

The Transition of China From a Purely Socialist to a Socialist Market Economy: China's Experience in Dealing with Abuse of Administrative Power and Whether the Philippines Can Learn from It

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I. INTRODUCTION

Competitive neutrality is a broad principle encompassing a myriad of competition-related issues involving the complex interaction amongst the state, public, and private enterprises.¹ At its core, it is concerned with “[providing] for a level playing field for all commercial actors”² in order to eliminate or at least minimize state-induced measures distorting competition.³ Although competitive neutrality often focuses on state-owned enterprises (SOEs),⁴ the Organization for Economic Co-operation and Development (OECD) reported that competitive neutrality concerns actually arise in any of the following state-induced measures: “(a) state ownership and control[;] (b)

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1. Mona Chammas, *Competitive Neutrality in Competition Policy (An Issues Paper Published by the Organisation for Economic Co-operation and Development)* at 4, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)5&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)5&docLanguage=En) (last accessed Nov. 30, 2019).
 2. Mark Pearson, *Competitive Neutrality (A Discussion Paper for the 8th Seoul Competition Forum)* at 2, available at <https://www.accc.gov.au/system/files/Competitive%20Neutrality%20%E2%80%93%20Discussion%20Paper%20for%208th%20Seoul%20Competition%20Forum%20-%20Mark%20Pearson%20-%20September%202014.pdf> (last accessed Nov. 30, 2019).
 3. *Id.*
 4. See Chammas, *supra* note 1, at 5.

subsidies and public services (entrusted companies)[;] (c) regulation[;] and (d) industrial policy and state activism.”⁵

The fourth OECD state-induced measure (industrial policy and state activism), which includes, among others, the government’s practice of conferring comparative advantages to certain enterprises in the form of favorable regulatory or administrative environment,⁶ is more commonly known in China as an abuse of administrative power.⁷ In the context of China, such phenomenon refers to a situation wherein a central or local administrative authority abuses its administrative power by issuing regulations that confer comparative advantages on companies, usually SOEs, it owns or has an interest in.⁸ Although not unique in China, this practice is more prevalent in China than elsewhere⁹ because SOEs, as crucial drivers of China’s economic growth,¹⁰ are naturally intertwined with the Chinese government due to its subscription to socialism, and will continue to do so moving forward given that President Xi Jinping recently reiterated the need to make them stronger and bigger.¹¹ However, it is unfair to conclude that China is oblivious of the harm caused by abuses of administrative power in the market because the Chinese government remains steadfast in instituting reforms towards

5. Chammas, *supra* note 1, at 7.

6. See Chammas, *supra* note 1, at 10.

7. See Thomas K. Cheng, *Competition and the State in China*, in *COMPETITION AND THE STATE* 183 (Thomas K. Cheng, et al. eds., 2014).

8. Cheng, *supra* note 7, at 171.

9. *Id.*

10. Wendy Leutert, China’s state enterprise reform: Bigger, yes, but better?, *available at* <https://www.brookings.edu/opinions/chinas-state-enterprise-reform-bigger-yes-but-better/> (last accessed Nov. 30, 2019).

11. Orange Wang & Sidney Leng, Chinese President Xi Jinping’s show of support for state-owned firms ‘no surprise’, analysts say, *available at* <https://www.scmp.com/economy/china-economy/article/2166261/chinese-president-xi-jinpings-show-support-state-owned-firms> (last accessed Nov. 30, 2019).

promoting and upholding fair competition.¹² This may be due to the fact that in transitioning from a purely socialist to a socialist market economy, China has increasingly relied on the market to efficiently allocate resources, although its economy is still subject to the state's macroeconomic direction.¹³

Similar to China, the importance of instituting government-wide competitive neutrality reforms has also been recognized by the Philippines especially since it has recently made significant advances towards effecting a National Competition Policy (NCP).¹⁴ After being delayed for at least two decades in Congress, the Philippine Competition Act (PCA) was finally passed in August 2015.¹⁵ Moreover, a whole chapter on competition was, for the first time, dedicated in the Philippine Development Plan 2017–2022 (PDP) where the importance of formulating an NCP that “aims to steer regulations and administrative procedures of government agencies toward promoting competition” was highlighted.¹⁶ The PDP enumerates the challenges which the Philippine government faces in formulating the NCP, one of which is the need to reform the dual and conflicting roles of SOEs or Government-Owned

12. See generally State Council, Opinions of the State Council on Establishing a Fair Competition Review System During the Development of Market-oriented Systems, Guo Fa [2016] No. 34 (June 1, 2016) (China).

13. Wendy Ng, *The Influence of Socialist Principles on the Legal Regulation of Markets in China*, in SOCIALIST LAW IN SOCIALIST EAST ASIA 356 (Hualing Fu, et al. eds., 2018) [hereinafter Ng, *Socialist Principles*].

14. See National Economic and Development Authority, Philippine Development Plan 2017–2022 at 246, available at <http://extwprlegs1.fao.org/docs/pdf/phi169293.pdf> (last accessed Nov. 30, 2019).

