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# Changing Global Dynamics and International Competition Law: Considering China's Potential Impact

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## Abstract

*Competition law is increasingly international in its scope and application. Today, over 130 jurisdictions have competition law. Although most competition laws are national in scope and no formalized competition law-related rules apply globally, international norms for competition law have been created and fostered. These norms largely reflect the perspectives and approaches of the USA, European Union and developed countries more generally. However, developing countries now constitute the majority of competition law jurisdictions, and Brazil, Russia, India, China and South Africa – which all have competition laws – have risen as important economic powers. Whether and how these changing global dynamics will impact international competition law norms is an important issue that remains under-explored. This article considers this question by examining China and its competition law. It examines the extent to which China has adopted and incorporated international norms into its competition law and evaluates whether China's approach to, and understanding of, competition law might challenge or change the development of international competition law norms in the future.*

## 1 Introduction

The number of jurisdictions with a competition law has increased rapidly since the early 1990s, growing from fewer than 20 in 1990 to over 130 today. Despite the absence of formal international agreements on competition law or formal competition-related rules that apply on a global scale, an international consensus on the

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soft norms, standards and best practices for competition law has been created and fostered. There is increasing discourse on, and reference to, international competition law norms by domestic and international actors within the competition law community.

At the international – and, at the very least, transnational<sup>1</sup> – level, there is general agreement that, to address the problem of anticompetitive conduct and its harmful effects, a competition law should cover anticompetitive agreements, abuses of market power and mergers. There is also a consensus that economic analysis, tools and concepts usefully inform competition law analysis and enforcement. These international norms are reflected in national competition laws. At the national level, most competition laws address all three types of anticompetitive conduct. Though there are national variations in the objectives of the law, its scope (especially with regard to exemptions) and the specifics of how the general prohibitions are implemented (in particular, there is an increasingly apparent divergence with respect to abuse of dominance conduct), there is nonetheless a significant degree of convergence among national competition laws, especially in relation to cartels and mergers, and there are many similarities in the language and standards adopted. Economic analysis is also increasingly commonly used by national competition authorities in enforcement and policy development. As such, competition law is now truly international, with competition law norms and practices settling across jurisdictions, together with a measure of agreement as to their content. Therefore, even though there is no formal international competition law or a single ‘model’ of competition law that is transplanted from jurisdiction to jurisdiction, there exists a ‘transnational legal order’<sup>2</sup> for competition law.

To date, competition law discussions at the international level have been dominated by the USA, the European Union (EU) and developed countries more generally. However, developing countries now constitute a majority of competition law jurisdictions, and Brazil, Russia, India, China and South Africa (the BRICS countries) are increasingly important economic powers. As David Gerber notes, ‘the future of global competition law depends on decisions to be made in countries outside Europe and the US [and these] decisions will be shaped by factors that differ significantly from those created by the US and European experience’.<sup>3</sup> However, whether these changing dynamics will disrupt and challenge existing understandings of competition law globally or be reflected in the future development of international competition law norms are questions that remain under-explored.

This article considers this issue by examining China, its competition law and the implications for international competition law. Even though China is a relatively new

<sup>1</sup> In this article, the term ‘transnational’ is intended to describe legal norms, practices or conduct that extend beyond national borders but fall short of being international in their influence or application.

<sup>2</sup> A transnational legal order is ‘a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions’. See Shaffer and Halliday, ‘Introduction’, in G. Shaffer and T.C. Halliday (eds), *Transnational Legal Orders* (2015) 3.

<sup>3</sup> D.J. Gerber, *Global Competition: Law, Markets and Globalization* (2010), at 116.

competition law jurisdiction (its first comprehensive competition law, called the Anti-Monopoly Law (AML),<sup>4</sup> came into effect in August 2008), it has quickly attracted the attention of businesses, lawyers, governments, academics and other commentators worldwide. China's economic reach, along with the fact that many multinational businesses have operations in or affecting China, means that China has become an important global competition law jurisdiction. Whether China's approach to competition law might impact international norms will depend on factors such as the extent to which China follows and diverges from international norms, the contestations to the norms that arise and the degree and level of interaction between China and the institutions that generate those norms.

To consider and explore the potential impact of China on international competition law, this article adopts an analytical approach that is drawn from research on transnational legal orders and comparative international law. Although these two areas of research appear to have different starting points – comparative international law takes as given the existence of rules that are internationally applicable, whereas the transnational legal orders literature aims to find out how rules transcend national boundaries – they ask common questions.<sup>5</sup> Both areas examine how international norms are formulated, the key actors and institutions involved and the dynamics of such processes; the national or regional approaches to the law; the interaction between the national and international levels; and how international norms might be challenged or disrupted by changes such as shifts in geopolitical power to reflect a different perspective.<sup>6</sup> These questions will form the basis of the analytical approach taken in this article.

This article is structured as follows. Part 2 examines how competition law norms are formulated, settled and propagated across national boundaries, focusing on the key actors and institutions involved in that process. This analysis identifies the dominant voices in international competition law discourse and the mechanisms through which that influence is disseminated and reflected in international norms. Part 3 then examines China's engagement with international competition law norms. It assesses the extent to which international competition law norms have been incorporated into the AML and its decisions and considers the approach that China takes to competition law. Part 4 then explores whether China's approach to competition law might change or challenge the existing understanding of international norms and influence its future development. It is important to note that the scope of inquiry in this article is limited to the substantive – not procedural – aspects of competition law and enforcement.

<sup>4</sup> Anti-Monopoly Law of the People's Republic of China (AML), promulgated by the Standing Committee of the National People's Congress, 30 August 2007 (effective 1 August 2008).

<sup>5</sup> Indeed, comparative international law characterizes international law as a transnational legal field. See A. Roberts, *Is International Law International?* (2017), at 3.

<sup>6</sup> See, e.g., *ibid*; A. Roberts *et al.* (eds), *Comparative International Law* (2018); Shaffer and Halliday, *Transnational Legal Orders*, *supra* note 2; G. Shaffer (ed.), *Transnational Legal Ordering and State Change* (2013).

This article argues that, whilst China is unlikely to formally challenge international competition law norms in the short term, its understanding and approach to competition law is different to the international *status quo*. China adopts a state-centred approach to competition law, which derives from its view that the state is central to the competitive process and markets. Though it presents an alternative approach to competition law for other countries, especially those with developing or transitioning economies, its feasibility may be limited for a variety of reasons.

## 2 Development of International Competition Law Norms and the Key Players

An international consensus on competition law developed in large part as a response to the increasing number of jurisdictions with a competition law. As noted above, the number of jurisdictions with a competition law has grown rapidly since the early 1990s. The competition laws drafted and adopted by new competition jurisdictions have tended to follow or be based on the competition (antitrust) laws and practices of the USA and EU, which are regarded as the ‘model’ or ‘leading’ competition law jurisdictions;<sup>7</sup> hence, competition law is largely a product of legal transplantation. With the increasing globalization of business and commercial activity, national competition laws are being enforced extraterritorially with greater frequency to address anticompetitive conduct. This means that domestic laws have impact beyond national borders, and multiple jurisdictions may be involved in reviewing or investigating potentially anticompetitive conduct. This has resulted in greater cooperation amongst competition agencies worldwide, leading to the exchange of information and enforcement experiences. At the same time, there are concerns that national competition laws might be in conflict or be enforced inconsistently.<sup>8</sup> In the absence of binding international competition law rules, the convergence of substantive rules and, to a lesser extent, procedural rules has been promoted as a strategy to address these issues.<sup>9</sup> As a result, soft norms on competition law have developed and apply around the world.

