

**Proposed Revisions to Selected Articles of
The April 8, 2005 Revised Draft of
The Anti-Monopoly Law of the People’s Republic of China,
In Supplementation of the Joint Submission of the American Bar Association’s
Sections of Antitrust Law, Intellectual Property Law and International Law,
On the Proposed Law, dated May 19, 2005,
Submitted to Mr. Wu Zhenguo of MOFCOM***

The Section of Antitrust Law, the Section of Intellectual Property Law and the Section of International Law of the American Bar Association (collectively, the “Sections”) submit these proposed revisions to selected articles of the April 8, 2005 Revised Draft of the Anti-Monopoly Law, to supplement their comments, dated May 19, 2005 (“May 2005 Joint Comments”), on the proposed Anti-Monopoly Law of the People’s Republic of China. The views expressed herein are presented jointly on behalf of the Sections. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association, and, accordingly, should not be construed as representing the policy of the American Bar Association.

This supplementation of the May 2005 Joint Comments is designed to provide more specificity on implementing those comments.¹

Chapter 2 (Prohibiting Monopoly Agreements)

Article 8 Prohibiting Monopoly Agreements

We propose the following changes to Article 8:

1. In the first paragraph, we propose language designed to bring the substantive test of monopoly agreements more in conformity with the substantive test used under both U.S. and EU law. The new language would prohibit only those agreements that eliminate or substantially restrict competition in a relevant market, rather than simply eliminating or restricting competition between two undertakings.

2. In the second paragraph, we propose language to make it clear that the types of agreements listed will be presumed to eliminate or substantially restrict competition. This approach is consistent with U.S. and EU and is, we believe, what the drafters intended.

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¹ The Sections have not, in this Supplement, suggested implementing revisions to each article of the proposed law that were discussed in their May 2005 Joint Comments. In some cases, the May 2005 Joint Comments suggested changes that do not require illustrative revision. In other cases, such as Articles 16 and 18, the Sections suggest their deletion. In still other cases, such as Article 45, the appropriate revisions may implicate many other areas of law.

3. In the second paragraph, we also propose language limiting the range of presumptively unlawful agreements to horizontal agreements among actual or potential competitors, except in the case of resale price maintenance. As to resale price maintenance, we propose to limit presumptive illegality to setting minimum, rather than maximum, resale prices. Again, this is consistent with both U.S. and EU law.

4. We propose to eliminate the exemption for resale price maintenance in the publishing industry because we believe industry-specific exemptions should generally be avoided.

Article 8 Prohibiting Monopoly Agreements

Any agreement, decision or concerted action (hereinafter referred to as the “agreements”) among undertakings ~~with the purpose likely or actual effect of which is to eliminate or substantially restricting competition among undertakings within a relevant market~~ shall be ~~prohibited~~ unlawful.

For the purposes of the first paragraph, the following agreements include agreements that shall be presumed to have the likely or actual effect of eliminating or substantially restricting competition in a relevant market unless they are ancillary to an integration of economic resources designed to achieve the objectives identified in Article 9:²

- (a) agreements among actual or potential competitors relating to the products or markets in which they compete that:
 - (i) fix, maintain or change prices of products;
 - (ii) limit the output or sales of products;
 - (iii) allocate the sales markets or the raw material purchasing markets;
 - (iv) limit the purchase of new technology or new facilities, or the development of new products or new technology;
 - (v) jointly boycott transactions; or
 - (vi) ~~limit resale price; or (vii) rig bids; or~~
- (b) agreements between one or more sellers and buyers that set a minimum resale price.

² However, please see page 12 of the May 2005 Joint Comments regarding Article 9. Article 9 should be revised to require balancing of the potential anticompetitive harm of a particular agreement against its potential benefits. Article 9(ii) should be deleted. The exemption of Article 9(iv) should be clarified to provide that it would not apply if an agreement will adversely affect competition in the market within China.

~~This Article~~~~The second paragraph~~ shall not apply to any agreement by which the product covered has a share of less than 10% of the relevant market during the valid period of the agreement.

~~The first paragraph shall not apply to the conduct of limiting resale prices in issuing and distributing publications.~~

Chapter 3 (Prohibition of Abuse of Dominant Market Position)

Article 15 Presumption of Dominant Market Position

We propose an alternative to the current draft of Article 15, which differs in the following ways from the current draft:

1. We would eliminate the presumption that any undertaking with a market share of one-half has a dominant position, and provide instead that a firm with a share of less than one-half may not be found to have a dominant position. This is, we believe, more consistent with U.S. and EU law.

2. We state more clearly what must be found in order to find that a firm has a dominant position – namely that smaller competitors would not have the ability and incentive to constrain the exercise of market power by the dominant firm. This is the test used under U.S. law, where the courts define market power as the ability to raise price or exclude competitors.³ As one U.S. court stated recently, “In evaluating monopoly power, it is not market share that counts, but the ability to *maintain* market share.” *United States v. Dentsply Intern., Inc.*, 399 F.3d 181, 187 (3d Cir. 2005), <http://www.ca3.uscourts.gov/opinarch/034097p.pdf> .

3. Consistent with our July 2003 and May 2005 Joint Comments,⁴ we propose deleting the second paragraph, which introduces a concept of collective dominance. That concept is not found in U.S. law and has only rarely been invoked under Article 82 in the EU law.

4. If the State Council decides to retain the notion of collective dominance, we propose an additional requirement that in order to be found collectively dominant, the undertakings must be “united by contractual, structural or economic links in such a way that they adopt the same conduct on the market.” This requirement is found in the EU law on collective dominance and is necessary to make it clear that consciously parallel behavior in a concentrated market is not sufficient to support a finding of collective dominance. Such a requirement is necessary because, without it, Chapter 3 would apply

³ See, *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=384&page=563>

⁴ See, July 2003 Joint Comments at 11-12, 15; May 2005 Joint Comments at 15-16.

too broadly and could chill legitimate competitive behavior in markets with relatively few participants.

