
Should China's Competition Model be Exported?: A Reply to Wendy Ng

Eleanor M. Fox*

Abstract

The Chinese competition model is primarily distinguished by its Chinese characteristics: a baseline that closely resembles US/EU law and an overlay of 'state over market' to do what is strategically good for China. Replying to Wendy Ng's suggestion that the Chinese competition model might be usefully exported to developing countries, this article disagrees. The Chinese law does have some outstanding characteristics, and developing countries might need a state/market balance different from the laissez-faire West. But a more appropriate alternative vision for developing democracies is the state as enabler of the market rather than the state as controller of the market, along with emphasis on the inclusiveness value in controlling the power of the giant corporations.

1 Introduction

The USA, Europe and the West have dominated the effort to formulate soft principles of competition law.¹ If the project of formulating best principles had originated in developing, rather than developed, economies, would the principles look somewhat different? Would unique characteristics of developing countries play a role? If so, is China's antitrust model good for the 'Rest'? This is the question posed by Wendy Ng's thoughtful and provocative article 'Changing Global Dynamics and International Competition Law: Considering China's Potential Impact'.² Dr Ng asks whether China's approach might 'challenge and change the development of international competition law' and whether it is an adaptable and feasible model for the developing world. She

* Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, USA. Email: eleanor.fox@nyu.edu. The author thanks Deborah Healey for her helpful comments. She thanks her student Yu Jiang for his helpful research.

¹ 'Competition law' and 'antitrust law' are used interchangeably.

² Ng, 'Changing Global Dynamics and International Competition Law: Considering China's Potential Impact', 30 *EJIL* (2019) 1409.

applauds China's embrace of international competition principles moulded to accommodate a different 'implemented understanding'; she explains how China has reset the market/state balance by staking out a leading role for the state in the economy, and she reflects that developing countries might similarly need a larger role for the state than the Western model provides. She concludes that China's model 'might be useful for developing countries, as there is now a key competition law jurisdiction that they can look to as one that appears to implement and enforce competition law in a manner that can help to address their development concerns, challenges and goals'.³

This article disagrees. It argues that, while China's adoption and implementation of its competition law have been remarkable and while China and its outstanding, quick-learning enforcers deserve much credit and praise, China's model, especially its state/market relationship, is specially made for China. We should appreciate it on its own terms and not even try to adapt it to developing countries.

Nonetheless, Wendy Ng's article is an important contribution to the literature on how world competition norms are developed and diffused and how China has received them. It explains that world norms of competition law are based almost exclusively on US and European Union (EU) paradigms, whereas much of the rest of the world does not start from the same baseline either of market facts (how well markets work) or of norms on the relationship of the state to markets, although both should be vital ingredients of each nation's economic law. The article reports how, in just a few years after adopting its competition law, China has emerged as one of a handful of principal competition law enforcers in the world – a noteworthy achievement.

There is little doubt that China's antitrust performance has been notable. Its dedicated antitrust enforcers have mounted a steep learning curve quickly and have absorbed and normally applied what is often called 'international standards'.⁴ But the authorities are sometimes diverted from the neutral task of applying rules and standards equally to equivalent situations (rule of law). The antitrust authorities are answerable to higher ministries. To the Western world, the most obvious special characteristic of the Chinese competition system is its mixture of antitrust with ad-hoc, non-transparent strategic industrial policy.⁵ While focusing on this characteristic may overshadow the richness of Chinese antitrust law, one might be especially worried about a state-centred model in this era of nationalism – a time in which so many nations have retreated from the community – regarding world norms that bind the world on the eve of the new millennium.

Dr Ng mentions several other characteristics of the Chinese model. Most of these are not sufficiently unique or generally applicable to constitute an exportable model,

³ *Ibid.*, at 1427.

⁴ There are international competition norms only in a broad sense. In some areas, such as monopolization/abuse of dominance, nations' antitrust laws significantly diverge. The extent to which there is a transnational legal order in competition law is overstated.

