Draft provides: 'This Law is enacted for the purposes of... safeguarding ... public interest'. The inclusion of public interests as a test in the drafts of China's Antimonopoly Law brought concerns from other WTO Members during China's trade policy review. For example, the EU asked the meaning of the public interest in the context of the Antimonopoly Law and how China would apply the public interest test.¹¹⁷ In response, the Chinese government stated: 'As for public interest mentioned in the draft of Antimonopoly Law, specific stipulations could be found in the future implementation regulation, rules and guidelines'.¹¹⁸ From this response, it can be seen that China intended to keep the term 'public interest' in its Antimonopoly Law rather than delete such term. However, China did reassure the EU by stating that further administrative rules and guidance on applying public interest test would be provided in the future. The Antimonopoly Law 2007 clearly includes 'public interest' as one of its objectives.¹¹⁹ In the future, thus, some guidance or administrative rules on implementing and interpreting the public interest are needed in order to address the concerns from other WTO Members.

¹¹⁴ *Id.*, p. 71.

¹¹⁵ *Id.*, pp. 72-73.

¹¹⁶ For the discussion of public interests in the Antimonopoly Law, see Chapter Three.

¹¹⁷ Trade Policy Review Body, WT/TPR/M/161/Add.1, note 101, p. 242.

¹¹⁸ *Id.*

¹¹⁹ The Antimonopoly Law 2007, Art. 1.

The US,¹²⁰ the EU,¹²¹ Canada,¹²² and the Chinese Taipei¹²³ asked whether and how China's Antimonopoly Law would be applied to SOEs. In reply, the Chinese government stated:

China's competition legislation system, including the coming Antimonopoly Law, will be equally applicable to all market entities including SOEs, enterprises of collective ownership, private enterprises and foreign invested enterprises. It will neither grant exemption to SOEs, nor provide for different treatment between SOEs and private enterprises in its application...The rights of all market entities to participate in fair competition in China will be effectively protected by this competition legislation system.¹²⁴

One year after China's first trade policy review, the 10th NPC Standing Committee deliberated the June 2007 Draft in June 2007. Compared to the June 2006 Draft, one of the changes of this draft is that it includes a new provision that clearly prohibits big SOEs from abusing their dominant positions and harming consumers' interests.¹²⁵ Such a provision did not appear in previous drafts. This provision remained in the Antimonopoly Law 2007.¹²⁶ From this, we can see that the formulation of the Antimonopoly Law 2007 has been influenced by the TPRM through providing a forum of policy dialogue.

The US asked whether the monopolistic conduct of any sectors or industries, such as the energy sector, was exempted from the application of the most recent draft of the Antimonopoly Law.¹²⁷ In response, the Chinese government stated:

The current draft of the Antimonopoly Law does not explicitly provide the

¹²⁰ Trade Policy Review Body, WT/TPR/M/161/Add.2, note 110, p. 71.

¹²¹ *Id.*, p. 72.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*, pp. 72-73.

¹²⁵ See, 'Second Reading the Antimonopoly Law Adds Six New Provisions', [二审反垄断法草案新增六项规定, *Ershen Fanlongduan Fa Caoan Xinzeng Liuxiang Guiding*], 26th June 2007, <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=367617&pdm=1520>.

¹²⁶ The Antimonopoly Law 2007, Art. 7.

¹²⁷ Trade Policy Review Body, WT/TPR/M/161/Add.2, note 110, p. 71.

industries or areas that are exempt from its application. Therefore the law will be applicable to all industries and areas.¹²⁸

However, this provision does provide a loophole through which some industries and sectors can be granted exemptions from the application of the Antimonopoly Law because it is not applicable where other laws or administrative rules provide provisions. Such language routinely appeared in most of the drafts during the process of formulating the Antimonopoly Law. However, Article 2 of the Antimonopoly Law 2007 does not include such words. Therefore, no industries can be granted exemptions under Article 2 of the Antimonopoly Law 2007. Considering the fact that most of drafts provides: ‘this Law is not applicable where other laws or administrative rules provide provisions’, this change is very dramatic. It illustrates the impact of the TPRM on the formulation of the Antimonopoly Law 2007 through providing a forum for policy dialogue.

In sum, the TPRM has played a significant role on the formulation of the Antimonopoly Law 2007 through providing a forum for policy dialogue. China did not address all the concerns on its Antimonopoly Law raised by other WTO Members during its first trade policy review. However, it did address some of them. Without the forum for policy dialogue provided by the TPRM, it would not be easy for other WTO Members to raise their concerns and get explanations and reassurances regarding some draft provisions of China’s Antimonopoly Law. This dialogue forum provided by the TPRM also benefits China. Through the TPRM, China has addressed such concerns which otherwise could lead to serious complaints, such as the concern regarding the national treatment principle.¹²⁹ Addressing such concerns lead to the changes in certain provisions of China’s Antimonopoly Law. These changes are examples of the impacts of the TPRM on the formulation of the Antimonopoly Law 2007 through providing a forum of policy dialogue.

3 Conclusion

Despite the fact that it is not specially designed as a competition-specific peer review mechanism, the TPRM, as the only peer review on trade-related policies

¹²⁸ *Id.*, p. 73.

¹²⁹ See Chapter Three.

at the international level, could still contribute to the development of domestic competition law and policy in the WTO Members. Under the TPRM, the review regarding China's Antimonopoly Law went beyond the boundary of the existing WTO rules on competition issues because the scope of the TPRM is not narrowed to trade policies only. Compared to the impact examined in Chapters three, four and five, therefore, the impacts of the TPRM on the formulation of the Antimonopoly Law 2007 cover more contents of the Antimonopoly Law 2007 and thus are more comprehensive.

This chapter has shown that the TPRM has contributed to the formulation of the Antimonopoly Law 2007 through providing policy advice, by lending intellectual and moral support, improving transparency, providing a channel of learning experiences from other WTO Members and providing a forum for policy dialogue where concerns can be expressed and policies can be explained. China will be reviewed under the TPRM every two years. The Secretariat Report of China's first trade policy review has clearly mentioned: '[w]hile adoption of the new law [China's Antimonopoly Law] will mark a significant further step in the evolution of China's legislative framework, much will depend on its implementation'¹³⁰ In particular, it claimed: 'Sound implementation of the new law in a transparent and non-discriminatory manner will be vital to its effectiveness'.¹³¹ In the future, therefore, it is no doubt that the implementation of the Antimonopoly Law 2007 will be scrutinized under the TPRM. Thus, the Chinese competition enforcement authorities need to be aware of the influence of the TPRM on the implementation of the Antimonopoly Law 2007 through the functions mentioned above.