15. See An Act Providing for a National Competition Policy Prohibiting Anti-Competitive Agreements, Abuse of Dominant Position and Anti-Competitive Mergers and Acquisitions, Establishing the Philippine Competition Commission and Appropriating Funds Therefor [Philippine Competition Act], Republic Act No. 10667 (2015).

16. National Economic and Development Authority, *supra* note 14, at 246.

or Controlled Corporations (GOCCs)¹⁷ in having both regulatory and proprietary functions that cause distortions on competition.¹⁸

Given this backdrop, this Article focuses on the narrowly provided definition of state activism¹⁹ in the context of China — particularly in the reforms the Chinese government made to address distortionary effects caused by regulations favoring SOEs — and recommends what the Chinese government can improve to prevent abuses of administrative power which confer comparative advantages on SOEs. It also examines whether the lessons from China can be applied to the Philippines' ongoing effort in reforming GOCCs to level the playing field between public and private enterprises.²⁰ At the outset, it is important to clarify that this Article does not engage in discussing the anti-competitive practices that Chinese SOEs are likely to engage in as a result of being state-owned. It only focuses on the special relationship between the Chinese government and SOEs which incentivizes administrative authorities to abuse their administrative power to insulate SOEs from competition and the steps China has taken to alleviate this problem.

Part II of this Article begins by examining the transition of China from a centrally-planned economy to a socialist market economy. Vital to this examination are the reforms which the Chinese government made on SOEs

17. SOEs are known in the Philippines as GOCCs. Franklin M. Drilon, Former Senate President of the Republic of the Philippines, *Recent Endeavors of the Philippines on Drafting a New SOE Act*, Address at the 6th Meeting of the Asia Network on Corporate Governance of State-Owned Enterprises in Seoul, South Korea (May 17, 2011) (transcript available at <https://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/48049338.pdf> (last accessed Nov. 30, 2019)).

18. National Economic Development Authority, *supra* note 14, at 246.

19. For purposes of this Article, the discussion on state activism is only limited to the government's practice of interfering with the market by conferring comparative advantages to certain enterprises in the form of a favorable regulatory or administrative environment.

20. See, e.g., An Act to Promote the Financial Viability and Fiscal Discipline in Government-Owned or -Controlled Corporations and to Strengthen the Role of the State in Its Governance and Management to Make Them More Responsive to the Needs of Public Interest and for Other Purposes [GOCC Governance Act of 2011], Republic Act No. 10149, § 2 (g) (2011).

beginning in the late 1970s. Part III analyzes the special relationship between the Chinese government and SOEs. This includes defining what an abuse of administrative power is in relation to SOEs and discussing the linkages between the Chinese government and SOEs that incentivize government authorities to abuse their administrative power. Part IV provides the steps China has taken to reduce or prevent abuses of administrative power favoring central and local SOEs. This Part is supplemented by several recommendations on what China can improve to further strengthen its efforts of arresting abuses of administrative power. Part V discusses GOCCs in the Philippines and assesses whether the lessons from China can be applied to the Philippine context. The problems which the Philippines currently faces in relation to GOCCs are also discussed under this Part. Finally, Part VI summarizes and concludes the Author's findings in relation to the foregoing.

II. THE END JUSTIFIES THE MEANS: CHINA'S UTILIZATION OF THE MARKET AS A WAY TO ACHIEVE ITS INDUSTRIAL GOALS

Chinese SOEs have undergone numerous reforms in the past — from being fully owned by the state and the sole commercial actors in the economy²¹ to incorporating modern corporate reforms such as the mixed ownership or shareholding reform in which SOEs were separated from their parent ministries and transformed into joint-stock corporations owned by a mixture between the state and non-state enterprises, although the state still owns the controlling shares.²² This change was primarily caused by China's transition from a centrally-planned economy to a socialist market economy, particularly when China introduced market principles to the economy, forcing the government to reform SOEs in order to foster competition in the newly-formed markets.²³ This Part discusses the reforms China made to SOEs beginning in the late 1970s, which serves as a backdrop on why they maintain

21. Hongfei Zhong, *Where is the future: China's SOE reform*, J. WASH. INST. CHINA STUD., Spring 2006, at 105.

22. *Id.* at 105-06.

23. Bruce M. Owen, et al., *China's Competition Policy Reforms: The Antimonopoly Law and Beyond* (A Discussion Paper Published Online by the Stanford Institute for Economic Policy Research) at 13-14, available at https://siepr.stanford.edu/sites/default/files/publications/06-32_0.pdf (last accessed Nov. 30, 2019).

close ties with the government in addition to the obvious fact that they are owned by the state.