The development, settlement and propagation of international competition law norms have been facilitated and promoted through several formal and informal mechanisms. First, bilateral and multilateral agreements touching on competition issues have created channels of exchange and communication between jurisdictions. Although relatively few in number, some competition agencies have bilateral cooperation agreements on competition matters with one another. For example, the USA has competition cooperation agreements with nearly 20 jurisdictions, including the

<sup>7</sup> B.M. Owen, ‘Competition Policy in Emerging Economies’, Stanford Institute for Economic Policy Research Discussion Paper no. 04-10 (2005) 3, at 6–7; S. Joekes and P. Evans, *Competition and Development: The Power of Competitive Markets* (2008), at 14.

<sup>8</sup> Gerber, *supra* note 3, at 90–95; Cheng, ‘Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law’, 12 *Chicago Journal of International Law* (2012) 433, at 434–438.

<sup>9</sup> Gerber, *supra* note 3, at 111; Cheng, *supra* note 8, at 436–442.

European Commission.<sup>10</sup> Whilst the scope of cooperation in these agreements can be quite limited,<sup>11</sup> bilateral competition cooperation agreements have encouraged the exchange of views on issues or cases of mutual interest, reduced enforcement conflicts between jurisdictions and promoted convergence on a number of substantive and procedural matters.<sup>12</sup> Trade agreements might also contain competition policy chapters. Even though such chapters do not usually impose significant obligations on the parties,<sup>13</sup> they do establish a voluntary channel of information exchange and influence on each other's competition laws.<sup>14</sup>

Second, several international organizations and networks play key roles in developing and promoting international competition law norms. The Organisation for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN) are especially active in this space.<sup>15</sup> They issue recommendations and guidance documents on competition law and enforcement issues, hold regular meetings where members and non-members discuss specific competition law issues and share experiences and promote convergence.<sup>16</sup> The OECD and UNCTAD also provide technical assistance to newer competition law jurisdictions (including countries seeking to adopt a competition law) and conduct peer reviews of competition laws.

The respective influence of the OECD, UNCTAD and the ICN on the development of international competition law norms, as well as the norms that they formulate and

<sup>10</sup> For a more detailed discussion of bilateral agreements between competition agencies, see M.M. Dabbah, *International and Comparative Competition Law* (2010), at 494–509.

<sup>11</sup> Cooperation may include notifying one another of significant changes to their competition law or of enforcement activities that impact on the other's interests, providing requested information or providing technical assistance, for example. It is less common for a cooperation agreement to require that parallel investigations be coordinated or provide that one party can request another to undertake an investigation.

<sup>12</sup> For a discussion of US and European Union (EU) cooperation on competition matters, see Dabbah, *supra* note 10, at 501–505, 512–517.

<sup>13</sup> Though Gal and Padilla note that the EU has in its trade agreements required some level of similarity in relation to the application of competition laws. See Gal and Padilla, 'The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy', 76 *Antitrust Law Journal (ALJ)* (2010) 899, at 901.

<sup>14</sup> Gerber, *supra* note 3, at 109.

<sup>15</sup> The World Bank promotes the adoption of competition law and policy, but it largely leaves the formulation of the norms to the Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD) and the International Competition Network (ICN). Other transnational competition law-related organizations and networks exist, such as the European Competition Network and the ASEAN Experts Group on Competition, but their influence is regional rather than international in scope, though they largely support international efforts. See further Dabbah, *supra* note 10, at 153–154, 366–408.

<sup>16</sup> See, e.g., OECD, *Competition*, available at [www.oecd.org/competition](http://www.oecd.org/competition); UNCTAD, *The United Nations Set of Principles on Competition*, Doc. TD/RBP/CONF/10/Rev.2, 22 April 1980; UNCTAD, *Model Law on Competition: Substantive Possible Elements for a Competition Law, Commentaries and Alternative Approaches in Existing Legislation* (2010); 'About', ICN, available at [www.internationalcompetitionnetwork.org/about](http://www.internationalcompetitionnetwork.org/about); 'The ICN's Vision for Its Second Decade', 10th Annual Conference of the International Competition Network, The Hague, Netherlands, 17–20 May 2011, at 4.

promote, are in part a function of their membership base and focus. The membership of the OECD consists mostly of developed countries, whereas UNCTAD and the ICN have a broader membership base. All of the member states of the United Nations participate in UNCTAD, and the ICN's members are competition agencies worldwide; as of June 2016, 132 competition agencies from 120 competition law jurisdictions were members of the ICN.<sup>17</sup> The guidance and recommendations issued by the OECD usually reflect the competition laws, enforcement practices and preferences of developed countries, and Maher Dabbah observes that many non-member countries view the OECD as a vehicle for more developed countries.<sup>18</sup> Further, even though non-member observer countries can participate in OECD meetings and roundtables, their input is limited, and they are required to assist the OECD in promoting its competition law guidance and recommendations to other non-member countries.<sup>19</sup> In contrast, UNCTAD focuses on the interests and needs of developing countries. However, UNCTAD appears to have had less influence than the OECD on international competition law development due to the lower level of engagement that the USA and, to a lesser extent, the EU have with UNCTAD.<sup>20</sup> The ICN has played a key role in fostering an international competition law community,<sup>21</sup> and it has practical influence on policy and law reforms even though its recommendations and guidance are not binding. According to a 2016 survey conducted by the ICN of its members, more than half of the survey respondents used ICN materials to develop or revise internal procedures, guidelines and best practices, and some members used ICN materials in the review or revision of their competition laws.<sup>22</sup> However, whilst its membership is broad and it focuses on inclusiveness, Eleanor Fox notes that developed countries have had the most influence in setting the ICN's agenda and formulating its norms and recommendations.<sup>23</sup>

The competition authorities of the USA and the EU also actively promote competition law and policy worldwide. In addition to being involved in, and influential at, the OECD, the ICN and, to a lesser extent, UNCTAD, they often provide technical assistance and capacity building to newer competition law jurisdictions. Such technical assistance includes helping to prepare draft laws, commenting on draft laws, providing advice and assistance on the implementation and enforcement of laws and training

<sup>17</sup> ICN, *The Future of the ICN in its Second Decade: Final Report*, 15 June 2016, at 3.

<sup>18</sup> M.M. Dabbah, *The Internationalisation of Antitrust Policy* (2003), at 253; Dabbah, *supra* note 10, at 140–141.

<sup>19</sup> OECD Competition Committee, *Proactive Strategy vis-à-vis Non Members*, Doc. DAF/COMP(2005)26, 14 June 2005, at 7. To be invited to participate as an observer, the OECD Competition Committee requires a non-member to commit, *inter alia*, 'to associate themselves to certain [OECD] Council Recommendations [and] to actively participate in the Committee's outreach events and to disseminate the Committee's recommendations and best practices to other authorities'. Non-members are observers for a two-year period; there is 'no presumption of renewal; it will be earned by performance'.

<sup>20</sup> Sokol, 'International Antitrust Institutions', in A.T. Guzman (ed.), *Cooperation, Comity and Competition Policy* (2011) 187, at 200.

<sup>21</sup> Gerber, *supra* note 3, at 116.

<sup>22</sup> ICN, *supra* note 17, at 3.

<sup>23</sup> Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network', 43(1) *The International Lawyer* (2009) 151, at 152.

competition officials and judges.<sup>24</sup> The influence of such efforts is demonstrated by the fact that the European model of competition law seems to have been followed by a number of new competition law jurisdictions, and theories of harm and analytical and enforcement approaches and policies developed and adopted in the USA are highly influential in, and applied by, many jurisdictions.<sup>25</sup> Moreover, the USA and the EU are regarded as the leading competition jurisdictions, reflecting their political and economic influence. This is also due to their lengthy experience with competition law and enforcement.<sup>26</sup> The USA, in particular, has had over 100 years of competition law experience and has been at the forefront of competition law interpretation and development, especially with its use of economic theory.