⁵ For example, the Chinese authorities let Qualcomm's proposed acquisition of NXP die without clearance possibly as a result of the trade war between the USA and China. See D. Clark, 'Qualcomm Scraps \$44 Billion Deal after China Inaction', *New York Times* (25 July 2018). I do not imply that China alone is guilty of using its antitrust system to wage political warfare. It is not.

even though some are worthy of emulation and deserve more acclaim than they have thus far received.

This article proceeds in the following way. Part 2 is a reflection on the international norms of antitrust and the relationship of the state to the market. Part 3 suggests that a different alternative model may be more attuned to the needs of the non-Western countries. Part 4 returns to the Chinese model and assesses the other unique qualities identified by Dr Ng. Part 5 concludes.

2 International Norms and the State/Market Relationship

Dr Ng inquires whether there are international competition norms (and concludes that there are) and whether China does, or is likely to, challenge them (and concludes that it is not). She adds:

[D]iscussions of [China's] competition law are situated in the broader conversation about the relationship between competition, markets and the state in the socialist market economy. The Chinese Communist Party has stated that the market plays a decisive (though not complete) role in allocating resources and that the government's role is to, *inter alia*, oversee the market, maintain market order, and intervene and remedy market failures. The relationship between the state and the market in the economy is one that is close and entwined, and competition law is a legal instrument that sits within this relationship.⁶

* * *

There are concerns that the AML [Anti-Monopoly Law] is being enforced to further industrial policy aims and to undermine intellectual property rights (IPRs), that it is being applied unfairly to the detriment of foreign companies and in an inconsistent manner and that a number of cases lack sufficient basis in competition principles. ...

However, many of the criticized decisions were nonetheless framed and justified by language and analysis recognizable as international competition law concepts and approaches.⁷

Dr Ng justifies the gap between international standards and China's outcomes as China's 'implemented understanding' of international principles.

In other words, according to Dr Ng, China does not disagree with international norms in principle but may disagree on outcomes. The difference in outcomes, she says, derives from a different conception of the relationship of the state to markets. Developing economies generally need a state/market balance that is different from the West. Therefore, China's model may be useful to developing countries.

Much of Dr Ng's analysis contains important insights, but she makes two major errors. First, the way in which China claims to follow international standards even while applying industrial policy is not a virtue. The language 'implemented understanding' is felicitous, but it is camouflage. Second, China's brand of state control and its supervision of competition to protect order, fairness, good outcomes and, generally, the socialist market state (as well as competition) also does not follow 'international standards'. Competition law does not protect order. It protects competition. The phrase

⁶ Ng, *supra* note 2, at 1423.

⁷ *Ibid.*, at 1421–1422.

‘international standards’ does not have a precise meaning, but, if it means anything, it means that there is no discrimination against foreigners in the application of law and no bundling of nationalistic industrial policy into antitrust, and, in functioning markets, international norms counsel a reliance on competition, not the state.

China’s enhanced state involvement implies that the state is free to control markets, even very well-functioning markets – for example, the state may step in when markets are tipping towards foreign suppliers or are undercutting state-owned enterprises (SOEs)⁸ or Chinese brands⁹ or simply when the opportunity arises to condition a deal on a promise of a flow to China of natural resources¹⁰ or foreign technology.¹¹ China may override the market to get outcomes that are more favourable to China than competition would produce.