A. What are SOEs? How are They Defined in China?

The OECD Competition Committee defines SOE as a company which is controlled or influenced by the state regardless of its ownership.²⁴ The core feature of an SOE, following this definition, is the state's ability to control or influence its operations; this means that a company may still be considered an SOE even if the state only owns a minority stake in it so long as the state has the ability to influence its operations.²⁵ SOEs, in the context of China, appear to share the definition provided by the OECD as these enterprises similarly refer to those "whose capital is owned by the state in total or in part, and which is controlled directly or indirectly by the state."²⁶ Similar to the OECD definition, central to the nature of an SOE in China is the state's control over it, although it must be noted that the controlling shares of the mid to large-sized SOEs in China are owned by the state.²⁷

Chinese SOEs are owned and controlled either by the central or local government.²⁸ Central SOEs refer to business groups or vertically-integrated companies which are owned by the central government or State Council, through the State-owned Assets Supervision and Administration Commission (SASAC) and are linked with other business and non-business groups (e.g.,

24. OECD Directorate for Financial and Enterprise Affairs Competition Committee, Competition Law and State-Owned Enterprises (A Background Note Published by the Organisation for Economic Co-Operation and Development) at 5, available at [https://one.oecd.org/document/DAF/COMP/GF\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/COMP/GF(2018)10/en/pdf) (last accessed Nov. 30, 2019).

25. *Id.* These are also known as state-influenced entities. *Id.* at 5 & 29.

26. Meng Yanbei, *Research on issues about the applicable scope of China's Anti-monopoly Law in monopolistic industries*, 2 RENMIN CHINESE L. REV. 165, 173 (2014).

27. Zhong, *supra* note 21, at 106.

28. Yanbei, *supra* note 26, at 173 & Fan Gang & Nicholas C. Hope, The Role of State-Owned Enterprises in the Chinese Economy (A Study on the State of the U.S.-China Economic Relationship Published Online by the China-United States Exchange Foundation) at 5, available at <https://www.chinausfocus.com/2022/wp-content/uploads/Part+02-Chapter+16.pdf> (last accessed Nov. 30, 2019).

universities).²⁹ A more detailed description on what these business groups are is provided under the discussion on reformation of Chinese SOEs. On the other hand, local SOEs are often smaller compared to central SOEs and are directly controlled by local governments although, technically speaking, these SOEs are owned by the local SASAC.³⁰

B. Transition of China From a Centrally-Planned Economy to a Socialist Market Economy: The Inevitable Reformation of SOEs

China was heavily inspired by the centrally-planned system of the Soviet Union during the 1950s which led to the conversion of virtually all private enterprises in China into being state-owned.³¹ During this period, the Chinese economy was solely determined and planned by the state because the government controls every facet of the economy and decides how resources would be allocated.³² SOEs, which were then wholly owned and controlled by various ministries, dominated the economy, extending as far as to those sectors that are commonly open to private enterprises.³³ There was no market competition to speak of at that time because the market was virtually nonexistent.³⁴ In fact, market competition was viewed as one of the reasons why a society governed by capitalist principles is unable to efficiently allocate

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29. Li-Wen Lin & Curtis J. Milhaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 700 & 707 (2013).
30. Gary H. Jefferson, *State-Owned Enterprise in China: Reform, Performance, and Prospects* (A Working Paper Published Online by Brandeis University) at 3, available at https://www.brandeis.edu/economics/RePEc/brd/doc/Brandeis_WP109R.pdf (last accessed Nov. 30, 2019) & Angela Huyue Zhang, *Taming the Chinese Leviathan: Is Antitrust Regulation a False Hope?*, 51 STAN. J. INT'L L. 195, 202-03 (2015).
31. Xiao Geng, et al., *State-owned enterprises in China: Reform dynamics and impacts*, in CHINA'S NEW PLACE IN A WORLD IN CRISIS 156 (Ross Garnaut, et al. eds. 2009).
32. See Jacob S. Schneider, *Administrative Monopoly and China's New Anti-Monopoly Law: Lessons From Europe's State Aid Doctrine*, 87 WASH. L. REV. 869, 872 (2010).
33. *Id.*
34. See Paul Hubbard, *Where have China's State monopolies gone?*, 9 CHINA ECON. J. 75, 75 (2016).

resources, to the extent that the Chinese society back then heavily despised it as a concept.³⁵

The centrally-planned system, unfortunately, failed to halt the worsening poverty incidence in China.³⁶ This led to a series of economic reforms commencing in 1978 when China, under the leadership of Deng Xiaoping,³⁷ gradually loosened the Central Government's grip on the national economy by encouraging managerial autonomy and incentivizing SOEs to perform profitably.³⁸ From 1978 to 1984, China devolved the management of SOEs to enterprise managers and allowed them to sell their products for profit once they have reached the planned production quota that the government has set.³⁹ This marked the beginning of SOE reforms in China and its long journey towards institutionalizing a socialist market economy.⁴⁰

The succeeding batch of economic reforms focused on separating the ownership and management of SOEs, which became the impetus for introducing the concept of a contract responsibility system⁴¹ in 1987.⁴² The contract responsibility system increased the share of profits which SOEs could retain for themselves — as compared to the previous system where they were required to remit all of their profits to the Central Government — and provided ways to precisely determine the amount that SOEs should remit.⁴³

35. XIAOYE WANG, *THE EVOLUTION OF CHINA'S ANTI-MONOPOLY LAW* 30 (2014).

36. See Bruce Owen, et al., *Antitrust in China: The Problem of Incentive Compatibility* (A Working Paper Published Online by Stanford Law School) at 5-6, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=595801 (last accessed Nov. 30, 2019).

