

Washington University Global Studies Law Review

Volume 3
Issue 2 *Chinese Anti-Monopoly Law*

January 2004

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Recommended Citation

Selene Ko, *An Introduction to Chinese Legislation*, 3 WASH. U. GLOBAL STUD. L. REV. 267 (2004), https://openscholarship.wustl.edu/law_globalstudies/vol3/iss2/2

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Washington University Global Studies Law Review

VOLUME 3

NUMBER 2

2004

CHINESE ANTI-MONOPOLY LAW

AN INTRODUCTION TO CHINESE LEGISLATION[†]

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I should perhaps mention, as an introduction to this introduction, that I was not a participant in this Symposium. The editors of Global Studies invited me to write this piece in order to familiarize the reader with the circumstances in the People's Republic of China (PRC) that surround the drafting of the Anti-Monopoly Law. Although the Draft Law is available publicly in other places, this Law Review was asked not to publish the draft. Regardless, the pieces that follow this introduction are a unique opportunity for scholars studying the PRC. These pieces provide a kind of legislative history for the Anti-Monopoly Law by showing how Chinese and foreign scholars have come together and shared their experiences in the area of competition law.

In 1995, a drafting group was established to develop a Chinese Anti-Monopoly Law. As the Chinese leadership pursued reform efforts to move toward a more market-oriented economy and win international support for China's entry into the World Trade Organization (WTO), many recognized that the existing competition laws were still insufficient to

[†] This Essay is the work of the Author alone and in no way represents or expresses the views of the Congressional Executive Commission on China, its staff, or any of its members. The opinions expressed in this Essay are the personal views of the Author and do not necessarily reflect the views of the Congressional Executive Commission on China or any of its individual members.

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address the challenges presented by the inflow of foreign companies into the marketplace and the expectations of foreign investors and China's trading partners. The Anti-Monopoly Law is regarded as an important step in limiting the government's involvement in the economy, as it is expected not only to regulate anti-competitive practices of private actors but also to prohibit "the abuse of administrative powers to restrict competition."¹ While the substantive provisions of the Draft Law are important, the process by which this law and other laws are being developed is equally as significant, in terms of what such process reflect about the status of China's compliance with its WTO obligations and the development of the rule-of-law in China.

As part of its entry into the WTO, China committed to incorporating certain rule-of-law principles into its legal system, including, but not limited to those imposed on all WTO members. A number of WTO accession agreements impose transparency obligations on its members by requiring that all laws, regulations, judicial decisions, and administrative rulings relating to trade be published promptly.² WTO agreements also require that trade-related measures be administered in a "uniform, impartial, and reasonable manner."³ Moreover, trade-related measures should not be enforced before they are officially published.⁴ Finally, WTO members must maintain tribunals and procedures for the prompt, independent review of trade-related administrative actions.⁵

China's WTO accession documents elaborate on its rule-of-law related obligations and impose more specific directives as to how China must

1. Donald C. Clarke, *China's Draft Anti-Monopoly Law*, Paul, Weiss, Rifkind, Wharton, & Garrison Lawyer Memo (Oct. 2002), <http://www.paulweiss.com/db30/cgi-bin/pubs/Anti-monopoly%20law.PDF>.

2. *See, e.g.*, General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT]; *see also* WTO, WTO Legal Texts, at http://www.wto.org/english/docs_e/legal_e/legal_e.htm (last visited Dec. 19, 2003); General Agreement on Trade in Services, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Legal Instruments—Results of the Uruguay Round, WTO Agreement, Annex 1B, 33 I.L.M. 1167 [hereinafter GATS]; Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments—Results of the Uruguay Round vol. 31, art. 63, 33 I.L.M. 81 (1994) [hereinafter TRIPS]; Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round vol. 1, 33 I.L.M. 1125 [hereinafter TRIMS] (referencing obligations on transparency found in Article X of GATT 1994).

3. *See, e.g.*, GATT, art. X(3)(a), GATS, art. VI(1). Similar language in TRIPS provides that "[p]rocedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays." TRIPS, art. 41.

4. GATT, art. X(2).

5. GATT, art. X(3)(b). *See also* TRIMS, art. 6(1).

implement certain obligations, such as its transparency obligations. According to China's Protocol on Accession (the "Protocol"):

China shall establish or designate an official journal dedicated to the publication of all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPS or the control of foreign exchange and, after publication of its laws, regulations or other measures in such journal, shall provide a reasonable period for comment to the appropriate authorities before such measures are implemented China shall publish this journal on a regular basis and make copies of all issues of this journal readily available to individuals and enterprises.⁶

Other provisions of the Protocol contain similar publication requirements with respect to procedures governing State trading, import and export licensing, establishing technical regulations and standards, price setting, and judicial review.⁷ As previously mentioned, some of the obligations found in China's accession documents go beyond those imposed on other countries during their accession processes. This difference results from the fact that, unlike other WTO applicants, China was not required to achieve full compliance prior to accession. One term of access unique to China, which trade analysts often highlight, mandates that China provide a reasonable period for comment on a trade-related measure before it is enforced. This practice is commonly known as providing "notice and comment."