Dr Ng has described these tendencies at greater length elsewhere. Thus, she has written: ‘China regards itself as a socialist state, with a socialist market economy and a socialist legal system.’¹² The leadership of the Chinese Communist Party is an essential feature, as is public ownership in all key sectors. China’s adoption of market principles has placed ‘the state in dual and potentially conflicting roles, and impact[ed] the way in which the law applies to regulate the market’.¹³ The SOE’s privileged status is part of an entrenched political structure. Therefore, while the AML aims to ensure antitrust compliance of SOEs and a level playing field for state and private firms, ‘in practice, the achievement of those objectives is hampered’.¹⁴

As Dr Ng notes in this earlier article, the special regard for SOEs reveals itself in many forms. The competition authorities are constrained from enforcement against SOEs, and when the authorities do find that SOEs have violated the AML, they may be likely to resolve the matter by an order suspending the offending conduct without any fines, in contrast with the high fines imposed on foreign firms.¹⁵ Acquisitions by SOEs, even though Chinese law requires notification, are often made without notification.¹⁶ The competition authorities have enforced the AML in a manner that helps to further the ‘macroeconomic control of the state’.¹⁷ The state supervises markets

⁸ See Ng, ‘The Influence of Socialist Principles on the Legal Regulation of Markets in China: The Anti-Monopoly Law’, in H. Fu *et al.* (eds), *Socialist Law in Socialist East Asia* (2018) 351, at 380.

⁹ See Coke and Huiyuan, MOFCOM 2009: Announcement, no. 22 (2009), available at <http://fldj.mofcom.gov.cn/article/ztxx/200903/20090306108494.shtml>.

¹⁰ See Glencore/Xstrata, MOFCOM 2013: Announcement, no. 20 (2013), available at <http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml>.

¹¹ See Microsoft/Nokia, MOFCOM 2014: Announcement, no. 24 (2014), available at <http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml>; Bayer/Monsanto, MOFCOM 2018: Announcement, no. 31 (2018), available at <http://fldj.mofcom.gov.cn/article/ztxx/201803/20180302719123.shtml>; KLA-Tencor/Orbotech, SAMR 2019: Announcement, no. 7 (2019), available at http://gkml.samr.gov.cn/nsjg/xwxc/201902/t20190220_290940.html.

¹² Ng, *supra* note 8, at 380.

¹³ *Ibid.*

¹⁴ *Ibid.* Anti-Monopoly Law of the People’s Republic of China (AML), promulgated by the Standing Committee of the National People’s Congress, 30 August 2007 (effective 1 August 2008).

¹⁵ Ng, *supra* note 8, at 365–366.

¹⁶ *Ibid.*, at 368–369.

¹⁷ *Ibid.*, at 370, see also 361ff.

by administering price control and stabilizing price levels in some areas of commerce under the Price Law.¹⁸ Moreover, by imposing conditions in exchange for merger clearance, it is able to monitor the conduct of merged firms over a long period of time.¹⁹

In trying to understand China's approach to competition law, we might place competition law in the larger canvas. In the larger canvas, Premier Xi Jinping, while clearly supporting a role for markets, 'has assigned the highest weight to protecting, perpetuating, and strengthening the monopoly controls of the CCP [Chinese Communist Party]'.²⁰ Nonetheless, and in some tension with the narrative of pervasive state control, one might see the AML and its devoted enforcers and supporters as holding their ground in defence of markets.²¹

Thus, while Dr Ng's narrative of the need to consider an alternative to the Western approach to competition law may be right, and developing countries' need to rethink the state/market relationship may be right, China's model is complicated and tailored to China, and it does not seem appropriate for export.²² Moreover, attention to the state/market relationship should not be the sole element of an alternative competition model fit for development. A tweak in the law to make markets more open and friendly

¹⁸ Price Law of the People's Republic of China, promulgated by the Standing Committee of the National People's Congress, 31 December 1997.

¹⁹ *Ibid.*, at 375. Still, there is AML enforcement against state-owned enterprises (SOEs), and it may be increasing. See S. Ning, 'China's Anti-Monopoly Law and Its Enforcement against State Monopolies: Achievements and Limitations', *Concurrences Review* (February 2016).