As a result, the soft law, norms and practices relating to competition law that are developed and promoted by the OECD, UNCTAD, the ICN, the USA and the EU on an international scale are ‘a collection of [competition law-related] formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of [competition] law across national jurisdictions’.<sup>27</sup> Due to the power dynamics that are inherent in the institutions and mechanisms that formulate and propagate international competition law norms, they are heavily influenced by and reflect the perspectives and practices of the USA, the EU and developed countries more generally.<sup>28</sup>

It remains to be seen whether this state of affairs will continue, given the increasing diversity of the countries that have a competition law, the growing importance of developing countries to competition law and the global economy and changing global dynamics. National competition laws and enforcement practices do vary, even if their basic prescriptions are largely the same. A number of competition laws incorporate objectives beyond the enhancement of consumer welfare, and governments may have different attitudes towards the usefulness and importance of competition law in resolving economic problems. The development of national competition laws

<sup>24</sup> See, e.g., Hughes *et al.*, ‘International Competition Technical Assistance: The Federal Trade Commission’s Experience and Challenges for the Future’, in E. Fox *et al.* (eds), *Antitrust in Emerging and Developing Countries: Featuring Africa, Brazil, China, India, Mexico* (2016) 189; UNCTAD Secretariat, Effectiveness of Capacity-building and Technical Assistance Extended to Young Competition Agencies, Doc. TD/B/C.I./CLP/11/Rev.1, 29 June 2011, at 7–8.

<sup>25</sup> Kovacic, ‘Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Economies’, 66 *University of Cincinnati Law Review* (1998) 1075, at 1087–1089; McMahon, ‘Competition Law and Developing Economies: Between “Informed Convergence” and International Convergence’, in A. Ezrachi (ed.), *Research Handbook on International Competition Law* (2012) 209, at 223–225; Kovacic, ‘Dominance, Duopoly and Oligopoly: The United States and the Development of Global Competition Policy’, 13(11) *Global Competition Review* (2010) 39, at 40–42.

<sup>26</sup> The USA was the second country in the world to adopt a competition law statute, enacting the Sherman Act in 1890. The origins of European competition law thought began in Austria during the 1890s, and the first competition law statute in Europe was enacted in Germany in 1923. The Treaty of Rome, which contained competition provisions that applied generally to member states and throughout the European Community, was entered into in 1957. Treaty Establishing the European Economic Community 1957, 298 UNTS 3.

<sup>27</sup> Shaffer and Halliday, *supra* note 2, at 5.

<sup>28</sup> Cheng, *supra* note 8, at 448–449.



and associated enforcement practice may eventually lead to a situation where it becomes untenable to have international competition law norms that are inadequate to address the goals, concerns and needs of a majority of competition law jurisdictions. Further, the recent past has seen the USA and the EU take different approaches to certain antitrust/competition law issues, which could affect the stability of certain international norms, as the approaches of these jurisdictions have been key in shaping the content of those norms to date. Moreover, the wider shift in global power dynamics, moving away from a unipolar power to a situation where multiple powers exist, might also impact competition law issues. As Gregory Shaffer and Terence Halliday point out, ‘the rise of China and the other BRICs should affect the creation, operation, reform, and potential demise of some [transnational legal orders]’.<sup>29</sup>

As such, to explore these changing dynamics and their potential impact on international competition law, the remainder of this article considers China and its competition law. This inquiry focuses not only on the question of whether and how international norms are received and applied in China but also on the equally important, but under-considered, question of how China’s competition law and practice could impact international norms.

### 3 China’s Approach to Competition Law and Engagement with International Norms

To assess the approach that China takes to competition law and its engagement with international competition law norms, this article draws a distinction between China’s formal acceptance of the norms and its implemented understanding of them. Formal acceptance refers to the extent to which international norms have been incorporated into the text, language and analytical framework of the AML and decisions taken under that law. However, even where international competition law norms are formally received into the domestic context, the implemented understanding of those received norms may be transformed by the domestic legal and social discourses that are closely associated with that law.<sup>30</sup> This will affect how competition law is viewed, used and implemented.

This analysis demonstrates that, whilst China has largely incorporated the formal language and analytical frameworks reflected in international competition law norms in the AML, discussions of competition law are situated in a context where the state is considered essential to the proper functioning of markets and the competitive process. As a result, the state plays a central role in ensuring that competition law is implemented to support the functioning of China’s socialist market economy, and

<sup>29</sup> Shaffer and Halliday, *supra* note 2, at 33.

<sup>30</sup> See, e.g., Kahn-Freund, ‘On Uses and Misuses of Comparative Law’, 37 *Modern Law Review* (MLR) (1974) 1; Teubner, ‘Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences’, 61 *MLR* (1998) 11; Berkowitz *et al.*, ‘The Transplant Effect’, 51 *American Journal of Comparative Law* (2003) 163. Cf. A. Watson, *Legal Transplants: An Approach to Comparative Law* (1993).



it is viewed as an instrument that helps to further the interests and various roles of the state.

### *A The Formal Reception of International Competition Law Norms in China*

Overall, the AML has the attributes of a legal transplant that is based substantially on international competition law norms and, in particular, the competition laws of the EU and Germany.<sup>31</sup> The AML regulates anticompetitive agreements, abuses of dominance and mergers.<sup>32</sup> It distinguishes between horizontal and vertical agreements and prohibits hard-core cartel conduct, such as price fixing, market sharing and output restriction and resale price maintenance.<sup>33</sup> A leniency policy as well as exemptions for certain types of horizontal and vertical agreements are also provided for under the AML.<sup>34</sup> The AML also stipulates that excessive pricing, selling below cost, refusal to deal, exclusive dealing and tying are regulated as abuses of dominance.<sup>35</sup> Further, the concepts of relevant market and dominant market position as well as the approach to the competition assessment of mergers that are set out in the AML are largely consistent with international norms.<sup>36</sup>

The consistency of the AML with international norms can be traced to the considerable efforts made by the drafters of the AML to study and learn from the experiences of foreign competition authorities and international competition law norms. One of the guiding principles adopted by the drafters of the AML was that the law should be consistent with international norms and practices.<sup>37</sup> The views of various foreign competition law experts were sought during the drafting process. Such experts included competition officials from the USA, the EU, Germany, Japan, Korea and Russia; representatives from international organizations such as the OECD, UNCTAD and the World Bank and competition law academics from the USA, Europe and Australia, who were invited, for example, to conferences and seminars held by the Chinese government to discuss, comment and make suggestions on the draft AML.<sup>38</sup> Chinese government officials involved in the drafting of the AML also visited the USA, Europe, Japan,

<sup>31</sup> Wang, 'Highlights of China's New Anti-Monopoly Law', 75 *ALJ* (2008) 133, at 135; Bush, 'Constraints on Convergence in Chinese Antitrust', 54 *Antitrust Bulletin* (2009) 87, at 92–93; Zheng, 'Transplanting Antitrust in China: Economic Transition, Market Structure and State Control', 32 *University of Pennsylvania Journal of International Law* (2010) 643, at 647–668.

<sup>32</sup> AML, *supra* note 4, ch. 2–4.

<sup>33</sup> *Ibid.*, Arts 13, 14.

<sup>34</sup> *Ibid.*, Arts 15, 46.

<sup>35</sup> *Ibid.*, Art. 17.