37. *Id.* at 6.

38. Geng, et al., *supra* note 31, at 157.

39. *Id.*

40. Yingyi Qian, *The Process of China's Market Transition (1978-1998): The Evolutionary, Historical, and Comparative Perspectives*, 156 *J. INST. & THEORETICAL ECON.* 151, 153 (2000).

41. *Id.* at 157.

42. Cheng, *supra* note 7, at 172.

43. Qian, *supra* note 40, at 157.

This system incentivized SOEs to perform more efficiently since they can retain a larger portion of their profits which they can use to further improve their operations; even more so as the system was also accompanied by other reforms granting SOE managers more control and independence in the way they conduct their business.⁴⁴ SOE managers executed management contracts with various government agencies, which made them directly accountable to the Central Government in managing the SOEs they represent.⁴⁵ Naturally, this arrangement provided more autonomy to SOEs and further separated them from their parent ministries.⁴⁶ The increasing disassociation of the state from SOEs, along with its encouragement to foster SOE-level integration at the same time, led to the proliferation of business alliances.⁴⁷ These alliances “were designed to encourage interjurisdictional and cross-industry collaboration among SOEs ... and other organizations, such as research institutes and universities”⁴⁸ and were usually formalized via contractual arrangements.⁴⁹ At its best, business alliances provided various SOEs and non-SOEs (e.g., universities) an avenue where they could collaborate and work together.⁵⁰ However, the lack of a centralized or unified leadership within the alliance proved to be fatal in realizing the economic reforms which the government expected to gain from such alliances.⁵¹

The next phase in the series of economic reforms began in 1992 after Deng Xiaoping’s famous Southern Tour,⁵² following the economic slowdown in

44. Cheng, *supra* note 7, at 172.

45. Geng, et al., *supra* note 31, at 157.

46. *Id.*

47. Lisa A. Keister, *Interfirm Relations in China: Group Structure and Firm Performance in Business Groups*, 52 AM. BEHAVIORAL SCIENTIST 1709, 1710 (2009).

48. Lin & Milhaupt, *supra* note 29, at 713.

49. *Id.*

50. *Id.*

51. *Id.* at 714.

52. Long Weiqiu, *The Market Economy and Regulatory Change, in CHINA’S JOURNEY TOWARD THE RULE OF LAW: LEGAL REFORM, 1978–2008* 352 (Cai Dingjian & Wang Chenguang eds., 2010).

China during the early 1990s.⁵³ These series of reforms focused on corporatizing central SOEs by introducing modern corporate reforms,⁵⁴ separating central SOEs from their parent ministries and transforming them into joint-stock corporations,⁵⁵ merging various small and mid-sized SOEs with large ones or privatizing them following the principle of “[grasping] the large and [freeing] the small[.]”⁵⁶ and retreating central SOEs to key industries or commanding heights following the “backward and forward” approach.⁵⁷ Arguably, the most drastic and controversial reform introduced during this period was the shareholding reform since this system gradually transformed⁵⁸ the ownership structure of central SOEs from being wholly state-owned (as owned by their parent ministries) to having a mixed ownership allocated between the state and other non-state enterprises.⁵⁹ However, the shareholding reform did not vest private entities control over central SOEs as the state, especially in large SOEs, remained to have the controlling shares through SASAC.⁶⁰

The shareholding reform paved the way for the proliferation of “business [groups consisting] of legally independent entities that are partly or wholly owned by a parent firm and registered as affiliated firms of that parent firm.”⁶¹ The core or parent company in a business group usually owns a controlling

53. Qian, *supra* note 40, at 159.

54. Weiqiu, *supra* note 52, at 376.

55. Lin & Milhaupt, *supra* note 29, at 735. See also Feng Liu & Linlin Zhang, *Executive turnover in China's state-owned enterprises: Government-oriented or market-oriented?*, CHINA J. ACCOUNTING RESEARCH, Volume No. 11, Issue No. 2, at 131.

56. Song Xiaolei, *Corporate Governance: A Legal Study on the Reform of State-Owned Enterprises in China*, at 116 (July 2016) (unpublished Ph.D. thesis, University of London) (on file with Author).