Article 15 Presumption of Dominant Market Position

An undertaking that has a market share of one-half or more in a relevant market may be found to have a dominant position if smaller competitors would not have a sufficient ability and incentive to constrain the exercise of market power (as defined in Article 13)⁵ by that undertaking, taking into account the factors identified in Article 14.⁶ An undertaking that has a market share of less than one-half in a relevant market does not have a dominant position.

[Two undertakings that occupy the first two positions in terms of market share and that together account for two-thirds or more of the market, or three undertakings, each of whom has 10% or more of the market, that occupy the first three positions in terms of market share and that together account for three-quarters or more of the market, may be found to have a dominant position if those undertakings are united by contractual, structural or other economic links in such a way that they adopt the same conduct on the market.]

Article 20 Exclusive Transactions, Forced Transactions

The Sections propose to add the phrase “without legitimate business reasons” because there may be valid, efficiency-enhancing reasons for exclusive transactions.⁷ We also add the word “substantially” since such arrangements should not be prohibited unless they have a substantial adverse impact on competition. Finally, for the reasons set forth in the May 2005 Joint Comments,⁸ we delete the phrase “with other undertakings.”

⁵ Please see pages 14-15 of the May 2005 Joint Comments regarding Article 13. The Sections propose that Article 13 be revised to substitute the word “an” for the phrase “one or several”, so that the article will read: “For purposes of this law, ‘dominant market position’ refers to the market power of an undertaking to determine, maintain or alter the price, quantity or other trading conditions of relevant products so as to eliminate or restrict competition within a relevant market.”

⁶ Please see page 15 of the May 2005 Joint Comments regarding Article 14. The Sections propose that the following additional factors be included expressly in Article 14: (a) the ability of other firms to enter the market or to expand their output; (b) the ability of competitors to reposition themselves in the market, and (c) the existence of countervailing buyer power. In addition, a time element should be added to Article 14. Finally, Article 14 (iv), (v) should be deleted.

⁷ July 2003 Joint Comments, at 19-20; May 2005 Joint Comments, at 19.

⁸ May 2005 Joint Comments, at 19.

Article 20 Exclusive Transactions, Forced Transactions

An undertaking with a dominant market position shall not, without legitimate business reasons that result in an increase in efficiency or consumer welfare that exceeds any elimination or restriction of competition, require its distributors to sell exclusively its own products and not to sell the products of other undertakings or to buy products of designated undertakings or impose other exclusive or forced transactions, so as to eliminate or substantially restrict competition~~with other undertakings~~.

Article 22 Refusal of Access to Network

The Sections reiterate their statements in the May 2005 Joint Comments regarding the potentially detrimental effect of provisions that may be used to compel access by one competitor to the facilities of another competitor, and the need to include specific criteria to narrow the application of any such provision.⁹ To address the concerns expressed in the May 2005 Joint Comments, the Sections propose the following alternative to the current draft of Article 22:

Article 22 Refusal of Access to Network

An undertaking (“Dominant Undertaking”) with a Dominant Market Position, as defined in Article 13,¹⁰ shall not be required to grant access to a Network or Other Infrastructure that it owns, unless the undertaking seeking access can prove that: (1) the refusal to grant access will exclude substantially all competition in the relevant market; (2) the Network or Other Infrastructure is owned or entirely controlled by the Dominant Undertaking; (3) the undertaking seeking access is unable practically or reasonably to duplicate the Network or Other Infrastructure, or to obtain a reasonable alternative to access to the Network or Other Infrastructure; (4) the undertaking has sought access and the Dominant Undertaking has denied access to the Network or Other Infrastructure; (5) the Dominant Undertaking can feasibly provide access by the undertaking to the Network or Other Infrastructure; and (6) the undertaking is willing and able to pay the Dominant Undertaking the fair market value of access to the Network or Other Infrastructure. “Network” shall mean a system of interconnected physical facilities such as a telephone or railroad network. “Other Infrastructure” shall mean other physical facilities, such as bridges and tunnels.

⁹ May 2005 Joint Comments, at 20.

¹⁰ See note 5 above regarding Article 13.

Chapter 4 (Control of Concentrations)

Article 24 Thresholds for notification and calculation of turnover

We propose revised language for the first approach of Article 24 that is designed to conform the thresholds for notification with the ICN Recommended Practices for Merger Notification in two respects. First, the revised language eliminates market share thresholds. This change will conform Article 24 to the ICN recommendation against the use of subjective market share thresholds because of the difficulty of applying such thresholds in practice. Second, the revised language adds language to subsection (1) requiring that at least two parties have China-wide assets or turnover above RMB 300 million. This change will conform Article 24 to the ICN recommendation that notification not be required unless at least two parties to a transaction have assets or turnover in the jurisdiction requiring notification. We also propose to authorize the Anti-Monopoly Authority to adjust the thresholds upwards based on economic developments and market situations.

Article 24 Thresholds for notification and calculation of turnover

A pre-merger notification shall be filed with the Anti-Monopoly Authority under the State Council where:

- (1) the value of the transaction is more than RMB 300 million, and the aggregate worldwide assets or turnover of all undertakings concerned in the preceding year is more than RMB 5 billion, with at least one party controlling assets or having turnover in China in the preceding year above RMB 3 billion and at least one other party controlling assets or having turnover in China in the preceding year above RMB 300 million; or
- (2) the value of the transaction inside China is above RMB 500 million;
- ~~(3) the market share of one party to the concentration in the relevant market within China is above 20%; or~~
- ~~(4) the market share of one party to the concentration in the relevant market within China will be above 25% as the result of the concentration.~~

The assets, or turnover ~~or market share~~ of an undertaking mentioned in the preceding paragraph will include those ~~of its affiliated undertakings~~ under common control with it and undertakings under its control ~~in the calculation.~~

The Anti-Monopoly Authority under the State Council shall have authority to increase the thresholds in this Article periodically based on economic developments and market situations.

Article 26 Information to be notified

We propose revised language for Article 26 that is designed to conform with the ICN Recommended Practices by reducing the burden on the notifying parties of supplying information with the initial notification that is not needed for the Anti-Monopoly Authority to make a determination as to whether a more substantial, second phase review is necessary.