The significance of the transparency obligations is that they require China to open its traditionally opaque legislative and regulatory processes to the public and prohibit such practices as enforcement of *neibu* (internal) policies that cannot be accessed by the public (either before going into effect or once they become enforceable). While implementation of China's transparency obligations is necessary to satisfy the expectations of its trading partners, China's new-found interest in moving toward more open, transparent lawmaking and administrative rulemaking procedures reaches beyond a mere desire to comply with the terms of its WTO membership. As awareness of individual freedoms and rights has grown, so has the

6. WTO, Protocol on the Accession of the People's Republic of China to the World Trade Organization, WT/L/432, Nov. 10, 2001, art. 2(c)(2), available at <http://docsonline.wto.org/DDFDocuments/t/WT/L/432.doc> (last visited Dec. 19, 2003).

7. See generally *id.*; WTO, Working Party Report on the Accession of China, WT/ACC/CHN/49 Oct. 21, 2001, available at <http://docsonline.wto.org/DDFDocuments/t/WT/ACC/CHN49.doc> (last visited Dec. 19, 2003).

demand by the public for higher quality laws and for the right to participate in making those laws. China's lawmakers are increasingly recognizing that improved transparency is a potent means of gaining legitimacy for legislation.⁸

I. REFORM OF LAWMAKING AND RULEMAKING PROCESSES

The PRC Legislation Law passed in 2000 states that the standing committee of National People's Congress (NPC) shall seek opinions from various parties for legislative bills placed on the agenda for a particular session.⁹ According to Article 35 of the Legislation Law, where the legislative bills are "important," draft laws may be published in order to solicit opinions.¹⁰ In 2001, the Standing Committee of the NPC published a draft Marriage Law for public comment pursuant to Article 35. Chinese news outlets reported enthusiastic responses from the public. However, there is little evidence that the hearing on the Marriage Law has created any real momentum for expanding the use of public hearings in general.¹¹ The Legislation Law does not require the NPC to publish any draft laws, and without any such provisions mandating publication there is no guarantee that all trade-related laws will be published for comment as required by the terms of China's WTO accession.

With respect to the development of regulations, the State Council's Procedural Rules for Formulating Administrative Regulations require that the State Council gather opinions from relevant government bodies, associations, and citizens, but, as is the case with the NPC, the Rules do not require administrative bodies to release draft regulations to the public at large.¹² There are no uniform rules on how notice and comment are to be provided if an administrative body chooses to do so. Some central

8. Notes of Congressional-Executive Commission on China staff delegation trip to China (text on file with author).

9. Zhonghua renmin gongheguo lifa fa [The Legislation Law of the People's Republic of China], art. 34, in *Quanguo renmin daibiao dahui changwu weiyuanhui gongbao* [Gazette of the Standing Committee of the National People's Congress] No. 2, 112 (2000).

10. *Id.* art. 35.

11. In 2002 the Ministry of Railways received a great deal of attention from the press for holding a "landmark public hearing" on rate increases for railway ticket prices that was intended to serve as a model for other hearings. While the hope was that provincial level offices would use the hearing as a model there is no indication that that other ministries are following the lead of the Ministry of Railways. *Landmark Hearing Set in Beijing on Rail Ticket Prices*, CHINA DAILY, Jan. 7, 2002, <http://www.china.org.cn/english/2002/Jan/24848.htm> (last visited Sept. 26, 2003).

12. Xingzheng fagui zhiding chengxu tiaoli [Procedural rules for Formulating Administrative Regulations], arts. 12, 19, 20, 22, (2002), http://www.law-lib.com/law/law_view.asp?id=16619 (last visited Dec. 19, 2003).

government bodies make selected draft laws and regulations available to the public through publication in gazettes and on websites. Some ministries and commissions share measures in draft form with limited audiences, which raises concerns about discrimination and selective transparency. Oftentimes, interested parties have the opportunity to speak with government officials about the subject matter of proposed legislation, but have no access to the actual text. Even when governmental authorities make draft documents public, critics argue that doing so is meaningless because the circulated draft is already being treated as the final version.