<sup>36</sup> *Ibid.*, Arts 12, 17, 27, 28; Guideline of the Anti-Monopoly Commission of the State Council on Defining the Relevant Market, adopted by the State Council Anti-Monopoly Commission, 24 May 2009.

<sup>37</sup> Cao, An Explanation of China's Anti-Monopoly Law (draft), 22nd Session of the Tenth Standing Committee of the National People's Congress, 24 June 2006; Speech Excerpts: Draft of the Anti-Monopoly Law, 22nd Session of the Standing Committee of the Tenth National People's Congress, 27 June 2006; Shang, 'Antitrust in China: A Constantly Evolving Subject', 3 *Competition Law International* (2009) 4.

<sup>38</sup> Cao, *supra* note 37; Wu, 'Perspectives on the Chinese Anti-Monopoly Law', 75 *ALJ* (2008) 73, at 78; X. Wang, *The Evolution of China's Anti-Monopoly Law* (2014), at xvi, xviii–xix; Q. Wu, *Competition Laws, Globalization and Legal Pluralism: China's Experiences* (2013), at 137.

Australia and other jurisdictions to learn from their experiences with competition law and policy.<sup>39</sup> Further, foreign competition authorities and international organizations provided technical and capacity-building assistance to Chinese competition authorities, courts and universities; Stanley Wong observes that the USA and the EU have been the major providers of such assistance, with the OECD and UNCTAD, among others, also being involved.<sup>40</sup>

At the same time, the AML is tailored to suit China's specific concerns and circumstances. Another guiding principle that the drafters adopted was that the AML needed to reflect and suit China's national conditions, including its stage of economic development and industrial policy concerns.<sup>41</sup> As a result, there are a number of provisions in the AML that are less commonly found in other competition laws. For example, the AML prohibits abuses of administrative power that restrict competition, which include acts of local protectionism and impeding competition in, or entry into, particular sectors, in both cases typically to protect local and/or incumbent businesses.<sup>42</sup> Such public restraints on competition are widely considered in China to be significant barriers to furthering China's economic reforms and creating a unified, national market; therefore, it was ultimately decided that the AML needed to address this issue.<sup>43</sup> Whilst the concept of using competition law to address public restraints on competition is not unique to China – for example, the EU's competition rules can be used to challenge anticompetitive laws and regulations of member states<sup>44</sup> and the competition laws of Russia, Ukraine and Hungary also contain administrative monopoly prohibitions – it is not a common approach.<sup>45</sup> There are also AML provisions that allow for the consideration of public interest, industrial policy, economic development and social factors<sup>46</sup> and recognize and protect the leading role of the state in the economy, both as participant and regulator, which is compatible with the socialist nature of China's market economy.<sup>47</sup> Until March 2018, the administrative enforcement of the AML

<sup>39</sup> Wang, 'The Prospect of Antimonopoly Legislation in China', 1 *Washington University Global Studies Law Review* (2002) 201, at 224; Harris and Yang, 'China: Latest Developments in Anti-Monopoly Law Legislation', 19(2) *Antitrust* (2005) 89, at 89.

<sup>40</sup> Wong, 'Effectiveness of Technical Assistance in Capacity Building on Competition Law and Policy: The Case of China', in A. Emch and D. Stallibrass (eds), *China's Anti-Monopoly Law: The First Five Years* (2013) 357, at 364–365; see, e.g., EU-China Competition Cooperation, 'EU-China Competition Policy: Competition Weeks', available at [www.euchinacomp.org/index.php/competition-weeks](http://www.euchinacomp.org/index.php/competition-weeks).

<sup>41</sup> Cao, *supra* note 37; Anti-Monopoly Law Second Deliberation Draft More Compatible with Our National Conditions: Speech Excerpts of the Group Deliberations of the Draft Anti-Monopoly Law (1), 28th Session of the Standing Committee of the Tenth National People's Congress, 25 June 2007; Wu, *supra* note 38, at 77.

<sup>42</sup> AML, *supra* note 4, ch. 5.

<sup>43</sup> W. Ng, *The Political Economy of Competition Law in China* (2018), at 224–229.

<sup>44</sup> Consolidated Version of the Treaty on European Union, OJ 2016 C 202/13, Art. 4(3); Consolidated Version of the Treaty on the Functioning of the European Union, OJ 2016 C 202/1, Art. 106(1); R. Whish and D. Bailey, *Competition Law* (8th edn, 2015), at 238.

<sup>45</sup> These legal provisions were used to justify the inclusion of administrative monopoly within the ambit of the AML. Wang, *supra* note 38, 114, 117–118.

<sup>46</sup> See, e.g., AML, *supra* note 4, Arts 1, 4, 27, 28.

<sup>47</sup> See, e.g., *ibid.*, Arts 4, 7.

was divided amongst three authorities, reflecting the pre-AML competition-related experiences and responsibilities of the authorities but which was against the advice of domestic and foreign competition law experts.<sup>48</sup> This divided enforcement structure was dismantled in late March 2018, and competition enforcement is now the responsibility of the newly established State Administration for Market Regulation (SAMR).

It is somewhat more difficult to evaluate the extent to which international norms have influenced the enforcement of the AML due to the limited transparency provided by the decisions of the Chinese authorities. Only a limited number of administrative and court decisions made under the AML are publicly available, and decisions are released on a seemingly ad hoc basis. The decisions made by the competition authorities tend to be brief and present conclusions rather than provide reasons or evaluate arguments (in particular, non-merger decisions focus on presenting findings of fact rather than analysis), whereas court decisions contain more detail and analysis.

Nonetheless, it is apparent that the decisions made by the Chinese authorities are increasingly framed in language and analysis that are identifiable as, and consistent with, international competition law norms. This is especially the case for merger enforcement, where the published decisions of the competition authority demonstrated understanding of, and engagement with, merger analysis and exhibit a general trend towards convergence with the USA and the EU.<sup>49</sup> The Ministry of Commerce (MOFCOM), which was responsible for merger enforcement before the SAMR was established, looked at matters such as market shares, the degree of market concentration and market entry to evaluate the competitive impact of a merger, and it used tools and theories commonly adopted by other competition authorities in competition assessment, such as the Herfindahl-Hirschman Index and theories of competitive harm recognizable as unilateral, coordinated and foreclosure effects.<sup>50</sup> The merger conditions that have been imposed by the MOFCOM can be viewed as either structural, behavioural or hybrid remedies, consistent with the practices of other jurisdictions. These approaches have continued under the SAMR. For non-merger enforcement, the influence of international norms is also discernible, though it is not as strong as in the merger context. Even though the AML does not distinguish between those anti-competitive agreements that are prohibited outright (and, therefore, there need not be consideration of its impact on competition) and those that will be evaluated by weighing their pro and anticompetitive effects, as is commonly done in many other competition law jurisdictions,<sup>51</sup> there appears to be an emerging consensus that cartel

<sup>48</sup> Wang, *supra* note 31, at 144–145; Huang, 'Pursuing the Second Best: The History, Momentum and Remaining Issues of China's Anti-Monopoly Law', 75 *ALJ* (2008) 117, at 125; Sections of Antitrust Law and International Law and Practice, American Bar Association, Joint Submission to the Ministry of Commerce of the People's Republic of China, 15 July 2003, at 4–5, 26; Harris and Yang, *supra* note 39, at 91.

<sup>49</sup> Huang and Deng, 'Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China', 31(2) *Antitrust* (2017) 44, at 50.

<sup>50</sup> For an analysis of the decisions of the Ministry of Commerce (MOFCOM), see Ng, *supra* note 43, at 32–42.