Article 26 Information to be notified

Notification made pursuant to Article 24 and Article 25 for approval by the Anti-Monopoly Authority under the State Council shall include documents covering the following:

- (1) summary of application;
- (2) general information of the undertakings concerned;
- (3) the undertakings' financial reports and sales reports of the preceding accounting year;
- (4) information on the production ~~or costs, selling prices and output~~ and sales of the relevant products of the undertakings in RMB and, if applicable, units;
- (5) the effect on competition on the relevant market, ~~the national economy and public interest~~ as a result of the concentration;
- (6) the rationales for the concentration;
- (7) the expected date of concentration; and
- (8) Other documents required by the Anti-Monopoly Authority under the State Council.

For purposes of this Article, the term "relevant products" shall mean products sold by the undertakings in competition with each other. The term "relevant market" shall mean the product and geographic market, as defined in Article 4, in which those products are sold.

Article 27 Waiting Period

We propose two changes to Article 27 to conform it to the ICN Recommended Practices. First, we propose shortening the waiting period from 45 working days to 30 calendar days, which is the international norm. Second, we propose giving the Anti-Monopoly Authority the power to grant early termination of the waiting period once they determine that a transaction raises no serious competition issues. Again, this is consistent with the prevailing international practice, and the absence of such a provision has the potential to delay transactions based on reviews by countries that have relatively marginal contacts with the transactions.

Article 27 Waiting Period

A concentration shall not be implemented until ~~45 working~~30 calendar days after the receipt of the documents stipulated in Article 26 by the Anti-Monopoly Authority under the State Council.

Where no decision of further review is made by the Anti-Monopoly Authority under the State Council within ~~45 working~~ 30 calendar days, the undertakings concerned can implement the concentration.

The Anti-Monopoly Authority may terminate the waiting period at any time that it determines that the notified transaction does not raise material anti-competitive concerns.

Article 29 Substantial Review

Our only proposed changes to Article 29 are to replace “45” with “30” in the first paragraph in order to conform it to our proposed changes to Article 27, to provide that the extension of the second waiting period is in calendar days, to clarify that the second waiting period may be extended for an additional 90 calendar days to a total of 180 days, and to clarify that any of the three developments in the third paragraph will support the extension of the second waiting period. While using calendar days may shorten the actual waiting period, compared to business days, it will, more importantly, harmonize the waiting period with that of many other jurisdictions.

Article 29 Substantial Review

If the Anti-Monopoly Authority under the State Council considers it necessary to further review the concentration, it shall inform the notifying undertakings of its decision in written form within ~~45~~30 calendar days after receipt of the notification.

The Anti-Monopoly Authority under the State Council shall decide whether to approve the concentration within ~~90 working~~calendar days after the date of decision for further review. A decision of approval may include restrictions and conditions.

Under the following circumstances, the time limit stipulated in the second paragraph may be extended up to ~~180~~an additional 90 calendar days:

- (1) the undertakings concerned agree to extend the time limit;
- (2) the documents submitted are inaccurate and need verification; or
- (3) other significant events occurred after notification.

Article 30 Conditions for prohibition of concentration

We suggest technical changes to the language of Article 30 in order to conform it more closely to the standard for illegality for monopoly agreements that we recommend in Article 8. In addition, if our proposed changes to Article 15 to eliminate the concept of collective dominance are accepted, we would recommend that the word “and” in Article 30 be replaced by “or may” in order to allow concentrations that may substantially restrict competition to be prohibited even if they do not create a single firm with a dominant market position, as is the case currently in both the United States and Europe.¹¹

Article 30 Conditions for prohibition of concentration

The Anti-Monopoly Authority under the State Council shall prohibit the concentration where the concentration may create or strengthen a dominant market position [~~and/or may~~] eliminate or substantially restrict market-competition in a relevant market. However, the Anti-Monopoly Authority under the State Council may approve the concentration with restrictions and conditions where a concentration ~~will produce great~~can be proved to have significant benefits for the national economy and social welfare.

Article 31 Consultations

We propose adding a paragraph to Article 31 to make it clear that the Anti-Monopoly Authority may not disclose to industry regulators trade secret information protected by Article 41 without the written consent of the party providing that information.

Article 31 Consultations

When making a decision of approval or prohibition of a concentration, the Anti-Monopoly Authority under the State Council shall make prior consultation with the relevant industry regulators.

The State Council shall not, in such consultations, disclose to any industry regulator any confidential information protected by Article 41 without prior written consent of the party producing such confidential information or without the notification required by Article 41.

¹¹ Conversely, if our proposed changes to Article 15 are not accepted, then we would recommend retaining the word “and” so that only transactions that result in the elimination or substantial restriction of competition in a relevant market will be prohibited.

Article 31A Implementation

We propose adding a new article following Article 31 to address the implementation of Chapter 4. This new article would require the Anti-Monopoly Authority to issue regulations implementing the requirements of Chapter 4 within one year of enactment and would provide that Chapter 4 will not become effective until those regulations are issued. This is the approach that was followed in the United States and the European Union when premerger notification was first introduced. The new article would also make clear that when it becomes effective, Chapter 4 will supercede Articles 19-22 of the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.

Article 31A Implementation

Within one year from the date of enactment of this law, the Anti-Monopoly Authority of the State Council shall issue such regulations as it may determine to be necessary to implement the provisions of this Chapter. Draft regulations shall be issued for public comment at least 6 months before such regulations are issued and effective. The requirements of this Chapter shall not become effective until such regulations are issued and effective.

Articles 19 through 22 of the Provisional Rules for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, passed at the First General Meeting of the Ministry of Foreign Trade and Economic Cooperation on January 2, 2003, shall cease to have any effect once this Chapter becomes effective.

Chapter 5 (Prohibition of Administrative Monopoly)

The basic purpose of Article 5 (Responsibilities of Governments) and Chapter 5 (Prohibition of Administrative Monopoly) is important and beneficial. However, these provisions could be improved and clarified in several respects.