²⁰ Huang, 'Varieties of Capitalism in China: Private-Sector Development during the Xi Jinping Era', in J. deLisle and A. Goldstein (eds), *To Get Rich Is Glorious* (2019) 87, at 109; see also 'How the West Got China Wrong', *The Economist* (1 March 2018); E. Economy, 'The Problem with Xi's China Model', *Foreign Affairs* (6 March 2019). See B. Milanovic, 'The Clash of Capitalisms: The Real Fight for the Global Economy's Future', *Foreign Affairs* (January/February 2020), at 10 (depicting the existential struggle between two capitalisms: liberal, meritocratic, rule-of-law capitalism, led by the United States, and state-run political capitalism, led by China, and the tendency of both to entrench a small elite that runs the country).

²¹ See S. Ning and T. Gong, 'Mergers in China: Enforcing China's Anti-Monopoly Law in a Time of Change, e-Competitions' Special Issue, *Concurrences Review* (26 September 2019), at 3. Ning and Gong write: 'In China, there is so far no noticeable nationalistic tendencies forming in the domestic economy. The Chinese governments increasingly understand the importance of market competition. A series of market reforms, conceived by the highest level of the Chinese government, represent a significant change in the government's thinking about the role of the state and its relationship with the economy. As such, we would expect a more vigorously developing China's market featured with more liberalization and openness to overseas players.' Roundtable on Antitrust Developments in China Ten Years On, The Antitrust Source, American Bar Association, 31 August 2018. For a statement of the challenges including compromises made at the birth of the AML, see Huang, 'Pursuing the Second Best: The History, Momentum, and the Remaining Issues of China's Anti-Monopoly Law', 75 *Antitrust Law Journal* (2008) 117.

²² I might have preferred to answer a different question: how well has China performed in adopting markets backed by the enforcement of the AML? My answer would be: amazingly well. To quote from Ning and Gong, *supra* note 21, at 4. 'China is still a developing economy at a transitional stage. Only approximately 40 years ago, China [was] a highly controlled economy with a strict enforcement of centrally planned economy. Every economic activity from top to bottom level [was] controlled by the state. Only [with] a passage of four decades, China has gradually transformed itself into a market economy, from its backward, centrally planned economy into a middle-income, market-driven one, though [there are] still efforts to be made to become a full market economy. For this reason, China may still [be] decades away from becoming a fully developed market economy.'

to entry, and, thus, to embed the value of inclusiveness, is a critical element in many developing countries. I elaborate on both points in the next part.

3 Another Alternative: Drawing from the South African Experience

Wendy Ng's presentation of the Chinese model as an alternative for developing countries suggests the more basic question: what model is a good alternative for these nations? To answer this question, we need to know: what are the relevant characteristics of developing countries? Developing economies typically have more market challenges than the West. The markets do not work well. They may hardly exist. Developing countries still suffer the ravages of colonialism and even apartheid.

The South African experience suggests an alternative on both fronts: the state/market interface and inclusiveness, which connotes hospitality of the competition system to market actors without power. Let me turn first to the state/market relationship. Industrial policy (state interventions in the market) implies interventions to help the state's industry. The US antitrust authorities and most of the US antitrust community are opposed to the mixture of industrial policy with antitrust²³ on grounds that the 'intermeddling' of the state on supposed state-interest grounds undermines the important work of the market and antitrust and usually does not even fulfil its own goals. The market chooses winners better than the state can, it is said, and also opening the door to amorphous industrial policy can open the door to corrupt exercises of discretion. EU antitrust law likewise does not admit industrial policy in antitrust,²⁴ although this is a subject of ongoing contention. South Africa and other developing countries have put a more positive gloss on industrial policy, and researchers and policy-makers typically propose industrial policies that are friendly to markets that will provide a platform for the nation's firms to be more effective players.²⁵ This type of intervention does not entail overriding the market but, rather, enabling the market.