<sup>51</sup> E. Elhauge and D. Geradin, *Global Competition Law and Economics* (2nd edn, 2011), at 84, 735, 743, 772–773.

conduct is prohibited *per se* without reference to its competitive impact.<sup>52</sup> Similarly, whilst the AML does not expressly require consideration of the competitive impact of conduct when determining whether there has been an abuse of dominant market position, in practice, the competition authorities and the courts assess the impact of the conduct on competition before deciding whether the dominant party has breached the AML.<sup>53</sup> This is in keeping with the practices of most other jurisdictions.

However, there are some clear departures between China's enforcement practice and international competition law norms. In comparison to other jurisdictions, China has demonstrated a willingness to intervene at low combined market shares or small market share increments when considering mergers,<sup>54</sup> even though such market shares and increments typically would not raise concerns for other jurisdictions.<sup>55</sup> The most visible point of divergence between China's merger enforcement and international competition norms is that China is more open than other jurisdictions to using behavioural remedies. Behavioural remedies are ongoing commitments, are designed to modify or constrain behaviour and require monitoring and supervision over a long-term period, whereas structural remedies are one-off and seek to restore or preserve the competitive structure of the market that existed before the merger. China does not, unlike a number of other jurisdictions, express a strong preference for structural remedies over behavioural remedies.<sup>56</sup> In fact, it does not express any preference for any particular type of remedy, apart from requiring that it be sufficient

<sup>52</sup> The relevant regulation adopted by the State Administration for Market Regulation (SAMR) and which is currently in force provides that price fixing, output restriction, market sharing, restrictions on new technologies and boycotts are *per se* illegal. Interim Regulation on the Prohibition of Monopoly Agreements, SAMR, 26 June 2019 (effective 25 July 2019), Arts 7–11. See also, e.g., the competition authorities' decisions on its investigations into cartels relating to sea sand in Guangdong, the nationwide supply of allopurinol tablets, encryption device manufacturers in Anhui, Japanese ball bearing manufacturers, the Hubei Insurance Association and the Guangdong Panyu Animation and Entertainment Industry Association. In relation to court cases, see Judicial Interpretations Related to Issues Arising in Civil Litigation under the Anti-Monopoly Law, adopted by the Supreme People's Court, 8 May 2012. See further Cheng, 'The Meaning of Restriction of Competition under the Monopolistic Agreements Provisions of the PRC Anti-Monopoly Law', 40(2) *World Competition* (2017) 323.

<sup>53</sup> See, e.g., the Supreme Court of China's decision in the litigation between Qihoo 360 and Tencent and the competition authorities' decisions in the abuse of dominance investigations of Qualcomm, Tetra Pak, Chongqing Qingyang Pharmaceutical, the Fushun branch of the Liaoning Tobacco Company, Qingdao Xinao Xincheng Gas and Urumqi Water.

<sup>54</sup> For example, the MOFCOM has found potential anticompetitive effects arising from mergers with combined post-merger market shares of 9.3 per cent (Glencore/Xstrata) and 18 per cent (Marubeni/Gavilon), or with market share increments of less than 1 per cent (Novartis/Alcon, Marubeni/Gavilon).

<sup>55</sup> See, e.g., ICN Merger Working Group, ICN Recommended Practices for Merger Analysis (2017), at 13–15; Council Regulation 139/2004, OJ 2004 L 24/1, para. 32; Australian Competition and Consumer Commission, Merger Guidelines, November 2008, at 9; Japan Fair Trade Commission, Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination, 31 May 2004, at 20.

<sup>56</sup> Deng and Zhang, 'Interview with Shang Ming, Director General of the Anti-Monopoly Bureau under the Ministry of Commerce of the People's Republic of China', in *The Antitrust Source* (2014) 1, at 3; International Competition Network Merger Working Group: Analytical Framework Subgroup, 'Merger Remedies Review Project', 4th ICN Annual Conference, Bonn, June 2005, at 7.

to eliminate the anticompetitive effects of the merger, be operational in practice and be capable of addressing the competition problem in a timely manner.<sup>57</sup> In practice, the MOFCOM and the SAMR have used a range and combination of structural and behavioural remedies, and behavioural remedies have been imposed more often than structural remedies in both horizontal and non-horizontal mergers. Some of the types of behavioural remedies required by the MOFCOM and the SAMR might also be regarded as unconventional.<sup>58</sup> For example, where hold separate remedies are required, they are typically used to support the structural remedies to ensure the ongoing viability of a business and are temporary in nature. In contrast, the MOFCOM and the SAMR have imposed long-term hold separate remedies as standalone, and not ancillary, remedies.<sup>59</sup> For non-merger conduct, one key point of difference has been in the application of the leniency policy. The National Development and Reform Commission (NDRC), which was responsible for price-related non-merger enforcement under the AML prior to the SAMR, had applied the leniency policy equally to horizontal and vertical agreements.<sup>60</sup> This stood in contrast to the approach taken in a number of other jurisdictions, such as the USA, where leniency is only available in relation to horizontal agreements.<sup>61</sup>

Further, the outcomes of some AML cases have been criticized as being contrary to international norms. Decisions where the Chinese competition authorities reached outcomes that differed to those reached by other competition authorities looking at the same conduct, cases involving products in sensitive, strategic or important industries, the ostensibly disproportionate enforcement of the AML against foreign companies and the intrusive nature of the remedies required of parties, especially foreign companies, have attracted attention and criticism. There are concerns that the AML is being enforced to further industrial policy aims and to undermine intellectual property rights (IPRs), that it is being applied unfairly to the detriment of foreign companies and in an inconsistent manner and that a number of cases lack sufficient basis

<sup>57</sup> Ministry of Commerce Anti-Monopoly Bureau, 'Head of the Ministry of Commerce Anti-Monopoly Bureau's Interpretation of the 'Regulation on the Imposition of Restrictive Conditions on Concentrations of Business Operators (Trial)', 17 December 2014, available at <http://fldj.mofcom.gov.cn/article/j/201412/20141200835988.shtml>.

<sup>58</sup> Huang and Deng, *supra* note 49, at 47.

<sup>59</sup> This occurred in the merger reviews of Seagate/Samsung, Western Digital/Hitachi, Marubeni/Gavilon, MediaTek/MStar, Advanced Semiconductor Engineering/Siliconware Precision Industries and Cargotec/TTS.

<sup>60</sup> For example, the National Development and Reform Commission (NDRC) applied the leniency policy in its investigations of the resale price maintenance practices of infant formula companies and lens manufacturers, in addition to a number of its cartel investigations such as into the sea sand industry in Guangdong. The relevant SAMR regulation also does not distinguish between horizontal and vertical agreements in its discussion of the leniency policy. Interim Regulation on the Prohibition of Monopoly Agreements, *supra* note 52, Arts 33–34.

<sup>61</sup> See, e.g., S.D. Hammond and B.A. Barnett, Frequently Asked Questions Regarding the Antitrust Division's Leniency Program and Model Leniency Letters, 19 November 2008, updated 26 January 2017, available at [www.justice.gov/atr/public/criminal/239583.htm](http://www.justice.gov/atr/public/criminal/239583.htm).

in competition principles. The lack of transparency in decision-making has exacerbated these concerns.<sup>62</sup>

However, many of the criticized decisions were nonetheless framed and justified by language and analysis recognizable as international competition law concepts and approaches or, at the very least, approaches and concepts that have been adopted by other jurisdictions. For example, the MOFCOM relied on the portfolio effects theory, which had been used by the EU and Australian competition authorities in some of their merger cases, as grounds to prohibit Coca-Cola from acquiring Huiyuan, a Chinese fruit juice brand, in 2009.<sup>63</sup> Yet the decision was widely criticized as being driven by economic protectionism.<sup>64</sup> Similarly, the NDRC has been criticized for using the AML to pursue protectionist and industrial policy goals.<sup>65</sup> Even though most of its decisions have been relatively brief, the NDRC has usually sought to frame the investigated conduct and its assessment by some reference to concepts and approaches as reflected in international competition law norms. This was particularly apparent in the decision relating to its high-profile Qualcomm investigation.<sup>66</sup> Moreover, although the AML allows the competition authorities to consider matters relating to public interest, industrial policy, economic development and other considerations that are typically outside the realm of competition law, the competition authorities do not generally rely on such justifications when presenting their formal decisions, even where it might seem that those factors were relevant.