In any society based on competitive market principles, the need frequently arises to adopt regulations or other government action that is in tension or conflict with competition principles. While competition principles must sometimes give way to other public policies, decisions regarding the precedence and weight assigned to such conflicting policies should be made openly and within an institutional framework that permits public and government accountability for derogations from competition principles. Such a transparent process providing for clear institutional accountability will facilitate an open consideration of the merits of the exception relative to free competition, lead to more informed trade-offs, and help ensure that the benefits of the competitive process will be limited or sacrificed only to the minimum extent necessary to serve a legitimate supervening public policy objective. We strongly believe that the requirement of a transparent process will

also enhance the political legitimacy of the compromise between competition and other objectives that is ultimately selected.

Where standards of competition law are readily evaded through conflicting regulatory action without appropriate consideration to the potential resulting adverse economic or other effects, the fundamental objectives of competition law are needlessly sacrificed. This is a clear and undeniable lesson learned from extensive experience with the interaction between competition law enforcement and other regulatory schemes in many other countries over an extended period of time.

Accordingly, in order to assure that the competitive protections adopted by the Anti-Monopoly Law are not unnecessarily sacrificed or compromised without due consideration and clear responsibility for the consequences, the Sections urge clarification of Article 5 and Chapter 5 in the following respects: First, no claim of immunity, exemption or exception to the Law should be recognized unless specifically and expressly authorized by statute. Second, the Law should be applied expressly to the agencies and instrumentalities of government. Third, the final authority to rule upon the validity of any claim of exemption, immunity or exception to the Law shall reside with the Anti-Monopoly Authority, subject to appropriate judicial review as may be provided by law.

Each of these strengthening provisions can be directly incorporated into Article 5, as suggested here:

Article 5 Responsibilities of governments

People's Governments at all levels and their subordinate departments shall adopt measures to create favorable environment and conditions for fair competition. Evidence of specific benefit to an undertaking owned in whole or in part by a government entity shall not constitute a general benefit to the public interest.

No claim of immunity or exception to, or exemption from, the Anti-Monopoly Law shall be recognized as valid unless specifically and expressly authorized by national legislation.

The Anti-Monopoly Law shall apply to all agencies, instrumentalities and officials of government, and to all undertakings owned in whole or in part by a government entity or government department and to all other undertakings.

The Anti-Monopoly Authority has exclusive authority to determine the validity of any claim of immunity or exception to, or exemption from, the Anti-Monopoly Law. Such determinations shall be subject to appropriate judicial review as may be provided by law.

The four specific articles of Chapter 5 employ two basic concepts of improper anticompetitive conduct by government agencies and instrumentalities: “abuse” (Articles 32-34) and “violation of laws and administrative regulations” (Article 35). In either case the principle is the same: such conduct is prohibited when any government entity commits an “abuse” or a “violation of laws and administrative regulation” with the consequence specified in the particular article (*i.e.*, required purchase of designated products or suppliers, with restrictive purpose (Art. 32), restriction of market access or free flow of commodities between regions (Art. 33), compelled conduct in violation of the Anti-Monopoly Law (Art. 34), and preventing the establishment of “unified and orderly national market and of a fair competitive environment”¹² (Art. 35)).

This poses the question as to the circumstances regarded as an “abuse” or as a “violation of laws and administrative regulations.”¹³ Agencies of government that seek to restrict competition would be expected to describe their actions as a legitimate exercise of their own authority, thus leading to the prohibited anticompetitive consequences while evading characterization as an “abuse” or “violation of laws and administrative regulation.”

Accordingly, the Sections suggest that the concept of “abuse” or “violation of laws and administrative regulation” be linked to the principles of transparency and institutional accountability outlined above: regulations permitting derogations from the Anti-Monopoly Law should be regarded as authorized only when explicitly and specifically permitted by statute. Thus, for example, a new Article should be added to Chapter 5, perhaps after Article 35, as follows:

Article 35A “Abuse” and “Violation of Laws and Regulations”

For purposes of this Chapter 5, the terms “abuse” and “violation of laws and regulations” shall include any government action to create immunities, exceptions, exemptions or other derogations from this law, or to encourage, authorize or compel conduct otherwise inconsistent with the provisions of this law, where such action has not been specifically and explicitly authorized by national legislation.

In the alternative, the prohibitions in Articles 32-34 may be clarified by combining them into one provision, specifically defining prohibited conduct and eliminating the term “abuse” in the following manner:

¹² The phrases in quotation marks contain the potential to introduce some confusion and uncertainty regarding implementation of the Anti-Monopoly Law in a manner that best serves the fundamental objectives of the law, and such undefined phrases as “unified and orderly” and “fair competitive environment” should be considered for clarification or deletion. *See*, July 2003 Joint Comments at 7-10; May 2005 Joint Comments at 26-28.

¹³ *See* May 2005 Joint Comments at 26-28.

Article 32 (-34) Acts of Administrative Monopoly

No government, government department, or government employee may, through formal or informal use of administrative power, (1) require undertakings or individuals to purchase commodities from an undertaking designated by a government, government department, or government employee; (2) restrict access by undertakings to markets for commodities or restrict the free flow of commodities between regions; or (3) compel undertakings to engage in conduct otherwise prohibited under this law. This article does not apply to government action taken in accordance with the specific authorization of other laws, consistent with Article 55 of this law.

Under this formulation, the Anti-Monopoly Authority of the State Council would (1) determine whether the challenged administrative conduct results in any of the three listed anticompetitive effects, and (2) determine whether the challenged conduct was “in accordance with the specific authorization of other laws.” The second step thus focuses directly on the legal basis and purpose of the government department’s administrative authority. This formulation may address the same concerns as the prohibitions on “abuse of administrative authority” while avoiding the ambiguous concept of “abuse.”

Similarly, Article 35 might be strengthened by prohibiting all anticompetitive measures unless expressly permitted by other laws in the following way:

Article 35 Administrative Conduct with General Application

No government, government department, or government employee may promulgate rules with provisions which limit or eliminate competition with the purpose or effect of impeding the establishment of a unified and orderly national market and of a competitive environment. This article does not apply to government action taken in accordance with the specific authorization of other laws, consistent with Article 55 of this law.

Under this formulation, the Anti-Monopoly Authority of the State Council would (1) determine whether the challenged rule limits or eliminates competition, (2) determine whether the purpose or actual effects of the challenged rule are adverse to competition, and (3) determine whether the challenged rule is “in accordance with the specific authorization of other laws.” The third step thus focuses directly on the legal basis and purpose of the government department’s new rule.