Much of the effort to improve transparency has occurred not at the national level, but within the local people's congresses (LPCs) and local administrative bodies, which reflects the Chinese government's preference for testing legal reforms through pilot programs at the local level before implementing them nationally. For example, the Shanghai People's Congress has pioneered the opening of the legislative process. In addition to holding a number of public hearings on topics ranging from consumer protection to labor contracts to the preservation of historical buildings,¹³ the congress has also institutionalized the practice of seeking the views of the Shanghai Bar Association when issuing new laws.¹⁴ Chinese lawyers report that the Shanghai People's Congress is considering providing financial support to academics to draft legislation.¹⁵ Similarly, in the past year other provincial and municipal LPCs have also endeavored to increase public participation in their legislative processes, including the LPC's in Yunnan, Sichuan, Zhejiang, Henan, Gansu, Beijing, Guangdong, Kunming, and Guiyang.¹⁶ However, these efforts to improve transparency are limited to only a small number of geographic areas.

13. Notes of Congressional-Executive Commission on China Staff Delegation Trip to China (text on file with author).

14. *Id.*

15. *Id.*

16. Yunnan Provincial People's Congress Standing Committee passed a "Decision to Openly Solicit Legislative Items and Draft Laws." This decision to call upon the public to submit legislative items and draft laws was the first attempt by Yunnan authorities to open the legislative process to public participation. Zhang Tingting, *The Public Solicited for Legislative Items and Drafts*, CHINA INTERNET INFORMATION NETWORK, Aug. 12, 2002, www.china.org.cn/english/2002/Aug/39228.htm (last visited Sept. 24, 2003). The Sichuan People's Congress has been publicly soliciting proposals for local legislation since November 2002, and it included nine of these suggestions in the Standing Committee's 2003 Plan on Legislation Proposals. Alex Xu, *Nine Proposals by Public Representatives Adopted in Sichuan*, CHINA INTERNET INFORMATION NETWORK, Jan. 3, 2002, www.china.org.cn/english/2003/Jan/52699.htm (last visited Sept. 24, 2003). The Standing Committee of Zhejiang Province has announced a plan to regularize public participation in its legislative process by opening all of its meetings to the public. *Zhejiang: Citizens Have the Right to Attend Provincial People's Congress Meetings*, [ZHEJIANG RIBAO] ZHEJIANG DAILY, June 28, 2003, <http://www.zjdaily.com.cn> (last visited Aug. 14, 2003). The Henan Province. People's Congress announced a similar opening of

Still, the lawmaking and rulemaking processes at the national level have been opening gradually—albeit more slowly than at the local level. Starting in the late 1970s and early 1980s, long before the Legislation Law was passed, the NPC began turning to outside experts for assistance with developing important legislation,¹⁷ such as the 1982 Constitution, the 1997 amendments to the Criminal Law, the 1989 Administrative Litigation Law, and the 1987 Civil Procedure Law.¹⁸ Notably, the circle of legal experts contributing to draft laws has become increasingly international as China has looked to models in market-based economies. For example, after a committee of Chinese academics developed the first draft of China's Unified Contract Law, the second draft incorporated the views of foreign experts.¹⁹ In addition to improving the substance of the law, the process itself profited from the participation of academics. Chinese law scholar Pitman Potter notes:

To a considerable extent, the fact that the drafting process was given over largely to a cadre of legal specialists meant that many bureaucratic concerns of specific government agencies were left aside. While a number of conflicting views were forcefully articulated in the course of debates among the specialists on the drafting committees, the participants seemed to have avoided most of the bureaucratic politics that has been associated with NPC activities in connection with other legislation such as bankruptcy law.²⁰

The trend of involving academics, including foreign academics, has only expanded since China joined the WTO. Within the NPC's Working Committee on Legal Affairs, the legislative body established a WTO group, which has provided funding for academics to develop legislative drafts.²¹ With advice from Chinese and foreign scholars, NPC drafters are

its deliberations in September 2003. *PRC: Henan To Allow Citizens, Foreigners To Observe Provincial Congress Meetings*, ZHENGZHOU HENAN RIBAO, Sept. 24, 2003, as translated in FBIS, Doc. ID CPP20030925000007. In December 2002, the Guiyang City People's Congress began soliciting legislative proposals as well as comments from the public on existing legislation. *Citizens Invited to Participate in Lawmaking in SW China Province*, XINHUA, Dec. 25, 2002, <http://www.china.org.cn/english/government/52072.htm> (last visited Sept. 24, 2003).

17. See Zhu Jingwen, *Public Participation in Law-Making in the PRC*, in *LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA* 141 (2000).

18. *Id.* at n.2.

19. Pitman Potter, *Law-Making in the People's Republic of China: the Case of Contracts*, in *LAW-MAKING IN THE PEOPLE'S REPUBLIC OF CHINA* 199 (2000).

20. *Id.* at 200.

21. Notes of Congressional-Executive Commission on China Staff Delegation Trip to China, Shanghai, Nov. 6, 2002 (text on file with author).

working on major laws such as the Anti-Monopoly Law, the Administrative Procedure law and a new Civil Code that are expected to broadly impact Chinese society.