It is therefore clear that China is, even when making decisions with outcomes that are seen as being inconsistent with international norms, nonetheless framing and justifying those decisions in the formal language, analysis, concepts and tools of those norms. This indicates that, although China has largely formally internalized many

<sup>62</sup> See, e.g., US Chamber of Commerce, *Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy* (2014); European Union Chamber of Commerce in China, *European Chamber Releases Statement on China AML-Related Investigations*, 13 August 2014; Healey, 'Mergers with Conditions in China: Caution, Control, or Industrial Policy?', in L. Toohey *et al.*, (eds), *China in the International Economic Order: New Directions and Changing Paradigms* (2015) 245; M.K. Ohlhausen, 'Antitrust Enforcement in China: What Next?', Remarks delivered at the 2nd Annual GCR Live Conference, New York, 16 September 2014.

<sup>63</sup> Announcement of the Review Decision to Prohibit Coca-Cola's Acquisition of Huiyuan (Ministry of Commerce, Order no. 22, 18 March 2009); Zhang, 'Problems in Following EU Competition Law: A Case Study of Coca-Cola/Huiyuan', 3 *Peking University Journal of Legal Studies* (2012) 96.

<sup>64</sup> See, e.g., US Chamber of Commerce, *supra* note 62, at 43–44; Williams, 'Foreign Investment in China: Will the Anti-Monopoly Law Be a Barrier or a Facilitator?', 45 *Texas International Law Journal* (2009) 127, at 153–154; Lin and Zhao, 'Merger Control Policy under China's Anti-Monopoly Law', 41 *Review of Industrial Organization* (2012) 109, at 120; Huang, 'Coordination of International Competition Policies: An Anatomy Based on Chinese Reality', in A.T. Guzman (ed.), *Cooperation, Comity and Competition Policy* (2011) 229, at 240; Sokol, 'Merger Control under China's Anti-Monopoly Law', 10 *New York University Journal of Law and Business* (2013) 1, at 24–25.

<sup>65</sup> See, e.g., US Chamber of Commerce, *supra* note 62, at 53–67; Bush and Bo, 'Disentangling Industrial Policy and Competition Policy in China', in *The Antitrust Source* (2011) 1.

<sup>66</sup> Administrative Penalty Decision (National Development and Reform Commission, Order no. 1, 9 February 2015). For an analysis of this decision, see Cheng, 'The PRC NDRC Case against Qualcomm: A Misguided Venture or Justified Enforcement of Competition Law?', 5 *Journal of Antitrust Enforcement* (2017) 76.



international competition law norms, outcomes under the AML are not necessarily determinable or predictable by sole reference to those norms or the text of the AML. Therefore, this article argues that it is imperative to also examine the implemented understanding of those received international norms to better understand China's competition law and its engagement with international norms.

### ***B The Implemented Understanding of Competition Law in China***

In China, competition law is regarded as an essential part of a legal system that is needed to support the functioning of a market economy.<sup>67</sup> The Chinese government believes that the AML provides a basic framework that helps to establish competitive market structures, promote and ensure competitive conduct and guide the future direction of China's economic reforms.<sup>68</sup> The AML also helps to maintain fair and orderly market competition by eliminating market distortions, rectifying disorderly market competition and providing clear, transparent and predictable standards of conduct.<sup>69</sup> These views of competition law and the benefits it brings are not controversial and are consistent with discussions of competition law at the transnational and international levels.

Additionally, discussions of competition law are situated in the broader conversation about the relationship between competition, markets and the state in the socialist market economy. The Chinese Communist Party has stated that the market plays a decisive (though not complete) role in allocating resources and that the government's role is to, *inter alia*, oversee the market, maintain market order and intervene and remedy market failures.<sup>70</sup> The relationship between the state and the market in the economy is one that is close and entwined, and competition law is a legal instrument that sits within this relationship.

In this space, the AML is not only a key legal instrument that enhances the operation of the market mechanism in allocating resources; it also facilitates the state's market supervisory and regulatory functions and helps it achieve broader goals and outcomes.<sup>71</sup> This is reflected in both the text and enforcement practice of the AML. Article 4, which was added to the AML to expressly recognize that the AML, *inter alia*, should coordinate industrial policy with other economic policies,<sup>72</sup>

<sup>67</sup> Cao, *supra* note 37; Speech Excerpts, *supra* note 37; Shang, *supra* note 37, at 4.

<sup>68</sup> Cao, *supra* note 37; Speech Excerpts, *supra* note 37.

<sup>69</sup> Cao, *supra* note 37; Speech Excerpts, *supra* note 37.

<sup>70</sup> Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening Reform (People's Republic of China), Third Plenary Session of the 18th Central Committee of the Communist Party of China, 12 November 2013; Xi Jinping, An Explanation of Decision of the Central Committee of the Communist Party of China on Some Major Issues Concerning Comprehensively Deepening Reform, Third Plenary Session of the 18th Central Committee of the Communist Party of China, 15 November 2013.

<sup>71</sup> Cao, *supra* note 37; Economic Law Division of the Legal Affairs Commission of the Standing Committee of the National People's Congress (ed.), *The Anti-Monopoly Law of the People's Republic of China: Explanation of the Articles, Legislative Reasons, and Related Regulations* (2007), at 15.

<sup>72</sup> Report of the Law Committee of the National People's Congress on the Revision of the Anti-Monopoly Law of the People's Republic of China (draft), 28th Session of the Standing Committee of the Tenth National People's Congress, 24 June 2007.



provides that ‘the state formulates and implements competition rules compatible with the socialist market economy, perfects macroeconomic control, and develops a unified, open, competitive, and orderly market system’. There are also, as noted above, express provisions in the AML for the consideration of development, industrial policy, public interest and social factors. Moreover, the fact that the AML is now being enforced by the SAMR, which is responsible for, *inter alia*, market supervision and management and maintaining market order, further demonstrates that the AML is viewed as part of the broader system of macro-economic regulation and control.

This view of the AML as an instrument of market supervision has been reflected in a number of the enforcement actions taken by the Chinese competition authorities. The NDRC had considered the AML to be a part of the legal system relating to price supervision and regulation,<sup>73</sup> and it used the AML to monitor and supervise drug prices subsequent to pricing reforms in that industry and to respond to pricing concerns relating to imported infant formula and imported cars.<sup>74</sup> The supervisory approach to market regulation is likewise reflected in many merger conditions. As discussed above, a majority of the merger conditions imposed in China have been behavioural in nature. These conditions require implementation by a merged firm over a long-term period and allow the MOFCOM and the SAMR to monitor and gather information about the activities of a merged firm over a long-term period and provide it with grounds to intervene after the completion of the merger to ensure compliance with the conditions.<sup>75</sup>

Further, the AML has been implemented in a manner that not only addresses concerns about anticompetitive conduct but also helps to promote and address other policy aims and concerns of the state. For example, a number of merger and abuse of dominance cases have dealt with, as their key concern, IPRs,<sup>76</sup> and the competition authorities have been drafting an antitrust guideline applying specifically to IPRs, which follows on from an implementing regulation on the anticompetitive abuse of IPRs published by the State Administration for Industry and Commerce (which was responsible for non-price-related non-merger enforcement under the AML prior to the

<sup>73</sup> Opinion on Establishing and Perfecting the Price Supervision Mechanism, National Development and Reform Commission, Order no. 2099, 22 October 2013.