¹³⁰ Trade Policy Review Body, WT/TPR/S/161/Rev.1, note 66, p. 139.

¹³¹ *Id.*, p. 61.

Conclusion

Graham Mayeda claimed: '[t]he accession of China to the WTO has opened a two-way street along which influence will flow both from the WTO to China, but also from China towards the WTO and its members'.¹ He provided a study on how China could influence the international trading system.² By contrast, this thesis provides an example to how the World Trade Organisation (WTO) influences China by examining the WTO's impacts on the formulation of the Antimonopoly Law of the People's Republic of China (hereinafter the Antimonopoly Law 2007).

1 A Significant Topic

Over the last 60 years, the General Agreement on Tariffs and Trade (GATT) and its successor, the WTO, have led to an effective reduction of governmental barriers to trade through trade liberalization policies.³ Tariff and non-tariff barriers as well as regulatory obstacles have been either reduced or eliminated. Today there is consensus that some anticompetitive practices could have adverse impacts on international trade.⁴ In the absence of an effective competition regime, the benefits of trade liberalization would be nullified or at least reduced. Therefore, the WTO is very keen on the development of competition law and policy in its Members. Particularly, this is illustrated by the formal inclusion of national competition law and policy into the Trade Policy Review Mechanism (TPRM) in 2001.⁵ During China's first WTO trade policy review, for instance, the development of China's competition law and policy in general and China's Antimonopoly Law in particular was examined.

¹ G. Mayeda, 'A Normative Perspective on Legal Harmonization: China's Accession to the WTO', *University of British Columbia Law Review*, vol. 38, (2005), 83, p. 83.

² *Id.*, 83.

³ See, the Working Group on the Interaction between Trade and Competition Policy (WGTC), Communication from the European Community and Its Member States, 11th June 1997, p. 1, http://trade-info.cec.eu.int/doclib/docs/2003/april/tradoc_111273.pdf.

⁴ See Chapter One.

⁵ WTO, *Trade Policy Review Mechanism-Report of the Trade Policy Review Body for 2001*, WT/TPR/101, (2001), para. 12.

China started its Economic Reform and Open Door Policy in 1978. The main purpose of the Economic Reform is to transform the Chinese economic system from a centrally planned economy to a market economy where resources are located through market forces and competition. The Chinese Economic Reform is associated with the deregulation of prices and privatization of the State Owned Enterprises (SOEs). It has led to some diminution in the direct role of the State in economic activity. Nowadays, market forces play a major role in the Chinese economy.⁶ The purpose of the Open Door Policy is to liberalize trade and investment. The advent of trade liberalization has witnessed far-reaching trade policy reforms leading to a considerable reduction in governmental trade barriers.⁷ This process of trade liberalization has speeded up since China's accession to the WTO.⁸

With the introduction of the Economic Reform and Open Door Policy, anticompetitive practices by both domestic and foreign firms emerged in China. In order to combat these practices, China started to enact some competition-related legislation since 1980. Since then, it has enacted several pieces of legislation dealing with anticompetitive practices, such as the Price Law of the People's Republic of China (hereinafter the Price Law 1997)⁹ and the Anti Unfair Competition Law of the People's Republic of China (hereinafter the LAUC 1993).¹⁰ However, the competition-related legislation in China before the adoption of the Antimonopoly Law 2007 was scattered in several laws and regulations. It lacked system and comprehensiveness. It did not provide some essential components of what would be considered a complete set of competition policy tools, such as the definition of an abuse of a dominant

⁶ The government still plays a significant role in a few industries, such as the oil industry.

⁷ For example, the average applied MFN tariff was reduced from 35% in 1994 to 15.6% in 2001, just before China acceded to the WTO. See, Trade Policy Review Body, *Trade Policy Review- People's Republic of China- Report by the Secretariat*, WT/TPR/S/161, 28th February 2006, p. x, p. 4, and p. 29.

⁸ For example, the average applied MFN tariff was reduced from 15.6% in 2001, just before China acceded to the WTO, to 9.7% in 2005. See, Trade Policy Review Body, WT/TPR/S/161, note 7, p. x.

⁹ An English version is available at <http://www.chinagate.com.cn/english/430.htm>.

¹⁰ An English version is available at <http://en.chinacourt.org/public/detail.php?id=3306>.

position. Therefore, it could not meet the needs of the new environment as China's economy shifted from a centrally planned system to a market economy. Thus, the demand increased for the enactment of a systematic and comprehensive competition law in China.

After nearly 20 years of formulation, China adopted the Antimonopoly Law 2007 on the 30th August 2007.¹¹ The Antimonopoly Law 2007 aims to maintain competition and restrain anticompetitive practices. It bans: (1) monopolistic agreements such as price fixing cartels among companies in a competitive relationship and collusion among bidders; (2) abuse of a dominant market position, such as price discrimination and refusing or forcing transactions; (3) large-scale mergers and acquisitions among firms that could lead to a *de facto* restriction of competition in relevant markets; (4) administrative monopolies.

During the process of drafting China's Antimonopoly Law, various factors could have had impacts on its formulation. According to the source, they can be divided into domestic and international factors. Examples of domestic factors are economic conditions and domestic market structure. During the process of drafting China's Antimonopoly Law, China was aware of these domestic factors. In 2002, for instance, Peng Li, then Chairman of the Standing Committee of the 9th National People's Congress (NPC) (1998-2003) and former Prime Minister (1988-1998) claimed: 'China must formulate an antimonopoly law which... accommodates China's economic development needs'.¹²

The international factors that could have had impacts on the formulation of the Antimonopoly Law 2007 include the influences from individual countries and international organizations. One of the examples of the influences from individual countries is that China sent many representatives to other countries in order to learn their experiences regarding competition legislation during the

¹¹ The official Chinese edition is available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635143.htm. An unofficial English translation is provided as an appendix in this thesis.

¹² See, 'Enacting the Antimonopoly Law and Establishing and Perfecting Market Economy System' [制定反垄断法建立完善市场经济体制, *Zhiding Fanlongdua Fa Jianli Wanshan Shichang Jingji Tizhi*], *People's Daily* [人民日报, *Renmin Ribao*], 30th June 2002, <http://www.people.com.cn/GB/shizheng/252/2144/2867/20020630/764360.html>.

process of formulating the Antimonopoly Law. In addition to the influences from individual countries, international organizations could also have played a role in the formulation of the Antimonopoly Law. This study examines the influences from one such organization, the WTO.

