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U.S. Chamber of Commerce

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In preparing to write this piece on the Chinese Antimonopoly Law (“AML”), one of us was reminded of a recent visit to a botanical garden. Among the collection of meticulously cared for plants was one extremely bent banana tree. The tree was close to 25 feet in length and full of bananas, but rather than standing erect it had arched itself completely over, nearly touching the ground. It looked straight from the imagination of the children’s book author Dr. Seuss.

The garden’s botanist explained the reason for the contorted tree. Unlike banana trees found in their natural habitat, this tree has been nurtured in the closed environment of a greenhouse. While it looked like a perfect specimen (minus the bend in its trunk), it was actually quite weak and could not support the weight of the bananas. In their natural habitat, the botanist explained, the wind acts as exercise for trees strengthening their trunks. This tree, which had lived from infancy to maturity in the sheltered greenhouse, would be unable to withstand the first gust of wind.

The banana story is an excellent metaphor for the application of competition policy. Countries that act as greenhouses by adopting competition policies that shelter prized domestic companies from the competitive winds of the open market create mature

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companies that fail when they try and compete in the global marketplace. In vivid contrast, countries that adopt policies that encourage rivalry among firms—including foreign firms—create a process through which domestic firms become more innovative and capable of succeeding both at home and abroad. Equally important, domestic and global consumers enjoy more choices and lower prices as a result of this dynamic process.

Foreign governments and the global business community are closely watching how the People’s Republic of China will enforce the new AML. Clearly, the Chinese government fully understands the importance of fostering innovation in its economy. Under policy guidance set forth by President Hu Jintao and Premier Wen Jiabao, China is engaged in a comprehensive effort to build an innovative society by 2020. In advancing its approach, the government is attempting to place China on the map as a leading center for global innovation and reduce the technology gap between it and the developed world.

At the core of this approach is a strong desire by the Chinese government to transform many of its state-owned companies into globally competitive, “chaebol”-like entities that can populate the Global Fortune 500.¹ The government is placing a premium on “indigenous innovation,” which is widely understood to mean that Chinese companies should domestically develop and own the intellectual property rights (“IPR”) created as a result of China’s innovation drive.

To achieve the goal’s articulated by President Hu and Premier Wen, China has been promulgating a series of interconnected policies. Specifically, China has placed

¹ “Chaebol” refers to conglomerate, family-controlled firms.

market access restrictions that limit the ability of foreign companies to compete, curtailed foreign investment on the ground in “strategic sectors”, infringed on the IPR of foreign firms, set mandatory national standards that favor Chinese development of IP, established government procurement and accreditation practices that discriminate against foreign goods and services, and offered myriad preferential tax and other subsidized benefits to its many state-owned enterprises and Chinese private sector alike. While these policies are being implemented at all levels of the government, they emanate largely from central planners in Beijing and are being deployed with the increasingly clear goal of promoting global champions in economic sectors that China has defined broadly as core to its economic competitiveness.

U.S. companies long ago embraced the Chinese market as central to their global business strategies. U.S. business has contributed significantly to China’s economic and social development over the last 30 years. They are continuing to make sizable investments in the country, including in research and development centers that are training China’s innovators of tomorrow. In short, U.S. business has an abiding interest in the nature of China’s efforts to promote an innovative society.

However, for China to realize its goal of building an innovative society and reach its potential as a global innovation hub, China must accelerate its transition in key sectors from an economic system still dominated by the state and central planners to one that is transparent, market-based, and freely embraces open competition that creates incentives for innovation. China’s passage of the AML therefore represents a tremendous

opportunity for the country to complete its economic transition and for its regulators to shed the remaining vestiges of central planning and state control by embracing the competitive process.

The AML, if properly enforced, would not only help China reach its goal of being an innovation center, but also serve to unleash the economic potential promised by a market-based economy. A competitive and open market, promoted by appropriate AML enforcement, would create dynamic efficiencies that generate IP and spread innovation to new markets. The realization of such a prized economy is a benefit to all involved including Chinese companies, workers, and consumers, and U.S. exports and investment. A misguided application of the law, however, would result in the creation of a policy that acts as a greenhouse producing weak banana trees.

Privately, some Chinese officials have argued that AML enforcement should change over time. It is widely understood that the U.S. approach to antitrust has evolved and what once may have been a heavy-handed approach by regulators has softened with experience. Some Chinese officials have inferred that this evolution helped to vault U.S. companies into leading positions in the global economy. This line of thinking concludes that China too will need to take its time in ascending the learning curve, giving its companies a running start before they are forced to compete openly at home and around the world.