57. Cheng, *supra* note 7, at 173-74.

58. See Fang Liufang, *China's Corporatization Experiment*, 5 DUKE J. COMP. & INT'L L. 149, 149 (1995).

59. See Xiaolei, *supra* note 56, at 106-07.

60. See Zhong, *supra* note 21, at 106.

61. Xufei Ma & Jane W. Lu, *The critical role of business groups in China*, IVEY BUS. J., Volume No. 69, Issue No. 5, at 1. See also Lin & Milhaupt, *supra* note 29, at 714.

share on all of its affiliates and this common shareholding among the affiliates acts as the link that ties them together.⁶² The business group system is a far cry from the previous business alliance set up which heavily relied on contract-based alliances to link SOEs together. Despite the difference between the two systems, the rationale behind the establishment of business groups remains analogous with that of the business alliances which are to: “deepen specialization [of SOEs,] promote economies of scale, build competitiveness in domestic and international markets, and separate the commercial activities of SOEs from the regulatory role of the government.”⁶³ Although the term *business group* was already introduced in China as early as 1987,⁶⁴ the concept was fully operationalized when the government implemented the shareholding reform in the mid-1990s.⁶⁵ After gradually introducing business groups in the Chinese society by way of experimentation,⁶⁶ China issued the Interim Provisions on the Registration of Enterprise Groups in 1998, which formalized the procedure in registering business groups.⁶⁷

As mentioned earlier, the shareholding reform separated central SOEs from their parent ministries and transformed them into joint-stock corporations.⁶⁸ In order to manifest the theoretical ownership of the people⁶⁹

62. See Lin & Milhaupt, *supra* note 29, at 714.

63. Lin & Milhaupt, *supra* note 29, at 714.

64. *Id.*

65. See Lin & Milhaupt, *supra* note 29, at 714.

66. Lin & Milhaupt, *supra* note 29, at 715.

67. *Id.* (citing Qiye Jituan Dengji Guanli Zhanxing Guiding [Provisional Rules on Business Group Registration] (Promulgated by the St. Council, Sep. 1, 2006, effective Jan. 1, 1997) ST. COUNCIL GAZ., 1997 (China)).

68. Lin & Milhaupt, *supra* note 29, at 735.

69. Law on Industrial Enterprises Owned by the Whole People, arts. 1-2 (1988) (China). These articles provide —

Article 1. This Law is formulated in accordance with the Constitution of the People’s Republic of China with a view to ensure the consolidation and development of the economic sector under ownership by the whole people, to define the rights and obligations of industrial enterprises owned by the whole people, to safeguard their lawful rights

on the newly carved-out central SOEs⁷⁰ and limit the government's intervention in these SOEs,⁷¹ China established SASAC in 2003.⁷² Incidentally, the establishment of SASAC not only made the abstract concept of the people's ownership on central SOEs tangible by having an agency which represents their interest on such SOEs, but it also provided a distinct leadership figure for business groups, an issue which business alliances failed to address.⁷³

interests, to enhance their vitality and to promote the socialist modernization.

Article 2. An industrial enterprise owned by the whole people (hereinafter referred to as the enterprise) shall be a socialist commodity production and operation unit that shall, in accordance with law, make its own managerial decisions, take full responsibility for its profits and losses and practice independent accounting.

The property of the enterprise shall be owned by the whole people, and shall be operated and managed by the enterprise with the authorization of the state in line with the principle of the separation of ownership and managerial authority. The enterprise shall enjoy the rights to possess, utilize and dispose of, according to law, the property that the state has authorized it to operate and manage.

The enterprise shall obtain the status of a legal person in accordance with law and bear civil liability with the property that the state has authorized it to operate and manage.

The enterprise may, in accordance with the decision of the competent department of the government, adopt contract, leasing or other forms of the system of managerial responsibility.

Id.

70. Liu & Zhang, *supra* note 55, at 131.

71. Andrew Szamosszegi & Cole Kyle, An Analysis of State-owned Enterprises and State Capitalism in China (A Research Report Prepared by Capitol Trade, Incorporated for the U.S.-China Economic and Security Review Commission) at 73, available at http://sites.utexas.edu/chinaecon/files/2015/06/US-China-Commission_State-Owned-Enterprises-and-State-Capitalism.pdf (last accessed Nov. 30, 2019) (citing WTO Secretariat, *Trade Policy Review: People's Republic of China*, at 133-34, WT/TPR/S/161 (Feb. 28, 2006)).

72. Lin & Milhaupt, *supra* note 29, at 716.

73. See Lin & Milhaupt, *supra* note 29, at 716.

The core companies, in this respect, function like a holding company for SASAC which intermediate and connect SASAC to the affiliate companies.⁷⁴

Business groups, in reality, are not unique to China since Chinese economic managers actually drew inspiration from Japan and Korea's successful implementation of their own business group system, the *keiretsu* and *chaebol*.⁷⁵ What perhaps separates Chinese business groups from the *keiretsu* and *chaebols* are that: (1) the central government, through SASAC, is the controlling shareholder of the Chinese core companies⁷⁶ and, as a result, it has the ability to influence the operations of central SOEs⁷⁷ and (2) the Communist Party of China (CPC) exerts great influence and control over central SOEs.⁷⁸ The relationship between SASAC and central SOEs, involving the various bridges linking the central government and SOEs through SASAC, are further fleshed out in Part III. On the other hand, it is important to discuss the political structure of China — specifically the process on how policy decisions are made and carried out within the bureaucracy — in order to grasp the extensiveness of the CPC's control on central SOEs. Unlike in most Western countries that are typically governed by the three great branches of government (executive, judiciary and legislative), China is different in a sense that it employs a unitary state structure⁷⁹ that is headed by the CPC.⁸⁰ In other words, CPC leadership is the most crucial feature of China's political and

74. *Id.* at 710.