A WTO Member's domestic competition law could have an impact on international trade. In the case of the Antimonopoly Law 2007, such impacts could be even bigger due to China's sheer economic size and trading power. Therefore, the formulation of the Antimonopoly Law 2007 has generated unprecedented interest from both the WTO and its Members. However, there is a lack of thorough and comprehensive studies on the WTO's impact on the formulation of the Antimonopoly Law 2007. Against this background, this study examines the WTO's impacts on the formulation of the Antimonopoly Law 2007. It focuses on three questions: (1) whether the WTO could have had an influence on the formulation of the Antimonopoly Law 2007; (2) if so, how the WTO could have had an influence on the formulation of the Antimonopoly Law 2007; and (3) to what extent the formulation of the Antimonopoly Law 2007 has reflected the WTO's influences.

2 Key Findings in This Study

There is a consensus both within and outside of China that the WTO could have had impact on the formulation of China's Antimonopoly Law. During the discussions in the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP), for instance, the Chinese delegate acknowledged: 'to meet the needs of its national economic construction and in implementing its commitment made during its WTO accession process, China has been accelerating its work in drafting its Antimonopoly Law'.¹³ In 2002, Peng Li claimed: 'China must formulate an antimonopoly law which is consistent with the international conventions and customs, especially the WTO Agreements'.¹⁴ Other WTO Members also argued that the WTO rules were relevant in the

¹³ WGTCP, *Communication from China - Elements contained in Paragraph 25 of the Doha Ministerial Declaration*, WT/WGTCP/W/227, (2003), para. 3.

¹⁴ See, 'Enacting the Antimonopoly Law and Establishing and Perfecting Market Economy System', note 12.

formulation of China's Antimonopoly Law. For example, Tim Stratford, the US Trade Representative (USTR) official responsible for China, said: 'The United States will assess whether any legislation [the Antimonopoly Law] violates China's commitments to the World Trade Organization'.¹⁵

However, these comments only reflect one aspect of the WTO's impact on the formulation of the Antimonopoly Law 2007. This study has shown that the WTO could have had impacts on the formulation of the Antimonopoly Law 2007 in four aspects:

- (i) consistency: the Antimonopoly Law 2007 needs to be consistent with the WTO rules;
- (ii) obligation: the enactment of the Antimonopoly Law 2007 could help China implement its WTO commitments;
- (iii) enabling: the WTO rules could have enhanced the case for China seeking to combat anticompetitive practices through the Antimonopoly Law 2007;
- (iv) peer pressure: the TPRM could have contributed to the development of the Antimonopoly Law 2007.

In particular, Chapter Three examines the WTO's impact from the first aspect. It argues that the WTO national treatment principle matters to the WTO Members' national competition laws. As a WTO Member, thus, China needs to make sure that its Antimonopoly Law is consistent with the WTO national treatment principle. In theory, therefore, the relevance of the WTO national treatment principle could have had impacts on the formulation of the Antimonopoly Law 2007. In reality, however, it took China a few years to accept the relevance of the WTO national treatment principle in the formulation of the Antimonopoly Law 2007. This struggle has been reflected in the process of formulating the Antimonopoly Law 2007. Through analysing the changes of the relevant provisions in different drafts, Chapter Three shows that the WTO national treatment principle has had impact on the formulation of the objectives and

¹⁵ See, 'China to consider introducing anti-monopoly law', 28th December 2005, http://today.reuters.com/news/NewsArticle.aspx?type=reutersEdge&storyID=uri:2005-12-28T152702Z_01_ARM855600_RTRUKOC_0_US-CHINA-MONOPOLY.xml&pageNumber=1&summit; 'Nation may introduce antimonopoly law', 30th December 2005, <http://www.newsgd.com/business/laws/200512300064.htm>.

exemptions of the Antimonopoly Law 2007.

Chapter Four examines the WTO's impact from the second aspect. First, it argues that Articles VIII and IX of the General Agreement on Trade in Services (GATS) not only prohibit anticompetitive practices that have impact on international trade in services but also oblige WTO Members to combat such anticompetitive practices. Before the adoption of the Antimonopoly Law 2007, China's competition-related legislation did not cover all the anticompetitive practices prohibited under Articles VIII and IX of the GATS. The adoption of a competition law could help China to implement its obligations under Articles VIII and IX of the GATS by providing a general ban on all anticompetitive practices. This possibility of helping China to implement the obligations under Articles VIII and IX of the GATS has strengthened the expectation that the Antimonopoly Law would provide a general ban on all anticompetitive practices during the process of formulating this Law. Second, it argues that Section 1.1 of the Reference Paper on Regulatory Principles of the Negotiating Group on Basic Telecommunications (hereinafter the Reference Paper) requires Members to maintain 'appropriate measures' for 'the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices' in the telecommunications sector. The existing telecommunications legislation in China is far from effective to prevent anticompetitive practices. A comprehensive competition law could help China to implement the obligation under Section 1.1 of the Reference Paper because it could be an 'appropriate measure' for preventing anticompetitive practices in the telecommunications sector. This possibility of helping China to implement the obligation under Section 1.1 of the Reference Paper has led to the changes of certain provisions in the drafts and the Antimonopoly Law 2007 in order to make such legislation applicable to the telecommunications sector.

Chapter Five examines the WTO's impact from the third aspect. It argues that Articles 8.2, 40 and 31(k) of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) authorize WTO Members to regulate abuses of intellectual property rights. However, these enabling clauses could only enhance the case for a WTO Member seeking to combat abuses of intellectual property rights through domestic measures when it can resist pressures from other WTO Members. China's desire to prohibit abuses of intellectual property rights through its

Antimonopoly Law was criticised by other WTO Members during the process of formulating this Law. With the increasing significance of China's economy and trading power, however, China has become stronger and more able to resist pressures from other WTO Members in regard to regulating abuses of intellectual property rights. Under these circumstances, Articles 8.2, 40 and 31(k) of the TRIPS have enhanced the case for China seeking to regulate abuses of intellectual property rights through its Antimonopoly Law. This is illustrated in Article 55 of the Antimonopoly Law 2007, which stipulates that the law will apply to undertakings which abuse intellectual property rights to eliminate or restrict competition.

Chapter Six examines the WTO's impact from the fourth aspect. It argues that the TPRM could have contributed to the formulation of the Antimonopoly Law 2007 by (a) providing valuable and independent policy advice; (b) lending moral and intellectual supports to those who are in favour of adopting an antimonopoly law; (c) increasing transparency; (d) providing a channel of learning experiences from other Members; and (e) providing a forum where other Members can express their concerns and the Member under review can explain and defend their policies. Through analysing the changes of the relevant draft provisions, Chapter Six shows that the TPRM has contributed to the formulation of the Antimonopoly Law 2007.