Chapter 6 (Anti-Monopoly Authority)

Article 36 Function of the Anti-Monopoly Authority

The enforcement of the proposed law may also implicate China's WTO accession commitments.¹⁴ The non-discrimination and national treatment provisions of the GATT, GATS, and TRIPS agreements provide for transparent and uniform enforcement (or non-enforcement) of competition laws against all participants (domestic and foreign) in the economy. We suggest added language to ensure that enforcement of the law would be consistent with these commitments and would be consistent with and complement the prohibitions in Chapter 5 against administrative monopoly, particularly the prohibition in Article 33 against regional blockage.

The Sections also suggest authorizing a competition advocacy mission for the Anti-Monopoly Authority of the State Council and its local branches because they recognize that creating market competition will not be a goal that the Anti-Monopoly Authority can achieve on its own, even with the establishment of a national network of local branches to enforce the law. We believe that creating market competition requires substantial infrastructure and support from other governmental institutions and the society at large.¹⁵

Article 36 Function of the Anti-Monopoly Authority

The Anti-Monopoly Authority established under the State Council shall enforce this law uniformly against all undertakings, whether foreign or domestic, unless there is specific national legislation exempting the specific conduct or specific undertaking from this law. In addition, the Anti-Monopoly Authority shall perform the following functions:

- (1) formulating anti-monopoly policies and regulations to implement this law; such regulations shall set forth the procedures that the Anti-Monopoly Authority shall follow in performing its duties; the Anti-Monopoly Authority shall follow the procedures set forth in Article 36A and Article 36B in formulating and issuing such policies and regulations;
- (2) investigating anti-monopoly matters falling under the scope of this law;
- (3) ~~handling~~deciding cases in violation of this law;
- (4) investigating and evaluating market competition conditions;
- (5) conducting international exchanges and cooperation with foreign jurisdictions and negotiations of multilateral and bilateral agreements on competition;
- (6) handling other anti-monopoly matters in connection with this law; and

¹⁴ See, July 2003 Joint Comments at 28-29.

¹⁵ See, July 2003 Joint Comments at 26-27; May 2005 Joint Comments at 28-29.

(7) advocating competition policy and goals to other governmental entities, and educating the public on this law and competition policy.

Articles 36A - 36E

The April 8, 2005 Revised Draft is silent on several important administrative procedure aspects. The Sections suggest that a notice and comment process, related to the Anti-Monopoly Authority's rulemaking powers, would improve the quality of such rules, enable the Anti-Monopoly Authority to avail itself of domestic and foreign expertise, and build confidence in the Anti-Monopoly Authority's operations.¹⁶ Further, since the rules that the Anti-Monopoly Authority would introduce and implement will impact foreign businesses, Section 2(C) of China's WTO Accession Protocol, requiring notice and opportunity to comment for administrative actions that would impact foreign businesses, may be implicated. Section 2(C)(2) of the WTO Accession Protocol also appears to require that relevant Chinese government entities publish official gazettes. Therefore, we propose the addition of the following five new articles, perhaps following Article 36.

Article 36A Rulemaking Procedure for Anti-Monopoly Authority

The Anti-Monopoly Authority, in discharging its duties under Article 36(1) of this law, shall publish a general notice of proposed rulemaking in the Anti-Monopoly Authority Gazette and on the Anti-Monopoly Authority's website not less than thirty (30) days prior to the Anti-Monopoly Authority's first consideration of such rule. Such notice shall include (i) a statement of the time, place, and nature of public rule making proceedings; (ii) reference to the legal authority under which the rule is proposed; and (iii) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

After the notice required by this article, the Anti-Monopoly Authority shall provide interested parties an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the Anti-Monopoly Authority shall incorporate in the final rules a concise general statement of their basis and purpose.

The Anti-Monopoly Authority shall publish substantive rules not less than 30 days before its effective date.

¹⁶ See, July 2003 Joint Comments at 27-29; May 2005 Joint Comments at 28-30.

Article 36B Open Meetings

Except when the Authority expressly finds and announces in a published notice that the public interest requires otherwise, the Anti-Monopoly Authority shall conduct rulemaking meetings through meetings open to public observation. The Anti-Monopoly Authority shall issue notice at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and contact details of the official designated by the Authority to respond to requests for information about the meeting.

Article 36C Information Disclosures by the Anti-Monopoly Authority

The Anti-Monopoly Authority shall publish, and maintain on its website, the following information: (i) descriptions of its central and local branches and the places at which, the employees from whom, and the methods whereby, interested parties may obtain information, make submissions or requests, or obtain decisions; (ii) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations; (iii) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; (iv) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases; (v) any statements of policy and interpretations which have been adopted by the agency and are not published; (vi) administrative staff manuals and instructions to staff that affect a member of the public; (vii) materials released to persons or undertakings as set forth in the remainder of this article, which because of the nature of their subject matter, the Authority determines have become or are likely to become the subject of subsequent requests for substantially the same materials; and (viii) a general index of the records referred to in subparagraph (vii) of this article.

The Anti-Monopoly Authority shall make available to any person or undertaking, upon a written request made pursuant to this article, any information in the Authority's possession, except for information that are:

- (a) trade secrets and commercial or financial information obtained from a person or undertaking and are privileged or confidential;
- (b) specifically authorized under criteria established by the State Council to be kept secret in the interest of national defense or foreign policy and are properly classified pursuant to such criteria:

(c) related solely to the internal personnel rules and practices of the Authority;

(d) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or

(e) information or materials compiled for law enforcement purposes, only to the extent that the production of such information or materials (1) could reasonably be expected to interfere with enforcement proceedings, (2) would deprive a person or undertaking of a right to a fair trial or an impartial adjudication, (3) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (4) could reasonably be expected to disclose the identity of a confidential source, including a governmental or foreign agency or authority or any private entity or person which furnished information on a confidential basis, or (5) could reasonably be expected to endanger the life or physical safety of any individual.