²³ See Sokol, 'Antitrust, Industrial Policy, and Economic Populism', in D. Gerard and I. Lianos (eds), *Reconciling Efficiency and Equity: A Global Challenge for Competition Policy* (2019) 281. But there are some chinks in the armour. The US antitrust authorities commonly proclaim the separation of antitrust from industrial policy. The antitrust agencies (almost always) do not combine industrial policy with antitrust and, thus, purport to enforce 'pure' antitrust. That does not mean that the USA does not apply industrial policy. One home for industrial policy is the Committee on Foreign Investment in the USA, which is an inter-agency committee of the US government. It reviews the national security implications of foreign investments in US companies. If a transaction poses a risk to US national security, the president may prohibit it. Also, pressure from Congress against foreign firms' acquisitions or distribution deals on the grounds of national security can virtually force abortion of those deals. See also US Department of Justice Statement of Interest in Support of Qualcomm's Motion to the Ninth Circuit Court of Appeals for a Stay of the Enforcement of the FTC's Antitrust Remedies in *FTC v. Qualcomm*, 23 July 2019, arguing on industrial policy as well as antitrust grounds.

²⁴ See Mergers: Commission Prohibits Siemens' Proposed Acquisition of Alstom, 6 February 2019, available at https://europa.eu/rapid/press-release_IP-19-881_en.htm.

²⁵ See, e.g., Lewis, 'Competition Policy and Industrial Policy: Challenging the Mainstream Orthodoxy', in Gerard and Lianos, *supra* note 23, 271; Roberts, 'Competition Law Prescriptions and Competitive Outcomes', in Gerard and Lianos, *supra* note 23, 173; J. Barnes, A. Black and S. Roberts, 'Towards a Digital Industrial Policy for South Africa: A Review of the Issues', *Industrial Development Think Tank* (17 July 2019), available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5d355997ae8bf40001ee2906/1563777435535/DPIP_Final.pdf.

Second, I refer back to my comment on entry and inclusiveness. A good competition law may need to be friendlier to outsiders and less trusting of long-privileged dominant incumbents. This tilt of the law may be necessary to promote a healthier and more robust market system.²⁶ This prescription contrasts with the US law of monopolization. The US law privileges firms' – even dominant firms' – freedom from anti-trust obligations, based on the dual notions that 'free markets' give (even dominant) firms the incentives to serve consumers and that antitrust duties will chill these firms' innovation.²⁷ The primacy of these notions, which are empirically questionable even in the West,²⁸ overshadows the more pressing imperatives of the Rest to control economic and political power, create markets and embrace outsiders' participation in the economic ecosystem.

4 Other Chinese Antitrust Characteristics

Wendy Ng identifies four unique features of China's AML that might commend the Chinese model to other nations. Foremost is the larger role for the state, which we discussed earlier and continue addressing below. The second is a leniency policy (amnesty from punishment) for firms that report their 'sin' of using resale price maintenance (RPM) (vertical minimum price fixing). (States commonly offer amnesty from punishment to firms that report their cartels.) The third feature is remedies for violations; China uses behavioural relief more generously than structural relief and more generously than do most other jurisdictions. For example, to clear a merger, China may obligate the merged firm to continue to supply Chinese firms rather than to spin off offending assets. The fourth unique attribute is antitrust control over market-distorting state and local acts.

A A More Regulatory State

Dr Ng is correct that the Chinese model is regulatory. The statute itself is very detailed and much, much longer than the US antitrust statutes. It is even much longer than the antitrust provisions of the EU Treaty; although the treaty itself is supplemented by regulations such as the Merger Regulation, and the European Commission has adopted a number of block exemptions and guidelines.²⁹ China has adopted a number of regulations after a helpful process of public notice and comment, which has become standard good practice around the world. Creating more clarity and certainty, the three Chinese antitrust enforcement agencies have recently combined into one

²⁶ See E.M. Fox and M. Bakhom, *Making Markets Work for Africa: Markets, Development and Competition Law in SubSaharan Africa* (2019); Fox, 'Outsider Antitrust: "Making Markets Work for People" as a Post-Millennium Development Goal', in T. Bonakele, E. Fox and L. Mncube (eds), *Competition Policy for the New Era: Insights from the BRICS Countries* (2017) 22.