In sum, this study has found:

- (1) The WTO could have had impact on the formulation of the Antimonopoly Law 2007;
- (2) The WTO could have had influences on the formulation of the Antimonopoly Law 2007 through four aspects: (i) consistency: the content of China's forthcoming Antimonopoly Law needs to be consistent with the WTO national treatment principle; (ii) obligation: the adoption of the Antimonopoly Law could help China to implement obligations under Articles VIII and IX of the GATS and Section 1 of the Reference Paper; (iii) enabling: Articles 8.2, 40 and 31(k) of the TRIPS could have enhanced the case for China seeking to prohibit intellectual property-related anticompetitive practices through the Antimonopoly Law 2007; and (iv) peer pressure: the TPRM could have contributed to the formulation of the Antimonopoly Law 2007.

- (3) Through analysing the changes of some provisions in the drafts and the Antimonopoly Law 2007, this study has demonstrated that the formulation of the Antimonopoly Law 2007 has been influenced by the WTO in these four aspects.

Needless to say, however, it should be borne in mind that there are limitations of the WTO's impacts on the formulation of the Antimonopoly Law 2007. First, there is no overarching set of principles or interpretation of the WTO rules as they apply to competition issues. This makes it very difficult to implement competition-related WTO rules. It also makes competition-related WTO rules less known outside of the world of academics. Second, the WTO does not require a WTO Member to adopt a national competition law. China is no exception. Article 65 of the Report of the Working Party on the Accession of the People's Republic of China expressly mentioned that China was formulating an antimonopoly law.¹⁶ However, this provision is not included in the Protocol on the Accession of the People's Republic of China.¹⁷ Therefore, China has no obligation to enact a comprehensive competition law. Nevertheless, the limitations of the WTO on its Members' domestic competition laws should not be interpreted as saying that the WTO has no impact on the formulation of the Antimonopoly Law 2007. As has been shown in this study, the WTO has influenced the formulation of the Antimonopoly Law 2007 from four aspects.

3 Recommendations

The Antimonopoly Law 2007 will come into force on the 1st August 2008.¹⁸ The WTO not only has influenced the formulation of the Antimonopoly Law 2007, but also could have impact on the enforcement of the Antimonopoly Law 2007. In fact, the Antimonopoly Law 2007 will really begin to matter to the WTO and its Members when it is implemented. Moreover, the further development of the

¹⁶ For the text, see WTO document, WT/ACC/CHN/49, (2001).

¹⁷ The Protocol on the Accession of the People's Republic of China, Part I, Art. 1(2). For the text of the Protocol on China's Accession, see, WTO, *Protocol on the Agreement of the People's Republic of China to the Marrakesh Agreement Establishing the World Trade Organisation*, Cambridge: Cambridge University Press, (2003).

¹⁸ The Antimonopoly Law 2007, Art. 57.

Antimonopoly Law 2007 is inevitable because the development of competition law in China is a process. Thus, the adoption of the Antimonopoly Law 2007 is only the start of the WTO's impacts on China's competition regime. In the future, therefore, the Chinese competition enforcement authorities need not only to be aware of the WTO's impact but also to understand precisely such impacts. Due to the lack of comprehensive studies on the WTO's impact on competition law in general and the formulation of the Antimonopoly Law 2007 in particular, however, it is far from easy for the Chinese competition enforcement authorities to understand precisely the WTO's legal impact on China's competition regime. Based on this study, therefore, a few recommendations are provided to the Chinese competition enforcement authorities.

3.1 First Recommendation

The Chinese competition enforcement authorities must make sure that the enforcement of the Antimonopoly Law 2007 is consistent with the WTO national treatment principle. At least, there should be no *de jure* discrimination against foreign companies through either the Antimonopoly Law 2007 or further guidance of this Law. Any such discrimination could trigger complaints from other WTO Members and thus China could face unfavourable rulings from a Panel and the Appellate Body. In particular, the Chinese competition enforcement authorities need to be aware of the potential violation of the WTO national treatment principle through interpreting and implementing the terms 'public interest' and 'development of the socialist market economy' under Article 1 of the Antimonopoly Law 2007. In practice, *de facto* discrimination is generally related to the enforcement of the Antimonopoly Law 2007. Although the Antimonopoly Law 2007 will not come into force until the 1st August 2008, it is still necessary for the Chinese competition enforcement authorities to be aware of the risk of violating the WTO national treatment principle. In particular, the Chinese competition enforcement authorities need to be aware of the potential *de jure* discrimination against foreign companies when it interprets and implements the exemption provisions under the Antimonopoly Law 2007, such as Article 15.

3.2 Second Recommendation

Articles VIII and IX of the GATS require WTO Members to take action or provide remedies against certain anticompetitive practices in trade of services. Before the adoption of the Antimonopoly Law 2007, however, China's competition-related legislation was insufficient to implement such WTO obligations. The Antimonopoly Law 2007 could help China to implement such WTO obligations because it provides a general ban on anticompetitive practices. In order to materialise this benefit, however, the Chinese competition enforcement authorities need to make sure that further guidance on implementing the Antimonopoly Law 2007 is formulated in a way as to accommodate the needs of implementing the obligations under Articles VIII and IX of the GATS.

Section 1.1 of the Reference Paper clearly requires China to adopt appropriate measures for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anticompetitive practices in the telecommunications sector. In order to implement this obligation, China has at least three options: (1) amending the Telecommunications Regulation 2000; (2) adopting a new telecommunications law; (3) adopting the Antimonopoly Law 2007. As examined in Chapter four, the first two choices are not likely to materialise in the near future, while the Antimonopoly Law will come into force on the 1st August 2008. Realistically, therefore, it is wise for China to implement its obligation under Section 1.1 of the Reference Paper through the Antimonopoly Law 2007. The Antimonopoly Law 2007 could be applicable to the telecommunications sector because it does not grant any exemptions to the telecommunications sector. Therefore, the Chinese competition enforcement authorities need to be aware of the applicability of the Antimonopoly Law 2007 to the telecommunications sector and enforce this Law in a way as to accommodate the needs of implementing the obligation under Section 1.1 of the Reference Paper.

3.3 Third Recommendation

Articles 8.2, 40 and 31(k) of the TRIPS expressly recognize the legitimacy of invoking WTO Members' domestic legislation to combat abuses of intellectual property rights. They have enhanced the case for China seeking to regulate

abuses of intellectual property rights through the Antimonopoly Law 2007. However, Article 55 of the Antimonopoly Law 2007 only provides a general provision by stating that it is applicable to abuses of intellectual property rights. Thus, further guidelines or administrative rules are needed in order to provide a detailed procedure and a set of criteria on implementing Article 55. During the process of formulating such guidelines or administrative rules, the Chinese competition enforcement authorities need to be aware of the discretion provided by Article 8.2, 40 and 31(k) of the TRIPS.