Any request made pursuant to this article shall reasonably describe the information sought. The Anti-Monopoly Authority shall provide the record in any form or format requested by the interested party if the record is readily reproducible by the Anti-Monopoly Authority in that form or format. The Anti-Monopoly Authority shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this article.

In order to carry out the provisions of this article, the Anti-Monopoly Authority shall promulgate regulations, pursuant to notice and receipt of public comment, specifying the schedule of fees applicable to the processing of requests under this article and establishing procedures and guidelines for determining when such fees should be waived or reduced. Fees shall be limited to reasonable standard charges for document search, duplication, and review.

The Anti-Monopoly Authority shall determine within twenty (20) calendar days after the receipt of any such request whether to comply with such request and shall immediately notify the interested party making such request of such determination and the reasons therefor, and of the right of such interested party under Article 44 to appeal to the Intermediate People's Court any adverse determination. The time limits prescribed in the previous sentence may be extended by written notice to the interested party making such request for a period of no more than ten (10) working days.

To the extent required to prevent a clearly unwarranted invasion of personal privacy or harm to an interest protected by the exemptions in subparagraphs (a) through (e), an agency may delete identifying details when

it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of materials referred to in subparagraph (vii) of this article. However, in each case the justification or the deletion shall be explained fully in writing and the extent of such deletion shall be indicated on the portion of the document which is made available or published, unless including that indication would harm an interest protected by the exemption in subparagraphs (a) through (e) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the materials where the deletion was made.

A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by the Anti-Monopoly Authority against a party other than another governmental entity, only if (A) it has been indexed and either made available or published as provided by this article, or (B) the party has actual and timely notice of the terms thereof.

Article 36D Disinterested Persons

No interested person may participate on behalf of the Authority in any investigation or in the decisional process of any action or proceeding undertaken by the Anti-Monopoly Authority.

Article 36E Limits on Sanctions and Substantive Rules

A sanction may not be imposed or a substantive rule or order issued except within the jurisdiction delegated to the Anti-Monopoly Authority and as authorized by law.

Article 37 Local branches

The Sections propose language to clarify the specific role of local branches at the provincial level under Article 37, and to ensure that the Anti-Monopoly Law will be enforced in a consistent and predictable manner across China.

Article 37 Local branches

Local branches may be established at the provincial level where necessary and under the unified leadership and administration of the Anti-Monopoly Authority under the State Council.

Local branches shall ~~perform its function within the scope of authorization~~ not be subject to local government rules or regulations, and shall be subject only to the authority delegated and the procedures established by the Anti-Monopoly Authority under the State Council.

Article 38 Powers of Inspection

The Sections propose language to qualify the Anti-Monopoly Authority's powers of inspection with limits such as those placed on administrative licensing by the Administrative Licensing Law, effective as of July 1, 2004, to provide that the sealing or attachment of items or evidence by the Authority be subject to the authority of the People's Court. The requirement to seek the authorization of the People's Court may help ensure that due process is observed and that the Anti-Monopoly Authority of the State Council has fully established a basis for such major actions. Finally, we propose that inspections conducted by the Anti-Monopoly Authority be conducted by two or more disinterested staff members, to help ensure the legitimacy of the Authority's actions.

Article 38 Powers of Inspection

When conducting investigations, the Anti-Monopoly Authority can take the following measures in accordance with law:

- (1) searching the residences, business locations or other places of the undertakings; such searches shall be conducted by two or more disinterested employees of the Authority;
- (2) requesting the undertaking concerned, interested parties and other relevant undertakings, organizations or persons to submit relevant documents and information;
- (3) pursuant to authorization by the people's court, examining, copying, digesting, sealing or retaining relevant evidence;
- (4) inquiring about the bank account information of the undertakings concerned; and
- (5) pursuant to authorization by the people's court, sealing up the business locations of the undertakings concerned.

Article 39 Duties of the Parties subject to investigation

The Sections propose language to ensure that entities producing information to the Anti-Monopoly Authority will be able to retain a copy of what was produced, and to clarify that the process for submission of documents will be consistent with Article 43 of the Administrative Litigation Law that sets forth a timeline for document production related to administrative litigation.

Article 39 Duties of the Parties subject to investigation

Undertakings concerned, interested parties and other relevant undertakings, organizations and persons being investigated shall cooperate with the Anti-Monopoly Authority by providing testimonies, relevant documents and information.

The Anti-Monopoly Authority shall request only those documents and information necessary for the Authority to discharge its duties specified in Article 36 of this law. When requesting relevant documents and information, the Anti-Monopoly Authority shall specify the scope, content, and time limit for the parties to submit the relevant documents consistent with the time limits set forth in Article 43 of the Administrative Litigation Law. All requests shall be in writing.

A party compelled to submit data or evidence is entitled to retain a copy or transcript thereof.

Article 40 Written record of investigation

The Sections propose language to clarify that the written record of investigation that is required should comply with the requirements in the Administrative Licensing Law.

Article 40 Written record of investigation

The investigating officers from the Anti-Monopoly Authority, in carrying out their duties pursuant to law, shall present documents proving their identity and make written record of the inspection. Such written record shall satisfy the requirements for such records set forth in the Administrative Licensing Law.

Article 41 Confidentiality

The Sections propose language to clarify the identification of data to be given confidential treatment.

Article 41 Confidentiality

The Anti-Monopoly Authority and its staff shall keep confidential ~~all of the commercial secrets~~ the documents and information, identified as confidential by the sources of those documents and information, obtained during the investigation. If the Anti-Monopoly Authority determines that the documents and information are not properly designated as confidential or

that it is required to disclose such documents or information for whatever reason, it shall inform the source of those documents and information of that decision in writing, and provide at least seven (7) calendar days' notice to the source of any disclosure that may be made of those documents and information.

Article 42 Right to be heard

The Sections propose that, notwithstanding Article 35 of the Administrative Litigation Law that may limit the use of "experts" to those persons employed by a State evaluation office, the Anti-Monopoly Law specifically allow the introduction of the opinions of non-State experts into the records of relevant investigations. We also propose that, in addition to the right to submit statements and defenses, parties under investigation be given the right to a public hearing on request. The Sections propose that, as in the Administrative Licensing Law, parties be entitled to seven days' notice of any hearing. Finally, the Sections propose to conform Article 42 to Articles 26 and 27 of the Administrative Litigation Law, to permit substantially similar cases to be consolidated and to allow qualified third party intervenors to participate in a hearing.