<sup>74</sup> The NDRC sanctioned six infant formula manufacturers (with a further three companies obtaining leniency) for resale price maintenance and undertook a series of investigations into the cartel and resale price maintenance conduct of Chrysler, FAW-Volkswagen, Mercedes-Benz and Dongfeng Nissan and their dealers. However, it remains to be seen whether the AML will continue to be enforced in this manner under the SAMR, as the SAMR has allocated its responsibilities for AML enforcement and price supervision to separate bureaus, whereas under the NDRC, the same bureau had both roles. SAMR, ‘San Ding’ Plan, 10 August 2018.

<sup>75</sup> For an analysis of the behavioural conditions imposed by the MOFCOM, see Ng, *supra* note 43, at 47–56, 286–288.

<sup>76</sup> These include the merger decisions involving Google/Motorola Mobility, Microsoft/Nokia and Nokia/Alcatel-Lucent, the NDRC’s investigations into Qualcomm and InterDigital for abuse of dominance and the private litigation between InterDigital and Huawei.

SAMR) in 2015.<sup>77</sup> This focus on IPRs reflects, in part, the complementary relationship that exists between competition and innovation and that forms part of competition law discussions, both in China and at the international level. It is also consistent with China's emphasis on innovation, especially in the context of its development and industrial policies.<sup>78</sup> The AML has also been enforced to support and further sector policies and reforms relating to the telecommunications, salt and pharmaceutical industries and also to foreign investment, all of which are sectors that either are, or were up until recently, subject to regulation.<sup>79</sup> In addition, an antitrust guideline on the automobile industry was being developed to address the competition issues and regulatory gaps that were demonstrated by the series of enforcement actions taken by the competition authorities in the industry.<sup>80</sup>

China's view of the role and function of the AML in part reflects a regulatory approach to competition law. Regulation and competition have typically been viewed as distinct and opposing means through which the state supervises the market. Imelda Maher observes that regulation aims to control, order and influence conduct to accomplish particular objectives and regards law as being instrumental and supervisory in nature, whereas competition law adopts a more rule-based doctrinal approach, is prohibitory in nature and seeks to enhance the operation of markets.<sup>81</sup> However, this distinction between regulation and competition law is diminishing as more competition laws incorporate elements that are associated with regulation, such as administrative enforcement, *ex ante* enforcement with a forward-looking approach, prescriptive rules, quasi-regulatory remedies and objectives beyond protecting competition and enhancing consumer welfare.<sup>82</sup> Competition authorities are also generally taking a more active role in promoting competition and consumer welfare and shaping markets and business conduct.<sup>83</sup> However, there is no broad agreement on

<sup>77</sup> The most recent draft of the antitrust guideline was released for public consultation by the Anti-Monopoly Commission in March 2017. State Council Anti-Monopoly Commission, Antitrust Guideline on the Abuse of Intellectual Property Rights (public consultation draft), 23 March 2017.

<sup>78</sup> See, e.g., State Council, Outline of the National Medium- and Long-Term Plan for the Development of Science and Technology (2006–2020), 9 February 2006, ch. 1, ch. 2, Art. 2; State Council, Made in China 2025, 8 May 2015.

<sup>79</sup> See, e.g., the Wal-Mart/Newheight merger decision, the competition authorities' abuse of dominance investigations into the Wuchang branch of the Hubei Salt Industry Group and the Yongzhou branch of the Hunan Salt Industry Company and the competition authorities' series of investigations (abuse of dominance, cartel and administrative monopoly) into the nationwide supply of various forms of allopurinol.

<sup>80</sup> NDRC, State Council Anti-Monopoly Commission Antitrust Guidelines on the Automobile Industry (consultation draft), 23 March 2016. As of the time of writing, there has been no further update on the progress of these draft guidelines, including whether they will indeed be adopted by the SAMR and, if so, when.

<sup>81</sup> Maher, 'Regulating Competition', in C. Parker *et al.* (eds), *Regulating Law* (2004) 187, at 188; Maher, 'The Networked (Agency) Regulation of Competition', in P. Drahos (ed.), *Regulatory Theory: Foundations and Applications* (2017) 693, at 693.

<sup>82</sup> N. Dunne, *Competition Law and Economic Regulation: Making and Managing Markets* (2015), at 78–87; see also J. Drexel and F. di Porto (eds), *Competition Law as Regulation* (2015).

<sup>83</sup> Maggolino, 'The Regulatory Breakthrough of Competition law: Definitions and Worries', in Drexel and di Porto, *supra* note 82, 3, at 16–18.

either an international or transnational basis on this shift of competition law towards a more regulatory approach, though Niamh Dunne observes that this move is ‘more novel, and controversial, in the US than in the EU context’.<sup>84</sup>

But beyond a regulatory approach to competition law, this article argues that what fundamentally shapes China’s approach to, and implemented understanding of, competition law is its views on the close relationship between markets, competition and the state in the economy and the centrality of the state to that relation. This has led to a conception of competition law that is focused on the state, furthering its interests and roles. However, due to the lack of transparency surrounding decision-making and governance in China, this state-centred approach to competition law might not lead to stable, predictable or transparent outcomes across and within industries, actors and categories of prohibited conduct, as the interests and roles of the state – which may or may not be consistent with competitive outcomes – can change depending on a number of known and unknown factors. In this context, it is understandable why commentators criticize that some AML outcomes are motivated by non-competition and political concerns and depart from (at least the spirit of) international competition law norms.

## 4 Evaluating China’s Potential Impact on International Competition Law Norms

This article’s evaluation of the potential implications of China on international competition law considers two related strands. First, to what extent does China’s approach to competition law present a challenge or alternative to the existing international consensus on competition law and, second, if there is indeed such a contestation of norms presented by China, what influence or impact might it have on those norms.

To date, China has expressed little desire to depart from or challenge the international norms for competition law. As shown in the preceding analysis, China has adopted and accepted many international competition law norms into its formal competition law and practice. The AML itself is broadly consistent with international norms, though there are departures from those norms in some areas as the law has been tailored to reflect China’s specific circumstances. The Chinese authorities also frame their decisions to be within the bounds of the formal language, concepts, tools and analytical approaches reflected in international competition law norms, even in cases where it seems that industrial policy or other non-competition factors may have been relevant in the decision-making. Hence, in both the law and in its decisional practice, China has demonstrated formal conformance with what is considered to be international best practice.

Even though China does not necessarily contest the formal frame of international norms, its state-centred approach to competition law does constitute a departure, in practice, from the *status quo*. It is unclear, however, whether and how this approach might have resonance or be implementable internationally. On the one hand, in

<sup>84</sup> Dunne, *supra* note 82, at 86.

addition to addressing the harms caused by anticompetitive conduct, competition law in China serves other overlapping and concurrent functions, such as furthering industrial policy and development aims. This might be useful for developing countries, as there is now a key competition law jurisdiction that they can look to as one that appears to implement and enforce competition law in a manner that can help to address their development concerns, challenges and goals. Additionally, over the past few years, discussions and debates on the question of how competition law could be used to reduce inequality and poverty and foster inclusive growth have occurred at both the international and national levels with greater frequency and seriousness;<sup>85</sup> China's experience with and approach to such issues in the competition law context might be useful. However, China's approach to competition law is not simply justified by reference to the achievement of development-related goals; development is but one of an array of interests and roles that the state pursues. The lack of transparency in China means that it is difficult for outsiders to sufficiently know what factors, interests or goals underlie certain decisions and outcomes, which limits the usefulness of China's approach for other countries.