3.4 Fourth Recommendation

The TPRM has contributed to the formulation of the Antimonopoly Law 2007 through providing policy advice, by lending intellectual and moral support, improving transparency, providing a channel of learning experiences and providing a forum for policy dialogue. It will continue such influences on the Antimonopoly Law 2007. For instance, China will be reviewed under the TPRM in 2008 for the second time. There is no doubt that one of the concerns regarding China's competition law and policy will be the enforcement of the Antimonopoly Law 2007 during China's second trade policy review. In the future, therefore, the Chinese competition enforcement authorities need to be aware of and understand the comprehensive impacts of the TPRM on the Antimonopoly Law 2007. In particular, the Chinese competition enforcement authorities need to be aware that the implementation of the Antimonopoly Law 2007 will be scrutinized by the WTO and other WTO Members through the TPRM.

4 Further Studies

4.1 Other Potential Impact of the WTO on the Antimonopoly Law 2007

4.1.1 Potential Impact of Other WTO Rules on the Formulation of the Antimonopoly Law 2007

Although the purpose of this study is to examine the WTO's impact on the formulation of the Antimonopoly Law 2007, it has to be accepted that for

reasons of space and time this thesis has only focused on the impacts of the WTO national treatment principle, Articles VIII and IX of the GATS, Section 1 of the Reference Paper, and Articles 8.2, 40 and 31(k) of the TRIPS and the TRPM. There are dozens of competition-specific provisions under the current WTO system. And these competition-specific provisions might have had a bearing on the formulation of the Antimonopoly Law 2007. For instance, the Agreement on Technical Barriers to Trade (TBT) requires standards be no more restrictive on trade than is necessary.¹⁹ Articles 3, 4 and 8 of the TBT could be used to challenge the use of proprietary standards to restrict competition, such as in cases where standards (such as computer software standards) limit competition in networked services. In addition, the principles of transparency and fairness could also have influenced the formulation of the Antimonopoly Law 2007. All these illustrate that there is a need for further studies on whether these competition-related WTO rules could have influenced the formulation of the Antimonopoly Law 2007, and if so, to what extent the formulation of the Antimonopoly Law 2007 has reflected such influences.

4.1.2 Potential Impact of the WTO on the Formulation of the Antimonopoly Law 2007 from Non-Legal Perspectives

This study explores the WTO's impacts on the formulation of the Antimonopoly Law 2007 from a legal perspective. It is possible to look at this issue from other perspectives, such as an economic perspective. As mentioned in the Introduction of this thesis, there are some studies on the economic impact of the WTO on China. However, there is no comprehensive economic analysis on the WTO's impact on the formulation of the Antimonopoly Law 2007. Therefore, it is worthy of further studies.

4.1.3 Potential Impact of the WTO on the Implementation and Further Development of the Antimonopoly Law 2007

This study focuses on the WTO's impact on the formulation of the Antimonopoly Law 2007. With the adoption of the Antimonopoly Law 2007, attention now turns to the implementation and further development of this Law. Therefore, further

¹⁹ The TBT is available at http://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm.

studies are needed regarding the WTO's impacts on the implementation and further development of the Antimonopoly Law 2007.

4.2 Potential Impact of the WTO on Other Members' Competition Laws

After the WTO General Council's post Cancun Decision (hereinafter the July Package) which excluded competition policy from the Doha Round of trade negotiations,²⁰ any potential agreement on competition within the WTO will not materialize in the very near future. Thus, attention now turns to how to use the existing competition-related rules within the WTO rather than how to establish a new competition system within the WTO. This change makes studies on the impact of the existing WTO rules on national competition regimes more significant than before. For the WTO Member which has not adopted a competition law but is in the process of formulating a national competition law, such studies could raise the awareness of the relevance of the WTO in the formulation of a domestic competition law. For the WTO Member which has already adopted a competition law, such studies could help the competition authorities to be aware that the enforcement of the existing competition law must be consistent with the WTO rules. In addition, such studies could raise the awareness of the potential impact of the WTO on the further development of the existing competition law. Therefore, studies on the WTO's impact on WTO Members' domestic competition laws could be very helpful for WTO Members. However, there is a lack of such studies.²¹ Although this thesis throws some light on this general issue by examining the WTO's impacts on the formulation of the Antimonopoly Law 2007, further studies are needed in order to understand the WTO's impact on WTO Members' competition laws. Such studies could be more comprehensive than the studies on the impacts of the WTO on the formulation of the Antimonopoly Law 2007 because they include more than one WTO Member.

²⁰ Paragraph 1 (g) of the July Package,

http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm.

²¹ After July 2004 when the consensus was reached to exclude competition policy from the Doha Round of trade negotiations, there has been lack of studies on the competition issues under the WTO, not mention to the impacts of the existing WTO rules on WTO Members' national competition laws.

5 Contributions of This Study

This thesis has contributed to the policy making and the academic literature in at least three different areas. First, it has illustrated: (1) the WTO could have influenced the formulation of the Antimonopoly Law 2007; (2) the WTO could have influenced the formulation of the Antimonopoly Law 2007 in four aspects; (3) the formulation of the Antimonopoly Law 2007 has reflected such influences. Before this study, no research had been done regarding the WTO's impacts on the formulation of the Antimonopoly Law 2007. To some extent, the lack of studies on this topic illustrates how original this study is. It has thrown light into a dark area where there was no intelligent light. From this sense, the contribution of this study is that it fills the gap left by other scholars and helps policy makers to understand in a precise way the WTO's impacts on the formulation of the Antimonopoly Law 2007.

Second, this study has exposed a new research area, the WTO's impact on the development of WTO Members' competition regimes in general and competition laws in particular, through analysing the WTO's impacts on the formulation of the Antimonopoly Law 2007. T. L. Knutsen argued: 'one does not ask of a theory whether it is true or false, rather one asks whether it is enlightening'.²² If he is right, this thesis is certainly enlightening. It opens a new research area, the impacts of the WTO on WTO Members' national competition laws. This study is the only research that has been carried out regarding this issue so far. One of the reasons why there is a lack of studies in this area could be the interdisciplinary character of this topic. It combines both international trade law, particularly WTO law and national competition law and policy. In general, WTO law is considered as part of public international law, while national competition law belongs to national law. There are not many scholars with expertise in both subjects. Thus, it is far from easy to bring these two subjects together. Despite this difficulty, this thesis has demonstrated that studies in this area can be carried out by examining the WTO's impact on the formulation of the Antimonopoly Law 2007.