This thinking is fatally flawed. The truth is U.S. antitrust enforcement has never been used as a tool to promote a super-ordinate political goal of producing national

champions. Had the U.S. government wished to promote national champions, its enforcement of antitrust laws in the early part of the last century would have supported Standard Oil, not broken it apart. China should look to follow suit for similar Chinese firms that operate as near monopolies in state-dominated sectors and gain advantages through anticompetitive practices.

However, China can also learn from U.S. mistakes, which actually inflicted more harm than good on leading U.S. firms operating in a market economy. In fact, because of cases like *Standard Oil*, U.S. antitrust for decades was grounded in the near-blind belief “that big is bad.” During that period, leading U.S. companies in many instances faced undue scrutiny that often proved harmful to innovation, and thus, consumers.

With experience, the U.S. government’s approach to antitrust enforcement and its understanding of underlying economic theories has evolved. No longer does the size of a firm or its market share automatically equate to a finding of anticompetitive dominance. This is particularly true in a dynamic market economy where the state does not own or control the factors of production and only has the role of creating an environment in which business and innovation can flourish. U.S. regulators now routinely discard competitor complaints about a company when the company in question has built a leading position as a result of market share earned when consumers effectively vote with their pocketbooks. By placing consumer welfare at the center of antitrust economic analysis, regulators protect the incentives that cause companies to innovate and compete vigorously against each other.

If the secret to leading firms in the United States is not their reliance on the evolution of the country's antitrust enforcement, what does explain their edge? The answer is that U.S. companies are leaders in their industries where they anticipate and are responsive to the ever-changing market and continue to reinvent themselves to meet the needs of their customers. Where U.S. companies fail to successfully manage the leading edge of change, they fall behind, are bought out (often by more competitive foreign firms), or ultimately go bankrupt. These principles are taught in every business school and in every strategy class where competitive advantage is studied. Competitive advantage does not come bottled in the forms of subsidies and protectionist government policies.

It is very positive that the Chinese have openly sought and accepted counsel throughout their nearly 15-year drafting process of the AML.² It is clear that those opportunities as well as other exchanges with academia and antitrust regulators around the globe have positively impacted the final legislative product.

However, implementation offers a more real and substantial test. Chinese regulators have continued to stay engaged with competition experts and have welcomed multiple offers of foreign technical assistance. The Chamber is pleased to be a part of one such effort formed as a public-private partnership with other associations and a range of U.S. agencies including the Departments of Justice and Commerce, the Federal Trade Commission, the Office of the U.S. Trade Representative, and the U.S. Trade Development Agency. Together, we look forward to continuing what has been a

² The U.S. Chamber of Commerce offered written comments on multiple occasions and hosted a delegation from the National People's Congress during the final drafting stages of the AML.

constructive dialogue and exchange with China's competition authorities to discuss the nuts and bolts of enforcement, offer our hard-learned lessons and their policy implications, and highlight the tremendous benefits to China's economy of an enforcement regime guided by a commitment to market liberalization.

In recent years, the world has seen a proliferation in the number of competition enforcers. Competition policy and law today are more central than ever before to managing the future of the global trading system and to ensuring that the benefits of trade reach the intended recipients. Trade and competition are complimentary disciplines, both are intended to promote market liberalization and increase efficiencies. The enforcement decisions of competition regulators need to support the open exchange of the global market, and not place road blocks in its path to further development.

The Chinese AML should be welcomed into the ranks of the world's competition law doctrines. Because of the size of the Chinese economy, its competition policy has global implications. Therefore, it is important that investigations and enforcement be done in conversation with counterparts in other agencies around the world. The work the Chinese competition authorities conduct within forums like the International Competition Network and the adoption of best practices with respect to issues like rule of law and transparency will also be indicators of how China's newly minted regulators intend to implement and enforce the law.

China has proven its flexibility by adopting new government policies that support its economic development priorities. China's leadership has also emphasized time and

again its commitment to completing its transition to a market-based economy. Careful implementation of the Chinese AML can be a central catalyst to furthering both of these objectives. However, a misapplication of the AML in a manner that promotes national industrial policies will drive away foreign investment, inhibit Chinese innovation, and turn potentially vibrant Chinese companies into weak banana trees.