To date, China has not meaningfully engaged with the development of international competition law norms. As discussed in Part 2, the main global fora where international norms relating to competition law are formulated, settled and communicated are the OECD, UNCTAD and the ICN. Whilst China does participate in UNCTAD, it has very little involvement in the OECD and the ICN, which are the two key institutions that formulate and advocate for international competition law norms. China is not a member of the OECD (though it does observe at some of the OECD's meetings), and none of China's competition agencies have been or are members of the ICN.<sup>86</sup>

However, this might change in the future. The consolidation of the three competition authorities into one single authority may make it easier for China to engage more with international organizations and networks and other governments on issues relating to competition law and policy. The formation of the SAMR has removed many of the institutional, coordination and political issues associated with having three competition authorities and which would have likely created some domestic barriers to them representing China on the world stage. More broadly, China has signalled that it wants to play a larger role in international governance. At the 19th Party Congress of the Chinese Communist Party held in October 2017, General Secretary Xi Jinping

<sup>85</sup> For example, the World Bank and the OECD have jointly held conferences in the past few years to discuss the role of competition policy in promoting more sustainable and inclusive economic growth; the 2013 Global Forum on Competition held by the OECD was on the topic of competition policy and policy reduction and the role of competition law and policy in promoting sustainable development was examined at the UNCTAD's Ad Hoc Expert Meeting in July 2014.

<sup>86</sup> There is speculation about the reasons for China not being part of the ICN (for example, China does not want to participate in the ICN as Taiwan's competition authority is a member, China did not help to establish the ICN and finds it unnecessary to subsequently join given its status or China does not want to be restricted by the guidance that the ICN issues), but no official or formal reason is given for not joining the ICN.

stated that China was committed to supporting international cooperation and would ‘continue to play its part as a major and responsible country, actively participate in the development and reform of the global governance system and contribute China’s wisdom and strength to global governance’.<sup>87</sup> It may also take a more active role in exporting its own development path as a ‘new alternative to other developing countries who want to both accelerate their development and maintain independence’,<sup>88</sup> which represents a not insignificant departure from China’s long-standing anti-hegemonic approach to foreign policy. China’s approach to competition law could be presented as one aspect of its broader development path that is also suited for other developing countries.

If China does seek greater participation in the development of international competition law norms and to have its perspectives and approaches reflected in them, it could do so in at least two ways. It could do so within the existing institutions and mechanisms that generate, develop and settle these norms. China (through the SAMR) could join the ICN and actively participate in its activities and other cooperation efforts. China could also make more frequent contributions to the competition-related activities of the OECD and UNCTAD. The potential influence and impact that China might have in these multilateral fora, however, which are typically dominated by the voices of the USA, the EU and developed countries, might be limited.<sup>89</sup> Alternatively, China could take a bilateral or regional approach, forming partnerships and networks of its own to develop transnational competition law norms that are more in line with its approach to competition law. For example, the BRICS countries have established their own network to cooperate and to exchange ideas, experiences and best practices with each other on competition law issues, and, in May 2016, they signed a memorandum of understanding on competition law cooperation.<sup>90</sup> They established the network to strengthen cooperation and coordination amongst BRICS competition authorities, recognizing that they faced similar challenges as emerging markets and developing economies.<sup>91</sup> This suggests that the BRICS countries perhaps did not believe that international competition law norms were adequate to address and reflect their concerns and perspectives. However, the impact of the BRICS network has been limited to date, with little activity beyond the biennial conference. As William Kovacic points out, because the BRICS competition agencies face significant resource constraints, it might be

<sup>87</sup> Xi Jinping, Work Report Delivered at the 19th Party Congress of the Communist Party of China, 18 October 2017.

<sup>88</sup> *Ibid.*

<sup>89</sup> For example, in April 2019, the ICN approved a framework on competition agency procedures, which was an initiative led by the US Department of Justice Antitrust Division. See International Competition Network, New ICN-led Framework to Promote Fair and Effective Agency Process, 5 April 2019; US Department of Justice, New Multilateral Framework on Procedures Approved by the International Competition Network, 5 April 2019, available at [www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network](http://www.justice.gov/opa/pr/new-multilateral-framework-procedures-approved-international-competition-network).

<sup>90</sup> Memorandum of Understanding between the Competition Authorities of the Federative Republic of Brazil, the Russian Federation, the Republic of India, the People’s Republic of China and the Republic of South Africa on Cooperation in the Field of Competition Law and Policy, 19 May 2016.

<sup>91</sup> Joint Statement of the Heads of BRICS Competition Authorities, 13 November 2015.

difficult for them to commit sufficient resources to create recommendations, guidance or other materials that are able to influence international competition law norms.<sup>92</sup>

Even if China's competition law and enforcement have no formal impact on shaping international competition law norms, they may have some practical and commercial transnational consequences. The fact is that China wields substantial economic importance in global markets, and many non-Chinese and multinational businesses have operations in or affecting China. This means that these businesses, the lawyers that advise them and other governments will need to be aware of how China understands and implements competition law, and businesses will need to tailor their strategies, practices and compliance regimes to take account of the AML. This practical influence will be more apparent in areas where it appears that China formally diverges from international norms – for example, in the use of behavioural remedies in mergers. It remains to be seen whether this practical influence will ultimately lead China to change or even challenge the transnational legal order that is international competition law for the reasons outlined above.

## 5 Conclusion

To date, the USA and the EU have been the main voices and influences on international competition law, along with the OECD, UNCTAD and the ICN. Whilst their efforts have resulted in soft convergence across the competition laws of many countries, they have also resulted in an international consensus on competition law that reflects, in large part, the views and practices of the USA, the EU and developed countries more generally. China's emergence as a key competition law jurisdiction on the world stage is an important development for the continued evolution of international competition law, as it has the potential to challenge the *status quo* with its approach to, and understanding of, competition law.

This article has shown that it is relatively unlikely that China's competition law will challenge or change the existing international norms, at least in the short-term period. China has formally received many international norms into its competition law and decisional practices. Even though there are provisions in the AML that are not commonly found in the competition laws of other countries or reflected in the international norms, the Chinese authorities have not relied on these provisions in their decisions, even in cases where the outcomes appear to have been influenced by these China-specific provisions and considerations. Combined with China's lack of meaningful participation and engagement with the institutions and mechanisms that develop international norms, on its face, it seems that China's competition law will have limited influence on the future development of international norms.

However, this article argues that the potential implications of China's competition law lie less in the form of international competition law norms and more in the

<sup>92</sup> Kovacic, 'Competition Law in the BRICS Countries: More Than an Acronym', in A. Emch *et al.* (eds), *Competition Law in the BRICS Countries* (2012) 315, at 316–317.

implemented understanding of those norms. In China, competition law is understood and implemented in a context where the state is central to competition and the market economy. This has led to an understanding of competition law that is centred on furthering the state's roles and interests, which can range from ensuring competitive markets and enhancing consumer interest to promoting industrial policy, economic development or stability. Whilst this approach to competition law might not be viable or attractive as an implementable model or standard for other countries due to its relative lack of transparency, predictability and consistency as applied in China, this article believes that the greater value of China's state-centred approach to competition law is in the fact that it offers an alternative to the dominant voices in the international competition law arena. As Gerber observes, 'at the very least, China is charting another path to competition law development, and this gives other countries a wider range of choice in developing their own competition laws'.<sup>93</sup>

<sup>93</sup> Gerber, *supra* note 3, at 223.