²² T. Knutsen, *A History of International Relations Theory*, 2nd ed., Manchester: Manchester University Press, (1997), p. 1.

Third, this study has developed and applied a structure of four aspects of the WTO's impacts on domestic legislation: (1) consistency: the content of domestic legislation needs to be consistent with the WTO rules; (2) obligation: The adoption of domestic legislation could help Members implement WTO rules; (3) enabling: the WTO rules could enhance the case for Members seeking to act in the way permitted by the WTO; (4) peer pressure: the WTO peer review system, the TPRM, could contribute to the development of WTO Members' domestic legislation. This structure could be used for further studies on the WTO's impact on WTO Members' domestic legislation. In particular, it could be used for carrying out further studies on the impact of the WTO on other WTO Members' competition legislation.

Appendix

The Antimonopoly Law of the People's Republic of China

(Adopted at the 29th session of the Standing Committee of the 10th National People's Congress on the 30th August 2007)

Translated by Jia Yuan

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Chapter 1: General Provisions

Article 1: This Law is enacted for the purpose of preventing and restraining monopolistic conducts, protecting fair competition in the market, enhancing economic efficiency, safeguarding the interests of consumers and the public interest, promoting the healthy development of the socialist market economy.

Article 2: This Law shall be applicable to monopolistic conducts in economic activities within the People's Republic of China.

This Law shall apply to the conducts outside the territory of the People's Republic of China if they eliminate or have restrictive effect on competition on the domestic market of the PRC.

Article 3: "Monopolistic conduct" is defined in this law as the following activities:

- (i) monopolistic agreements among undertakings;
- (ii) abuse of dominant market positions by undertakings;
- (iii) concentration of undertakings that eliminates or restricts competition or might be eliminating or restricting competition;

Article 4: The State formulates and carries out competition rules which in accordance with the socialist market economy, perfects macro-control, and advances a unified, open, competitive and orderly market system.

Article 5: Undertakings shall through fair competition, voluntary alliance, concentrate according to law, expand the scope of operation, and enhance competition ability.

Article 6: Undertakings of a dominant position shall be prohibited to abuse a dominant position, eliminate, and restrict competition.

Article 7: For the undertaking in the state-owned economy controlled industries to which are related to national economic lifeline and state security, and in the industries to which the state grants special or exclusive rights, the state protect their lawful operation. The state also lawfully regulates and controls their operation and the price of their commodities and services, safeguards interests of consumers, promotes technical progresses.

Undertakings mentioned above shall lawfully operate, be honest and faithful, be strict self-discipline, accept social supervision, shall not damage interests of consumers using their dominant or exclusive positions.

Article 8: Administrative power by government and organisations to which laws and regulations grant rights to administer public issues shall be prohibited to abuse administrative power, to eliminate or restrict competition.

Article 9: The State Council establishes the Antimonopoly Commission, which in charge of organizing, coordinating, guiding antimonopoly works, performs the following responsibilities:

- (i) study and draft related competition policies;
- (ii) organize research, assess general competition situations in the market, issue assess report;
- (iii) enact and issue antimonopoly guidelines;
- (iv) coordinate antimonopoly execution works;
- (v) other responsibilities stipulated by the State Council.

The State Council stipulates composition and working rules of the Antimonopoly Commission.

Article 10: Antimonopoly execution authorities are in charge of antimonopoly execution pursuant to this law.

Antimonopoly execution authorities shall authorise the corresponded authorities of provincial government or government in an autonomous region or directly municipality to in charge of antimonopoly execution pursuant to this law, when needed.

Article 11: Association of undertakings should intensify industrial self-discipline, guide undertakings to lawfully compete, safeguard the competition order in the market.

Article 12: An “undertaking” in this law refers to a legal person, other organization or natural person that engages in businesses of commodities (hereinafter “commodities” include services).

A “relevant market” in this law refers to the territorial area within which the undertakings compete against each other during a time period for relevant products.

Chapter 2: Monopoly Agreement

Article 13: Any following agreements among the undertakings competed with each other shall be prohibited:

- (i) fix, or change prices of products;
- (ii) limit the output or sales of the products;
- (iii) allocate the sales markets or the raw material purchasing markets;
- (iv) limit the purchase new technology or new facilities, or the development of, new products or new technology;
- (v) jointly boycott transactions;
- (vi) other agreements identified by antimonopoly execution authorities.

Agreements referred to this law are agreement, decision or concerted action which eliminate or restrict competition.

Article 14: Any following agreements among undertaking and counterparty are prohibited:

- (i) fix the price for resale;
- (ii) restrict the lowest price for resale;
- (iii) another monopoly agreement identified by antimonopoly execution authorities.

Article 15: Agreements among undertakings with one of the following objectives shall be exempted from application of article 13, 14 if

- (i) agreements to improve technology, to research and develop new products;
- (ii) agreements for the purpose of product quality upgrading, cost reduction and efficiency improvement, of unify standards, norms or specialise;
- (iii) agreements by small and medium-sized enterprises to improve operational efficiency and to enhance their competitiveness;
- (iv) agreements to cope with economic depression, to moderate serious decrease in sales volumes or distinct production surplus;
- (v) agreements to achieve public interests, such as save energy, protect environment, relieve the victims of a disaster and so on;
- (vi) agreements to maintain legitimate interest in the cooperation with foreign economic entities and foreign trade;
- (vii) other situation stipulated by laws and the State Council.

Undertakings pursuant to (i) to (v), and therefore exempted from Article 13, 14, must additionally prove, that the agreements can enable consumers to share impartially the interests derived from the agreements, and will not entirely eliminate the competition in relevant market.

Article 16: Association of industry shall be prohibited to organize undertakings to conduct monopoly activities being prohibited by this law.

Chapter 3: Abuse of a Dominant Market Position

Article 17: Undertakings of a dominant market position shall not abuse their dominant market positions to conduct following conducts:

- (i) sell commodities at unfairly high prices or buy commodities at unfairly low prices;
- (ii) sell commodities at prices below cost without legitimate reasons;
- (iii) refuse to trade with counterparty without legitimate reasons;
- (iv) require its counterparty to trade exclusively with it or trade exclusively with the appointed undertakings without legitimate reasons;
- (v) tie products or require as unreasonable conditions for trading without legitimate reasons;
- (vi) apply dissimilar prices or other transaction terms to equivalent counterparties;
- (vii) other conducts identified as abuse of a dominant position by antimonopoly execution authorities

For the purposes of this law, “dominant market position” refers to the undertaking(s) having the ability to control the price, quantity or other trading conditions of products in relevant market, or to hinder or affect other undertakings to enter the relevant market.