²⁷ E.g. *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 US 398 (2004).

²⁸ See, e.g., C. Shapiro, 'Antitrust in a Time of Populism' (24 October 2017), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3058345.

²⁹ Treaty on European Union, OJ 2010 C 83/13 (TEU).

organization, the State Administration for Market Regulation (SAMR). The SAMR has released three new antitrust regulations, covering agreements, dominance and abuse of administrative monopoly (distortions by state bodies). The new regulations consolidate regulations of the predecessor agencies and introduce some changes, both in scope of enforcement and in the defences available to companies. For the first time, the new rules expressly mandate equal treatment of all firms during anti-monopoly enforcement proceedings.³⁰ This mode of antitrust regulation can be helpful and is followed by a number of jurisdictions.

B Leniency for RPM

Most antitrust jurisdictions have a leniency policy for cartels, such as price fixing by competitors. Cartels are unambiguously anti-competitive and harmful to consumers. They are usually secret because the firms know that cartelizing is a crime. Leniency policies have been a fruitful and important source for the detection of cartels. They give cartel members the incentive to come forward to tell on their fellow cartel members. The threat of whistle-blowing destabilizes cartels, whose members may constantly fear a whistle blower among them.

RPM is a vertical restraint; it is a restraint between a manufacturer and its distributors. It is not a cartel. For example, Nike might specify to its distributors the lowest price they can charge for Nike sneakers. RPM is not always harmful to consumers.³¹ It can give distributors sufficient price protection from same-brand competition to maintain a level of service to customers. If the sneaker brands all compete, RPM could not be an instrument to raise prices because consumers would not tolerate Nike's high prices; they can go elsewhere. RPM as a vertical arrangement for distribution does not fit the profile of conduct for which leniency is a good idea (namely, very bad conduct on its face, which is secret); it is hard to detect without insider whistle-blowing, and the very availability of leniency destabilizes the bad conduct and thus helps deter it. Leniency for RPM may not be an advance.³² Apparently, China is reconsidering the availability of leniency for reporting RPM, as Dr Ng reports.

C Remedies

Wendy Ng's third unique Chinese antitrust characteristic is remedies. China favours behavioural remedies. For example, if a merger raises antitrust problems of foreclosure, the Chinese authority might clear the merger subject to a duty of the firms

³⁰ See 'China's Antitrust Agency Updates Its Enforcement Rules: White Paper', *Jones Day* (August 2019); 'State Administration for Market Regulation's Triple Guidance on Antitrust Enforcement', *Hogan Lovells* (July 2019).

³¹ See Supreme People's Court, *Yutai Technology Feed and Hainan Price Bureau*, June 2019, summarized in 'Neither Fish nor Fowl: China's Supreme Court Proposes New Framework for Resale Price Maintenance', *Hogan Lovells* (July 2019).

³² The AML declares resale price maintenance (RPM) agreements illegal. AML, *supra* note 14, Art. 14. The courts, however, have held RPM subject to a rule of reason. The Supreme People's Court held in *Yutai*, *supra* note 31, that RPM agreements are illegal unless justified by the defendant.

to continue supplying Chinese buyers for a number of years. Alternative remedies might prohibit the merger or require a spin-off of the assets that created the problem. Behavioural remedies are disfavoured in the USA and in some other jurisdictions on the grounds that, although they might treat the symptom (for example, foreclosure), they cannot cure the disease (for example, the incentive to foreclose), and they require supervision, which can be costly and intrusive.

