PRESENTATION TO THE INTERNATIONAL SYMPOSIUM ON THE DRAFT ANTI-MONOPOLY LAW OF THE PEOPLE'S REPUBLIC OF CHINA

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I am pleased to be here in Beijing to participate in this International Seminar on the Draft Anti-Monopoly Law. We in the United States are honored to have been invited to share our experience in administering our competition laws.

As you know, competition policy is an essential element of a well-functioning economy. A competition law that is based on sound legal and economic principles facilitates economic growth and enhances consumer welfare. Our discussions are taking place at a particularly important time in the development of the Anti-Monopoly Law, and we recognize the significance of this opportunity. We hope that the views we express will assist in the formulation of a competition law regime that will contribute to the growth of the Chinese economy and the welfare of its citizens.

CHAPTER 3
ABUSE OF DOMINANT MARKET POSITION

A. Background on United States Law

United States law does not specifically address "abuse of dominant market position." A closely related concept may be found, however, in Section 2 of the Sherman Act,[1] which prohibits monopolization. The essential elements of the offense of monopolization are (1) the possession of monopoly power in a relevant market and (2) the willful acquisition or maintenance of the monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. Our law thus requires both the possession of monopoly power and the use of anticompetitive conduct to acquire, preserve, or expand that power. The Sherman Act does not define monopoly power or list the types of anticompetitive conduct that are prohibited; this has been left to interpretation by the enforcement agencies and the courts. Monopoly power is generally defined as the power profitably to charge higher prices than, or reduce output below, the levels that would exist if the market were competitive.

Two key principles of United States law on monopolization should be highlighted for your consideration in connection with your draft law. The first and most important principle is that United States competition law does not condemn the mere possession of monopoly power, but punishes only misuse that results in a substantial injury to competition. In our view, punishment of a firm that obtains a dominant or monopoly position by reducing price or offering new or improved products or services is contrary to the goal of promoting competition. A free market system envisions that competitors will strive for a superior position through innovation, greater efficiency, or other legitimate competitive behavior. Innovation, economic growth, and vig

As we note above in connection with the objective of setting a "fair price," we have found that mechanisms of this type are generally beyond the capabilities of competition authorities. Most commentators agree that they are generally beyond the capabilities of the courts as well.

Some courts in the United States have articulated a so-called "essential facilities doctrine" under Section 2 of the Sherman Act to define exceptional circumstances in which a duty to assist competitors may be found. In these cases, the courts have required the facility to be truly "essential," not merely convenient for competitors wishing to free ride on the investments of successful rivals. Even when limited to narrow, exceptional circumstances, the "essential facilities doctrine" has been heavily criticized, and its continued vitality is subject to doubt. The U.S. Supreme Court made clear in last year's *Trinko* decision that it has never accepted or endorsed the doctrine.

For these reasons, our view is that inclusion of compulsory access provisions in a competition law is neither advisable nor practical. To the extent that compulsory access is found to be necessary as a remedy for violations of other, more general provisions of the law, that remedy should be invoked only in the most exceptional circumstances.

CHAPTER 4
CONTROL OF CONCENTRATION [MERGERS AND ACQUISITIONS]

In the United States mergers are unlawful if their effect may be to "substantially lessen competition or tend to create a monopoly."

One question under consideration in this sem

on adverse competitive effects. Fourth, the merger standard and analysis in our Guidelines apply uniformly to all industries subject to our merger laws.

While our law covers all mergers, the emphasis of merger analysis in the United States is on mergers between competitors because other mergers rarely present substantial risk of harm to competition. Our view is that mergers between a supplier and a customer are only likely to present competition issues when they have a significant horizontal component, such as when one of the parties is the sole source of a necessary input required by both the other merging party and its competitors.

The key elements of our horizontal merger analysis are set out in our Horizontal Merger Guidelines. The Guidelines have la Twa35z9 0 n607et out in our Hrger

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parties’ level of sales in the jurisdic BB. To jus fyoagency review, the parties should have a sufficient lBcnl nexusoexceeding apprBpriate thresholds, such as ma assets levels within the reviewing jurisdic BB. The Comments in the Recommendn BBo identfyoapprBpriate standards of materialityoas to the level of “locnl nexus,” and theyo provide other guidance fBr reducing the burden BBtransac B Bs that are unlikelyoto result in appreciable competi ve eff ects in the jurisdic BB. With more than sixty jurisdic BBs around theoworld now having some form of m rger control, the efficient opera BB of globnl capitnl markets requires that jurisdic BBs not impose regul theyohave a sufficient direct interest in the transac BB. Jurisdic BBs increasinglyoareo conforming their prac ces to sa sfyothis objectve in light of the ICN Recommendn BB.

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transac BB value attributable to a specific jurisdic BB a so is typicnllyotoosubjectve to be appropriate foromulti-jurisdic BBal transac /ons. By contrast, assets and sales ofothe

[5] *See* 16 C.F.R. § 801.1 (b). In the case of an entity that has no outstandingovotingosecurities, “control” is defined as havingothe right to 50% or more of the profits of the entity, or havingothe right in the event of dissolu BB to 50% or more of the entity’s assets.

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CHAPTER 6
THE ANTI-MONOPOLY ENFORCE

Experience suggests that a competition agency needs to be given some discretion on the particular cases that warrant its investigation. Competition authorities often identify possible anticompetitive conduct based on sources other than complaints. In the United States, a significant proportion of our cases of anticompetitive conduct come from media accounts or from information obtained in other investigations. In our view, competition laws should clearly grant power to the agency to initiate investigations on its own authority. A competition agency should also have the authority to decline to investigate a complaint that has little or no merit. For example, less efficient competitors sometimes complain to competition authorities about conduct that amounts to nothing

- reasonable notice when a proceeding is initiated;
- a description of the nature of the proceeding;
- a statement of the legal authority under which the proceeding is initiated;
- a general description of the issues; and
- a reasonable opportunity to present facts and arguments in support of their position prior to any final adverse action.

The draft law should more clearly define the process, standards, and protections that apply to the agency's investigation and enforcement procedures. Due process also entails creation of appropriate rights and procedures for review of the agency's final decisions by an impartial and independent body. The current draft provision should clarify the procedures and standards for appeal.

B. The Relationship between the Competition Agency and Industry-Specific Regulators

Competition regimes should be organized to maximize certainty and predictability of decisionmaking and minimize actual or perceived conflicts between the mission of the competition agency and other government policies. Issues under consideration today concern the uld4e Tw l019rh e6031 98l25day Tc -0.00031.7b4oh11 BDC d0T83.90006