Article 18: The following factors will be taken into consideration in finding dominant market position:

- (i) market share in relevant market, and the competition situation of the relevant market;
- (ii) ability to control the sales markets or the raw material purchasing markets;
- (iii) financial status and technical conditions of the undertaking;
- (iv) the degree of dependence of other undertakings;

- (v) entry to relevant market by other undertakings;
- (vi) other factors related to find a dominant market position.

Article 19: Undertakings that have any of the following situations can be assumed to be have a dominant market position:

- (i) the relevant market share of one undertaking accounts for $1/2$ or above;
- (ii) the joint relevant market share of two undertakings accounts for $2/3$ or above;
- (iii) the joint relevant market share of three undertakings accounts for $3/4$ or above.

Undertakings with a market share of less than $1/10$ will not be deemed as occupying a dominant market position even if they fall within the scope of second or third item.

When the Undertakings assumed to have a dominant market position can prove that they do not have a dominant market, shall not be assumed to have a dominant market position.

Chapter 4: Concentration of Undertakings

Article 20: A concentration refers to the following situations:

- (i) the merger of undertakings;
- (ii) the acquisition by undertakings, whether by purchase of securities or assets, of control of other undertakings;
- (iii) the acquisition by contact or any other means, of control of other undertakings or of possibility of exercising decisive influence on other undertakings.

Article 21: A concentration falls under the notification criteria issued by the State Council, a report must be notify in advance with the antimonopoly execution authorities. Without notification the concentration shall not be implemented.

Article 22: A concentration refers to following situations, shall not notify to the antimonopoly execution authorities:

- (i) one undertaking which is a party to the concentration has the power to exercise more than half the voting rights of every other undertaking, whether of the equity or the asset;
- (ii) one undertaking which is not a party to the concentration has the power to exercise more than half the voting rights of every undertaking concerned, whether of the equity or the asset;

Article 23: Undertakings which notify a concentration in advance with the antimonopoly execution authorities, shall submit following documents or materials:

- (i) summary of notification;
- (ii) the effect on competition on the relevant market of the concentration;
- (iii) agreement of concentration;
- (iv) the financial reports and accounting reports of the proceeding accounting year of the undertakings concerned;
- (v) other documents or materials stipulated by antimonopoly execution authorities.

The summary of notification shall record, name, residence, scope of business, expected date for concentrating and other items stipulated by antimonopoly execution authorities of the undertakings concerned.

Article 24: In case that the documents submitted by the notifying undertakings are not complete, shall submit the rest of the documents and materials with a set period stipulated by antimonopoly execution authorities. It will be taken as not notified, when the added documents and materials are not timely submitted.

Article 25: The antimonopoly execution authorities shall preliminarily review the notified concentration and take the decisions whether to precede review and notify the undertakings in written form within 30 days, calculated from the date of receipt of the complete filing documents and materials referred to article 23 submitted by the undertakings.

Before a decision taken by the antimonopoly execution authorities, the concentration shall be not implemented.

If the antimonopoly execution authorities has taken decision not to precede review or has not decided in case of expiring of the period, the concentration shall be implemented.

Article 26: If the antimonopoly execution authorities has decided to precede the review, shall review and decide whether to prohibit the concentration and notify the undertakings in written form within 90 days, calculated form the date of the decision being taken.

If the concentration is prohibited, the reasons shall be explained. Within the review period the concentration shall be not implemented.

Under the following circumstances, the time limit stipulated in the first paragraph may be extended to add 60 days after notifying the undertakings in written form:

- (i) the undertakings concerned agree to extend the time limit;
- (ii) the documents or materials submitted are inaccurate and need verification;
- (iii) other significant events occurred after notification.

If the antimonopoly execution authorities have not decided in case of expiring of the period, the concentration shall be implemented.

Article 27: In the review of a concentration the following factors shall be considered:

- (i) market share in the relevant market of the undertakings concerned and their ability to control the market;
- (ii) concentrate degree of the relevant market ;
- (iii) effect on the market entry and technology improvement;
- (iv) effect on consumers and other undertakings;
- (v) effect on national economical improvement;
- (vi) other factors shall affect the competition, be considered by the antimonopoly execution authorities.

Article 28: If a concentration has or may have effect of eliminating or restricting competition, the antimonopoly execution authorities shall take decision of prohibition. However, if the undertakings can prove that the concentration bring more positive effect than negative effect on competition, or the concentration pursuant to public interests, the antimonopoly execution authorities shall decide, not to prohibit the concentration.

Article 29: The antimonopoly execution authorities shall make a decision of approval with restrictions and conditions where a concentration will reduce the negative effect on competition.

Article 30: The antimonopoly execution authorities shall announce the decisions of prohibition or conditional concentration to public.

Article 31: In case the acquisition of domestic enterprises by foreign investors or other manners to concentrate referred to national security, besides being reviewed according to this law, shall be carried out national safety review according to related regulations.

Chapter 5: Abuse of Administrative Power to Eliminate or Restrict Competition

Article 32: Administrative power by government and organisations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to limit or limit in a different form the organizations or persons to operate, purchase or use the products of any undertakings designated by them.

Article 33: Administrative power by government and organisations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to carry out following conducts, to hinder the free flow of the commodities between regions:

- (i) create discriminated items, carry out discriminated standards, or stipulate discriminated prices to nonlocal commodities.
- (ii) stipulate different technical requisition, test standards to nonlocal an local commodities, or conduct repeat testing, repeat certification and so on, in order to limit nonlocal commodities to enter local market;
- (iii) specially require administrative permit to counter nonlocal commodities, in order to limit nonlocal commodities to enter local market;
- (iv) create burdens or other methods to limit nonlocal commodities enter or local commodities exit;
- (v) other conducts which hinder commodities free flow between regions.

Article 34: Administrative power by government and organisations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to exclude or restrict nonlocal undertakings to participate local bids activities through the manners that they create discriminated quality requisitions, judge standards or not announce information according to law.

Article 35: Administrative power by government and organisations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to exclude or restrict nonlocal undertakings to set up branches through that they give unfair treatment to nonlocal undertakings.

Article 36: Administrative power by government and organisations to which laws and regulations grant rights to administer public issues shall not abuse administrative power to force the undertakings to carry out monopoly conducts according to this law.

Article 37: Administrative power shall not abuse administrative power to stipulate regulations including contents to eliminate or restrict competition.

Chapter 6: Investigation of the Suspected Monopoly Conducts

Article 38: The antimonopoly execution authorities investigate monopoly conducts according to law.

Refers to antimonopoly conduct, any organization or person has the right to report to the antimonopoly execution authorities. The antimonopoly execution authorities shall keep the secret for the reporter.