75. *Id.* at 711 & 713.

76. *Id.* at 734.

77. Chenxia Shi, *Recent Ownership Reform and Control of Central State-Owned Enterprises in China: Taking One Step at a Time*, 30 U.N.S. WALES L.J. 855, 859-60 (2007).

78. See Lin & Milhaupt, *supra* note 29, at 737.

79. China Legal Information Center, China's Basic System of Government, *available at* https://www.chinadaily.com.cn/m/chinalic/2015-05/30/content_20725720.htm (last accessed Nov. 30, 2019).

80. See generally Communist Party of China, Constitution of the Communist Party of China (Revised and Adopted at the 19th National Congress of the Communist Party of China on Oct. 24, 2017) General Program, paras. 21-25, *available at* <http://www.china.org.cn/20171105-001.pdf> (last accessed Nov. 30, 2019).

bureaucratic structure⁸¹ since all high-level policy decisions are decided by the Political Bureau (Politburo), the highest echelon in CPC's hierarchical construct composed of twenty-five members who are elected by the Central Committee.⁸² The central government, or State Council, which is headed by the Premier, who is also a member of the Politburo, is one of the many institutions or organs that directly report to the CPC.⁸³ Being the head of China's political hierarchy, the CPC "exercises overall leadership over all areas of endeavor in every part of the country."⁸⁴ Thus, SASAC is in reality "in the shadow"⁸⁵ of the CPC in a sense that it consults with or even defers to the CPC in making decisions involving crucial matters,⁸⁶ such as the appointment of managers in central SOEs.⁸⁷ In fact, all of the top managers and employees of SOEs are CPC members and, as such, they are similarly bound by the CPC's ideological principles.⁸⁸

As the central government loosened its grip on the economy after the introduction of various economic reforms, it simultaneously delegated the control of much of the countryside economy to local governments.⁸⁹ This resulted in a situation wherein local governments were forced to generate their own income through local sources because they could not rely on

81. Ng, *Socialist Principles*, *supra* note 13, at 353.

82. Communist Party of China, *supra* note 80, art. 23 & BBC News, How China is ruled, available at http://news.bbc.co.uk/2/shared/spl/hi/in_depth/china_politics/government/html/2.stm (last accessed Nov. 30, 2019).

83. South China Morning Post, How the Chinese government works, available at <https://multimedia.scmp.com/widgets/china/govt-explainer/index.html> (last accessed Nov. 30, 2019).

84. Communist Party of China, *supra* note 80, General Program, para. 34.

85. Lin & Milhaupt, *supra* note 29, at 737.

86. See Jiangyu Wang, *The Political Logic of Corporate Governance in China's State-owned Enterprises*, 47 CORNELL INT'L. L.J. 631, 652 & 656 (2014).

87. Lin & Milhaupt, *supra* note 29, at 727-28 & Szamosszegi & Kyle, *supra* note 71, at 75-76.

88. Wang, *supra* note 86, at 654.

89. See Schneider, *supra* note 32, at 872-73 (citing C. FRED BERGSTEN, ET AL., CHINA'S RISE: CHALLENGES AND OPPORTUNITIES 76-77 (2008)).

disbursements coming from the central government anymore to fund their operations.⁹⁰ Unfortunately, the increase in the autonomy of local governments has also aggravated instances of regional or local protectionism because local authorities now have a stronger incentive to favor local SOEs over other companies⁹¹ because the former are their main or major source of revenues.⁹²

III. THE RELATIONSHIP BETWEEN THE CHINESE GOVERNMENT AND SOES

Despite the reforms taken by China on SOEs, they continue to remain deeply embedded in the Chinese economy wherein it is estimated that the SOE sector alone “employs around 20.2 million people and is valued at US[\$] 29.2 [T]rillion.”⁹³ This is not surprising given that CPC, in its revised Constitution, has categorically stated its intention to “uphold and improve the basic economic system whereby public ownership plays a dominant role”⁹⁴ In this respect, a question lingers regarding the prevalence of abuse of administrative power in China⁹⁵ — what is the motive that drives or incentivizes the government to abuse its administrative power in favor of SOEs? In answering this question, this Part examines the relationship between the government and SOEs which incentivizes authorities to abuse their administrative power in favor of SOEs.