Article 42 Right to be heard

When conducting investigations in accordance with this law, the Anti-Monopoly Authority shall give the undertakings concerned and interested parties the opportunity to submit statements and defences. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Such evidence may include the opinion of experts who are not employed by the government.

The Anti-Monopoly Authority shall hear the opinions of the undertakings concerned and interested parties, and check whether the alleged facts, justifications and evidences are valid.

If a party requests in writing, the Anti-Monopoly Authority shall hold a public hearing to consider the evidence in an investigation. Such a public hearing will be held after at least seven (7) calendar days' notice has been provided in writing to all interested parties, and all interested parties shall have the opportunity to submit statements, evidence and defenses. A written record shall be maintained and published of the proceedings at the public hearing. Consistent with Articles 26 and 27 of the Administrative Litigation Law, the Anti-Monopoly Authority may consolidate substantially similar cases to be heard in one hearing and to allow qualified third party intervenors to participate in a hearing.

A party compelled to appear in person before the Anti-Monopoly Authority or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the Anti-Monopoly Authority, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an Anti-Monopoly Authority proceeding.

Article 43 Publication of decisions

The Sections propose language to clarify that decisions are subject to requirements that are comparable with the requirements for decisions under the Administrative Licensing Law. In particular, decisions should be made in writing on a timely basis and include an explanation, so that the full benefits of transparency may be obtained. In addition, we propose language to clarify the schedule under which decisions must be issued, comparable to that set forth in Article 38 of the Administrative Litigation Law.

We also propose to specify the languages in which decisions are to be published, as well as their mode of dissemination, in a manner consistent with the intent of Article 8 of the Administrative Litigation Law, to ensure that China is in compliance with its commitment, in Section 2(C) of its WTO Accession Protocol, to make available in appropriate foreign languages all decisions, judicial and administrative, that may affect China's trade regime.

Article 43 Publication of decisions

Decisions made by the Anti-Monopoly Authority shall be made in writing, and shall include the reasons for the decisions. If the bases for a decision include confidential information, then, pursuant to Article 36C, the public version of the decision shall indicate that factor and shall not disclose the information. Except for decisions in investigations of concentrations under Chapter 4, which shall be issued within the time limits set forth in Chapter 4, decisions shall be issued within 45 calendar days of the commencement of an investigation, subject to one 15-day extension. Such decisions may include a decision to extend the time for investigation for a specified period of time, not to exceed one year.

Decisions made by the Anti-Monopoly Authority shall take effect on the day of ~~its~~their issuance, unless the Anti-Monopoly Authority decides to postpone the effective date pending judicial review, and be published in the Chinese and English languages in the Authority's official journal and on the Authority's website. Each version of such decision shall be considered authentic. Decisions shall be published within ten (10) calendar days of date of issuance.

Article 44 Judicial Review and Enforcement

The Sections propose language to ensure compliance with Section 2(D) of China's WTO Accession Protocol requiring prompt judicial review be available for specified administrative actions, and consistency with Article 57 of the Administrative Litigation Law requiring a People's Court to reach a decision as to a specific administrative litigation within three (3) months of the date of that case's filing. We also propose the addition of language to clarify the Anti-Monopoly Authority's power to enforce its decisions.

We propose language providing that the Intermediate People's Court shall publish opinions on the procedures for the conduct of appeals from decisions by the Authority, first in draft form to allow adequate opportunity for comment and refinement,¹⁷ and shall establish a special division to focus exclusively on matters arising under the Anti-Monopoly Law.¹⁸ The Sections believe that the establishment of such a specialized division within the framework of the People's Courts is consistent with the intent of Article 3 of the Administrative Litigation Law as well as with current People's Court practice in hearing intellectual property-related disputes involving foreign parties.

The Sections propose language so as to allow actions by the Anti-Monopoly Authority to be suspended for the pendency of the appeal, since in some instances, a successful appeal is not meaningful if the decision by the Authority has already been implemented in the meantime.

Article 44 Judicial Review and Enforcement

~~Where the undertakings concerned and interested parties are dissatisfied with~~
A party adversely affected by a decision made by the Anti-Monopoly Authority is entitled to judicial review thereof, and may file for judicial review by an Intermediate People's Court at the place where the Anti-Monopoly Authority is located, within 30 days of the publication of the Authority's decision.

An action made reviewable by this law and final Anti-Monopoly Authority actions are subject to judicial review as provided in this article. The Intermediate People's Court may order the postponement of the effective date of any action by the Authority pending the adjudication of the appeal before it.

If a party, including an agency, instrumentality or official of government, fails to comply with a decision of the Anti-Monopoly Authority within the time period established by the Authority, the Authority may apply within

¹⁷ See, July 2003 Joint Comments at 27-28; May 2005 Joint Comments at 29-30.

¹⁸ See, July 2003 Joint Comments at 27-28; May 2005 Joint Comments at 29-30.

30 days of the expiration of the time period to the Intermediate People's Court for an order enforcing the Authority's decision and imposing penalties for failure to comply with the Authority's decision.

The Intermediate People's Court shall establish a division that will consider all appeals from decisions of the Anti-Monopoly Authority and all applications by the Authority to enforce the Authority's decisions. The Intermediate People's Court shall publish opinions on the manner of conduct of appeals from decisions by the Authority or of applications for enforcement by the Authority, within one year of the effective date of this law. Such opinions shall be published first in draft form within six months of the effective date of this law, and comments may be submitted by interested parties and agencies.

The Intermediate People's Court shall publish a decision within three (3) months of the filing of the appeal or application to the court. To the extent necessary to the decision and when presented, the Intermediate People's Court shall decide all relevant questions of law in connection with an action by the Authority. The Intermediate People's Court may: (i) compel action unreasonably delayed by the Authority or any party; (ii) impose penalties for failure to comply with a lawful decision of the Anti-Monopoly Authority; and (iii) hold unlawful any action, finding, and conclusion by the Authority found to be (w) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with this law; (x) contrary to constitutional right, power, privilege, or immunity; (y) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; or (z) without observance of procedure required by this law.