Additionally, non-academic legal experts are starting to contribute significantly to the drafting process. While Chinese lawmakers have often cooperated with foreign government counterparts on legal reform, only recently have private sector actors become more active. In the last few years, bar associations, including the All-China Lawyers Association, the Beijing Bar Association, and the Shanghai Bar Association, have helped draft trade-related measures and provided suggestions for changes to existing legislation that is not WTO compliant. Moreover, in many cases where government bodies do not publish drafts, officials have attempted to at least solicit views from parties interested in the legislation, such as representatives of regulated industries, even when the draft is treated as “confidential.”

II. ANTI-MONOPOLY LAW

The development of the new Anti-Monopoly Law reflects this trend towards increasing the participation of outside experts, both Chinese and foreign, in the drafting of laws. While originally the drafting committee consisted of bureaucrats,²² the development of law is now being driven by Wang Xiaoye, a researcher at the Law Institute of the Chinese Academy of Social Sciences and Vice President of the Chinese Economic Law Research Society. In 2002, Professor Wang joined other Chinese scholars working on the draft of the Anti-monopoly Law at the Chinese Anti-Monopoly Law Symposium in Beijing. This compendium consists of the contributions to the Beijing symposium by scholars from China, Japan, the United States, Germany, Indonesia, Venezuela, Thailand, and South Korea on their country's respective experiences drafting, executing, and amending anti-monopoly laws.

The free exchange of ideas among experts from both China and around the world on approaches to competition law, as well as the fact that China hosted this exchange reflects the intent of Chinese authorities to consider foreign models in the formulation of competition policy.²³ It also

22. The drafting group members mainly come from the Laws and Regulations Department of the State Economic and Trade Commission and the Laws and Regulations Department of the State Administration of Industry and Commerce.

23. Minister of the State Administration of Industry and Commerce (SAIC), *Competition Policy Statement*, <http://www.apeccp.org.tw/doc/China/Policy/cnpol1.html> (last visited Dec. 19, 2003). “SAIC shall strengthen multilateral and bilateral communication and cooperation with competition

demonstrates the increased freedom China gives academics working on new legislation, especially within the realm of economic law. For example, Professor Wang has been permitted to speak to the media about the draft law. In an interview in August 2003, she explained to the *Shiji Jingji Baodao* her views on the history of the development of the Anti-Monopoly Law, its strengths and shortcomings, and what she believed to be the obstacles to its implementation.²⁴

III. CONCLUSION

Despite these generally positive trends in opening lawmaking and rulemaking, substantial challenges still threaten China's ability to achieve the level of transparency contemplated by China's WTO Protocol and expected by China's trading partners—and, increasingly, by Chinese citizens. For example, the legislative process continues to remain closed to real, meaningful input from the citizenry. Moreover, while representing the progress China has made, the development of the Chinese Anti-Monopoly Law also demonstrates the limitations that still exist. The debate at the Beijing Symposium was open and free among academics, however, the Chinese government still considers the draft text of the Anti-Monopoly Law itself to be confidential and has not made it available to the public. Furthermore, even though reports indicate the drafting group completed a basic draft in early 2002, no public hearings have been held.

Nevertheless, even if China had rules and procedures that were capable of ensuring that legislation as significant as the Anti-Monopoly Law was being issued in a manner compliant with its WTO transparency commitments, other obstacles still may prevent China from meeting its full complement of rule-of-law obligations. While academic expertise may improve the quality of the law itself, even the best drafting cannot overcome the barriers to implementation inherent in the Chinese legal system. First, the Anti-Monopoly Law will affect the power of certain industries and government organizations, which have a special interest in maintaining pre-existing monopolies. As a result, not only has the introduction of the legislation²⁵ been delayed, but implementation could be adversely affected following passage of the law. Second, at a more basic level, even the most open and transparent process cannot ensure the

authorities in other economies in the process of legislation and enforcement of competition law." *Id.*

24. CASS *Expert Predicts WTO Meeting to Spur Enactment of China's Anti-Monopoly Law*, SHIJINGJI BAODAO, Sept. 1, 2003, translated in FBIS, Doc. ID No. CPP20030905000216.

25. *Id.*

creation of a more democratic system of governance. Because representatives are only elected to the lowest levels of people's congresses, there is no guarantee that representatives in the legislative bodies will ever consider the citizenry's views.²⁶ Still, efforts to broaden the sources of input to the drafting process are helping China progress towards a system based on the rule of law and should be encouraged.

26. China has experimented with direct elections at and below the county level. However, even at these levels, critics argue the process is not necessarily democratic. See CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, 2002 ANNUAL REPORT 35, available at <http://www.cecc.gov/pages/annualRpt/2002annRptEng.pdf> (last visited Dec. 19, 2003).