Moreover, on a closer look, the merger or conduct for which the conditions were devised might not be anti-competitive at all, and the conditions might be a tax on the transactions and a means for surveillance of behaviour. When parties to a merger must get clearance, the jurisdiction has power. The parties are likely to be amenable to the conditions. A jurisdiction can almost freely get a promise to comply with some of the conditions that the regulator wants. China can and does extract conditions to clear mergers that do not appear to be anti-competitive³³ or that go obviously further than necessary to cure competition problems.³⁴ (China is hardly alone in doing so.) The conditions typically give Chinese firms access to natural resources or intellectual property, and reporting obligations can give it ongoing information about firms.³⁵ While agencies in most nations impose behavioural conditions sometimes, a preference for behavioural remedies is not an ordinarily preferred antitrust policy.

D Control over Market-Distorting State and Local Acts

China has the best articulated antitrust law in the world for (limited) antitrust control over state and local abuses of power that distort competition. The covered offences usually distort competition by giving preferences to friends or, at the provincial level, preferring local product. This offence is called abuse of administrative monopoly. China's antitrust enforcement provisions against abuse of administrative monopoly are not strong because at some level the question is political, pitting one state agency against another, but, helpfully, the AML recognizes state and local government as a significant source of market-clogging restraints, and it authorizes a process for their transparency and removal.³⁶ In addition to the AML prohibitions, China has introduced the Fair Competition Review System, which establishes a system of self-review by the policy-making authorities with a view towards eliminating unnecessarily restrictive provisions in draft legislation.³⁷ Both projects are critically important, despite the limited room for effectiveness. They further the agenda against state-granted privilege and power. They have received too little attention and almost no praise from their natural supporters in the West.³⁸ China's progressive approach to catching distorting

³³ E.g. Glencore/Xtrata, *supra* note 10; KLA-Tencor/Orbotech, *supra* note 11.

³⁴ See Healey, Zhang and Coles, 'Sustaining the Status Quo: The Use of Conditions in Chinese Merger Clearance', 10 *Tsinghua China Law Review* (2017) 1. See cases cited in notes 9–11 above.

³⁵ See notes 5, 9–11 above.

³⁶ See D. Healey and E. Fox, 'State Restraints in China: A Different Case?', *Liber Amicorum* for Professor Wang Xiaoye', *Concurrences Review* (forthcoming). See AML, *supra* note 14, Arts 32–37, 51.

³⁷ Fair Competition Review System, described in Healey and Fox, *supra* note 36.

³⁸ But see Healey and Fox, *supra* note 36, at 787, 789–790, 807–808. The European Union has a somewhat similar framework in the Treaty on the Functioning of the European Union, OJ 2016 C 202/47.

state restraints is admirable and deserves support. The special characteristics of the AML and its enforcement are either not ideally adaptable to other economies or they can be selectively emulated.

5 Conclusion

Wendy Ng's article is an important contribution to the understanding of international competition norms, their Western pedigree and the need for an alternative model for economies with characteristics materially different from the West. The article usefully examines the Chinese difference in calibrating the market/state relationship. It suggests that this relationship might be a key to appropriate antitrust in developing economies. It also specifies characteristics of China's more regulatory approach in general.

This comment argues that the particular Chinese state/market interface may not be well suited for the non-Western world and particularly not for democracies in the developing world. The Chinese state/market interface is based on the primacy of the state even in 'market territory' where the market works. An alternative vision for developing democracies is the state as an enabler of the market rather than the state as a controller of the market.

China has cultivated its own antitrust law with Chinese characteristics. The characteristics derive from the unique structure and history of China, the many decades of central planning and the still unfolding process of evolution to markets. The West and the Rest should surely draw from the sympathetic features. Chief among these virtues are efforts to control anti-competitive state and local restraints and the assembly of a highly talented, expert, committed team of enforcers in short order. China's law with special Chinese characteristics is and should be uniquely China's.

Wendy Ng continues the debate with a Rejoinder on our *EJIL*: Talk! blog.

Art. 106 (TFEU) and the TEU, *supra* note 29, Art. 4, combined with Arts 101 and 102 of the TFEU. This integration of control over state and private restraints is natural in common markets in order to enable the functioning of the internal market.