A. *What is an Abuse of Administrative Power in China?*

Before discussing the relationship between the government and SOEs that incentivizes authorities to abuse their administrative power, it is important at the outset to define in greater detail what such abuse is in the context of China. The concept of abuse of administrative power is not unique in China,

90. See Schneider, *supra* note 32, at 872 (citing BERGSTEN, ET AL., *supra* note 89, at 76).

91. WANG, *supra* note 35, at 49.

92. See Schneider, *supra* note 32, at 873.

93. OECD Directorate for Financial and Enterprise Affairs Competition Committee, *supra* note 24, at 5.

94. Communist Party of China, *supra* note 80, General Program, para. 11.

95. Cheng, *supra* note 7, at 171.

although it is arguably more pervasive in China than anywhere else in the world.⁹⁶ Broadly speaking, it includes any act that authorities in charge of public functions commit in abuse of their administrative power which results in the lessening or restricting of competition in the market.⁹⁷ These acts include orchestrating “local protectionism, regional blockade, industry barriers, business monopoly, [illegally] granting preferential policies ... [,] prejudicing the interests of market players, and other phenomena contrary to the efforts of building a unified national market and promoting fair competition[.]”⁹⁸ In the context of China, such power usually stems from the government’s ability to require firms to seek government approvals before they can conduct economic activities,⁹⁹ which extend even as far as to those markets that are usually open to private enterprises and free from government intervention in other developed countries.¹⁰⁰ It must be noted that the beneficiary under this kind of abuse may not always be SOEs as it is possible that non-SOEs may also benefit from certain regulations that administrative authorities adopt in their favor.¹⁰¹ However, for purposes of this Article, the Author limits the discussion on abuses of administrative power with respect to the government’s penchant for creating a hostile environment for competitors of SOEs they own or have an interest in by adopting administrative measures that are directed to stifle competition in the market.¹⁰²

96. *Id.*

97. Anti-monopoly Law of the People’s Republic of China, Order of the President of the People’s Republic of China No. 68, art. 8 (2007) (China). This provision states that “[a]dministrative agencies and [organizations] empowered by laws and regulations administer public issues shall be prohibited to abuse their administrative power to eliminate or restrict competition.” *Id.*

98. Guo Fa [2016] No. 34, para. 2.

99. See Schneider, *supra* note 32, at 871.

100. WORLD BANK & DEVELOPMENT RESEARCH CENTER OF THE STATE COUNCIL, THE PEOPLE’S REPUBLIC OF CHINA, CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND CREATIVE SOCIETY 110 (2013).

101. Guangdong Education Department & Grandsoft company v. Thsware company (High People’s Court of Guangdong Province 2015) (unreported).

102. Cheng, *supra* note 7, at 182.

B. The National Champions: The Relationship Between the Central Government and Central SOEs

I. The Institutional Bridges

Central SOEs are typically large firms dominating monopolistic industries¹⁰³ — a result of the vigorous implementation of the backward and forward approach carried out in the late 1990s.¹⁰⁴ These SOEs are branded as “national champions” in China¹⁰⁵ and are usually concentrated in sectors which are considered important and vital to the national economy.¹⁰⁶ To recall, SASAC, “a special commission [under] the [C]entral [G]overnment,”¹⁰⁷ represents and manages the state’s controlling interest in central SOEs on behalf of the State Council.¹⁰⁸ The controlling shares of SASAC on these SOEs enable the central government to influence and interfere with the operations of SOEs.¹⁰⁹ However, the relationship between central government and SOEs does not simply emanate from an ownership standpoint because there are various linkages and systems put in place that strengthen the bond of these organs and ensure that they remain connected.¹¹⁰ These linkages are called *institutional bridges*,¹¹¹ having the sole purpose of bridging or connecting the Central Government to SOEs and vice-versa.¹¹²

The first institutional bridge is the China Group Companies Association (CGCA), an association operating directly under SASAC¹¹³ and acting as a

103. Ng, *supra* note 13, at 355.

104. Cheng, *supra* note 7, at 173-74.

105. Lin & Milhaupt, *supra* note 29, at 699.

106. See Yanbei, *supra* note 26, at 175.

107. Xiaolei, *supra* note 56, at 123.

108. Shi, *supra* note 77, at 861.

109. See Shi, *supra* note 77, at 861.

110. See Lin & Milhaupt, *supra* note 29, at 726.

111. *Id.* at 726.

112. See Lin & Milhaupt, *supra* note 29, at 726.

113. Lin & Milhaupt, *supra* note 29, at 726 & China Group Companies Association, Introduction of CGCA, available at <http://www.cgca.org.cn/english/Profile/>

middleperson between the central government and SOEs.¹¹⁴ The members of CGCA are mostly central SOEs (majority of which belong to the Fortune Global list of top 500 enterprises in the world) operating in various key industries such as military, energy, telecommunications, and oil.¹¹⁵ Note that the aforementioned industries belong to the monopolistic industries of China — a category of industries which is characterized by its importance to China’s national economy¹¹⁶ and are commonly dominated by central SOEs.¹¹⁷ According to its website, one of the numerous purposes of CGCA is to be a “bridge between corporations and government,” and it has, in fact, been successful in assisting SOEs to communicate with the central government.¹¹⁸

2013-04-10/2706.html (last accessed Nov. 30, 2019) [hereinafter CGCA, Introduction].