If the report is submitted in written form and supplies related facts and proofs, the antimonopoly execution authorities shall conduct necessary investigation.

Article 39: When conducting investigations, the antimonopoly execution authorities can take the following measures:

- (i) enter the premise or other related places of the undertakings being investigated;
- (ii) request the undertaking concerned, interested parties and other relevant organizations or persons being investigated to explain related circumstances;
- (iii) exam, copy related documents and materials of the undertakings, interested parties and other relevant organizations or persons being

investigated, such as certificates, agreements, accounting books, letters and telegraphs of business, electronic data and so on;

- (iv) seal up or detain related proofs;
- (v) inquire about the bank account information of the undertakings concerned.

Taking the measures stipulated above, shall be reported in written form to the chef person in charge of the antimonopoly execution authorities, and be approved.

Article 40: Investigating the suspected monopoly conducts by the antimonopoly execution authorities, the executors shall be not less than two persons, and shall show the papers of execution.

The executor conduct inquiring and investigating, shall fabricate written notes which are signature by the inquired or investigated person.

Article 41: The antimonopoly execution authorities and their staffs shall be obliged to keep the secret which known in the execution.

Article 42: Undertakings concerned, interested parties or other related organizations or persons being investigated shall cooperate with the antimonopoly execution authorities by performing responsibility, shall not refuse or hinder the antimonopoly execution authorities to investigate.

Article 43: Undertakings concerned, interested parties being investigated have the right to state opinions. The antimonopoly execution authorities shall verify the facts, reasons and proofs being given by undertakings concerned, interested parties being investigated.

Article 44: After investigating and verifying the suspected monopoly conducts, if the antimonopoly execution authorities believe that monopoly conduct was done, shall take decisions according to law and publish it.

Article 45: In case of a suspected monopoly conduct being investigated by the antimonopoly execution authorities, if the undertakings being investigated

promise that they will conduct concrete measures to eliminate the negative effect of the monopoly conducts within a time limit being acknowledged by the antimonopoly execution authorities, the antimonopoly execution authorities shall decide to suspend the investigation. The decision to suspend the investigation shall note what concrete was promised by the undertakings being investigated.

If the antimonopoly execution authorities decide to suspend investigation, shall supervision the circumstances in which undertakings perform their promises. If the undertakings have performed the promises, the antimonopoly execution authorities shall decide to stop the investigation.

Under the following circumstances, the antimonopoly execution authorities shall regain the investigation:

- (i) undertakings have not performed the promises;
- (ii) the fact being applied to suspend the investigation has significant changed;
- (iii) the decision to suspend the investigation is based on uncompleted or untruthful information being supplied by the undertakings.

Chapter 7: Legal Liabilities

Article 46: In case there exists monopoly agreement and is implemented by the undertakings in violation of this law, the antimonopoly execution authorities shall order the undertakings to cease such act, the illegal gains shall be confiscated, and a fine between 1% and 10% of the turnover in the preceding year shall be imposed; If the monopoly agreement is not implemented, a fine below 500,000 Yuan shall be imposed.

If the undertakings actively report the circumstance of the monopoly agreement to the antimonopoly execution authorities and supply important proofs, the antimonopoly execution authorities shall reduce or remit the fines according to own judgement.

If the association of undertakings organise undertakings of the branch to reach monopoly agreement in violation of this law, the antimonopoly execution authorities shall impose a fine below 500,000 Yuan; and if the circumstances are serious, the social organization register administrative department shall dissolve the register.

Article 47: In case there exists an act abusing dominant market position by the undertakings in violation of this law, the antimonopoly execution authorities shall order the undertakings to cease such act, the illegal gains shall be confiscated, and a fine between 1% and 10% of the turnover in the preceding year shall be imposed.

Article 48: In case the undertakings concentrate in violation of this law, the antimonopoly execution authorities shall order the undertakings to cease concentration, dispose securities or assets in limited time, transfer the operation and conduct other necessary measures to regain the status before the concentration, a fine below 500,000 shall be imposed.

Article 49: Referred to the fines of article 46, 47, 48 of this law, the antimonopoly execution authorities shall consider the nature, degree and time of duration of the violation, to decide concrete amount of fine.

Article 50: If undertakings carry out monopoly conduct, and cause losses to others, shall bear civil liability according to law.

Article 51: If administrative power by government and organisations to which laws and regulations grant rights to administer public issues abuse administrative power, to eliminate or restrict competition, shall be ordered by superior authorities to correct themselves; people in direct charge and people directly involved shall be imposed administrative punishment. The antimonopoly execution authorities shall supply suggestion to related superior authorities to handle according to law.

If administrative power by government and organisations to which laws and regulations grant rights to administer public issues abuse administrative power, to eliminate or restrict competition will be handled by another regulation, shall be applied to another regulation.

Article 52: In reviewing and investigating by the antimonopoly execution authorities, if they refuse to supply related materials, information, or supply incorrect materials, information, or remove, hide or destroy proofs, or other conducts to refuse or hinder investigation, the antimonopoly execution authorities shall order the undertakings to cease such act, A fine not to exceed 20,000 Yuan to individuals and 200,000 Yuan to organization may be assessed. If the circumstances are serious, a fine not to between 20,000 Yuan and 100,000 Yuan to individuals and between 200,000 Yuan and 1000,000 Yuan to organization may be assessed; if the said act constitutes a criminal offence, prosecution will be launched according to law.

Article 53: If the undertaking does not accept the decision made by the antimonopoly execution authorities according to article 28, 29 of this law, he/she shall in the first place apply for administrative review; and if the undertaking still disagree with the decision of the administrative review, he/she may file a administrative lawsuit according to law.

If the undertaking does not accept the decision made by the antimonopoly execution authorities besides the decisions stipulated by first paragraph, he/she shall apply for administrative review according to law or file administrative lawsuit.

Article 54: Any employee of the antimonopoly execution authorities who abuse his official power, neglect his duties, engage in malpractices or irregularities, or disclose any trade secret, constitute a criminal offence, prosecution will be launched according to law. Where the act is not so serious as to be prosecuted for criminal liability, he shall be imposed the administrative penalty according to law.

Chapter 8: Supplementary Articles

Article 55: Undertakings exercise intellectual property rights according to laws, administrative regulations related intellectual property rights, shall not be applied to this law; however, undertakings abuse the intellectual property rights to eliminate or restrict competition, shall be applied to this law.

Article 56: Agricultural producers and rural economic organizations alliance or concerted act in the producing, processing, selling, transporting or reserving agricultural products shall be not applied to this law.

Article 57: This law is effective as of August 1, 2008.

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