The Intermediate People's Court shall determine that an action or decision of the Anti-Monopoly Authority is lawful and shall enforce the action or decision of the Authority, unless the court finds that the action or decision is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with this law, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, or limitations, or short of statutory right, or without observance of procedure required by this law.

Chapter 7 (Legal Liabilities)

Article 46 Penalty against monopoly agreement

In the United States, the Department of Justice does not criminally prosecute violations of antitrust law unless they constitute so-called hard-core, *per se* conduct, such as horizontal price-fixing, bid-rigging, horizontal market allocation or horizontal customer allocation, where substantial profits from such collusive conduct justifies such severe

penalties.¹⁹ If Article 8 is not revised as suggested,²⁰ the Sections are concerned that criminal penalties will be imposed where conduct may not be of the types generally considered sufficiently egregious to warrant criminal sanctions. Accordingly, and assuming that Article 8 will be revised as suggested, the Sections propose the following revision of Article 46 in lieu of the current draft of that provision:

Article 46 Penalty against monopoly agreement

In case there exists monopoly agreement in violation of the relevant provisions of this law, the Anti-Monopoly Authority shall order the undertakings concerned to cease and desist such conduct, declare the monopoly agreement void, and may also impose fines of between RMB 100,000 to RMB 10,000,000, which fines in any event shall not exceed 10% of the turnover of the fined undertaking in the relevant market in the preceding year. If the monopoly agreement constitutes one of the types of agreements listed in Article 8(a),²¹ the conduct may be punished as a criminal offense and may be prosecuted and penalized accordingly.

Article 47 Penalty against abuse of dominant market position

For the same reasons stated above, the Sections propose that the final sentence of Article 47, referring to criminal prosecution for abuses of dominant market position, be deleted.

Article 48 Penalty against Unauthorized Concentrations

As stated in the May 2005 Joint Comments,²² the Sections view the sanctions set forth in Article 48 to be unduly harsh for failure to notify concentrations, implementation of concentrations before approval or failure to comply with obligations prescribed by the Anti-Monopoly Authority in its decision regarding a concentration. Accordingly, the Sections propose the following revisions to Article 48 in lieu of the current draft of that provision:

¹⁹ See May 2005 Joint Comments at 30-31. *See also* Scott D. Hammond, “An Overview of Recent Developments in the Antitrust Division’s Criminal Enforcement Program,” ABA Midwinter Leadership Meeting (Kona, Hawaii, January 10, 2005), <http://www.usdoj.gov/atr/public/speeches/207226.htm>.

²⁰ *See* proposed revision of Article 8 above.

²¹ *See* proposed revision of Article 8 above.

²² *See* May 2005 Joint Comments at 31.

Article 48 Penalty against Unauthorized Concentrations

In case an undertaking fails to notify the concentration when required to do so by this law, a fine of between RMB 100,000 and RMB 1,000,000, which in any event shall not exceed 10% of the turnover of the fined undertaking, may be imposed. In case an undertaking implements a concentration before approval under this law, the Anti-Monopoly Authority may declare the concentration concerned void, order the undertakings concerned to take steps necessary to restore the existence of separate undertakings, to the same state, to the extent feasible, as existed prior to the implementation of the concentration. In deciding whether to order such steps, the Anti-Monopoly Authority shall consider whether the concentration that was not notified or was improperly implemented may be prohibited under Article 30 and, if not, shall not order such steps. Instead, in such case, the Anti-Monopoly Authority shall impose a fine within the range indicated above on each undertaking that failed to notify or wrongfully implemented the concentration.

If an undertaking concerned fails to comply with the measures prescribed by the Anti-Monopoly Authority in the preceding paragraph, the Anti-Monopoly Authority may order the cessation of business operations by such undertaking in China or a part of China.

Chapter 8 (Supplementary Articles)

Article 55 Inapplicability to Legitimate Conduct

As discussed in the May 2005 Joint Comments, the current draft of Article 55 may be interpreted to cause all other laws to take precedence over the Anti-Monopoly Act, though that seems unlikely to be the drafters' intent.²³ To avoid this result, which could seriously undermine the effectiveness of the Anti-Monopoly Act, the Sections propose the following language in lieu of the current draft of that provision:

Article 55 Inapplicability to Legitimate Conduct

This law is applicable to conduct taken according to other laws and regulations unless this law or other national legislation expressly exempt such conduct from application of this law.

²³ See May 2005 Joint Comments at 33-34.

Article 56 Exemption of the Exercise of IPRs

As discussed in the May 2005 Joint Comments,²⁴ the language “other laws protecting intellectual property rights” should be restored to ensure that treaty rights and regulations regarding IP are not nullified by the Anti-Monopoly Law. In addition, the term “abuse” should be defined to ensure that a mere unilateral refusal to license, without any ancillary anticompetitive conduct and without any purpose or effect of creating or maintaining market power not otherwise granted by the IP in question, would not be found to constitute a violation of the Anti-Monopoly Act. Accordingly, the Sections propose the following language in lieu of the current draft of that provision:

Article 56 Exemption of the Exercise of IPRs

This law shall not be applicable to the exercise of rights under the Patent Law, the Trademark Law, the Copyright Law and other laws protecting intellectual property rights. Abuses of intellectual property rights may be subject to this law, provided that the conduct violates another provision of this law, and that the unilateral exercise of the right to exclude shall not constitute an abuse unless (1) the refusal is undertaken in furtherance of a violation of another provision of this law and (2) the refusal is undertaken for the purpose of creating or maintaining a monopoly.²⁵

Conclusion

The Sections hope that this supplement to their May 2005 Joint Comments is useful. We would be pleased to respond to any questions about their comments or this supplement, or to provide any additional comments or information that may be of assistance.

July 29, 2005

²⁴ See May 2005 Joint Comments at 34-35.

²⁵ See *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919), <http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=250&page=300>, and discussion in the May 2005 Joint Comments at 19-20.