114. Lin & Milhaupt, *supra* note 29, at 726 (citing Interview by Lin & Milhaupt, with senior administrative official, China Group Companies Association, in Beijing, China (June 21, 2011)).

115. China Group Companies Association, Member Enterprises, available at <http://www.cgcpa.org.cn/english/Member%20Enterprises> (last accessed Nov. 30, 2019) & CGCA, Introduction, *supra* note 113. See also Fortune Global 500, available at <https://fortune.com/global500/2019> (last accessed Nov. 30, 2019).

116. Anti-monopoly Law of the People’s Republic of China, art. 7. This provision states —

Industries controlled by the State-owned economy and relied upon by the national economy and national security or industries implementing exclusive operation and sales in accordance with the law shall be protected by the State to conduct lawful operation by the undertakings. The State shall regulate and control the price of commodities and services provided by these undertakings and the operation of these undertakings so as to protect the interests of the consumer and facilitate technical progress. The undertakings mentioned above shall operate lawfully, honestly, faithfully, strictly self-disciplined, accepting public supervision and shall not use their dominant or exclusive positions to harm interests of consumers.

Id.

117. See Kjeld Erik Brødsgaard, Can China Keep Controlling Its SOEs?, available at <https://thediplomat.com/2018/03/can-china-keep-controlling-its-soes> (last accessed Nov. 30, 2019) & Yanbei, *supra* note 26, at 174.

118. CGCA, Introduction, *supra* note 113.

Indubitably, the CGCA is an avenue where the central government can strengthen its ties with SOEs and be regularly updated of their needs and recommendations.¹¹⁹

The second institutional bridge is the *nomenklatura* method, a system of determining the CPC members who would be appointed to key government positions.¹²⁰ The *nomenklatura*, to put it simply, is a list of senior party members from which CPC chooses in appointing government officials including the managers of central SOEs.¹²¹ To recall, SASAC does not have the ordinary power of a controlling shareholder in a normal corporate set-up because it cannot appoint any person it deems best to manage a particular SOE without prior consultation with the CPC.¹²² In reality, most of the important positions in central SOEs are reserved to CPC members, thereby ensuring that only senior CPC members can be appointed as managers of SOEs.¹²³ This system links the central government and SOEs together in a sense that the key personnel in both organs are concomitantly high-ranking officials of CPC.¹²⁴ In this regard, the *nomenklatura* system not only acts as a linkage between central government and SOEs, but it also exhibits the long arm influence of CPC over SOEs.

The third bridge, one that is closely related to the *nomenklatura* system, is the *revolving door* system which entails the switching of personnel between the central government and SOEs.¹²⁵ Consistent with its namesake, the practice involves a revolving door-like movement of key personnel from one organ (such as the central government) to another (e.g., central SOE manager), such that a high-ranking government official and an SOE manager may be both ordered by the CPC to switch or exchange their roles of being a regulator and

119. See CGCA, Introduction, *supra* note 113.

120. Szamosszegi & Kyle, *supra* note 71, at 76. See also Lin & Milhaupt, *supra* note 29, at 727.

121. Szamosszegi & Kyle, *supra* note 71, at 76.

122. See Wang, *supra* note 86, at 653-54.

123. See Lin & Milhaupt, *supra* note 29, at 727.

124. Szamosszegi & Kyle, *supra* note 71, at 75.

125. See Lin & Milhaupt, *supra* note 29, at 726-27; Zhang, *supra* note 30, at 213; & Margaret M. Pearson, *The Business of Governing Business in China: Institutions and Norms of the Emerging Regulatory State*, 57 WORLD POL. 296, 308 (2005).

an SOE manager, respectively.¹²⁶ As such, it is not surprising in Chinese politics to see that an SOE manager has previously served as the head of a regulatory agency that regulates the affairs of the SOE he or she now manages.¹²⁷ Naturally, the revolving door system creates a link between the central government and SOEs because the practice of switching or exchanging familiar key personnel results in a friendly regulatory relationship between these two organs, especially when their heads have just switched roles.¹²⁸

2. The Close Relationship Between Central Government and Central SOEs Incentivizes Authorities to Abuse Their Administrative Power in Favor of Central SOEs

The various institutional bridges linking the central government and SOEs provide an encompassing snapshot why central SOEs enjoy the support of their industry regulators.¹²⁹ In addition to these bridges, recall that central SOEs were under the direct supervision of their parent ministries prior to the establishment of SASAC in 2003.¹³⁰ The closeness of central government with its SOEs — not only on a mere ownership standpoint, but also because of the fact that various institutional systems were put in place to ensure that these organs remain connected and devoted to the CPC's plan,¹³¹ and the historical context of the organizational structure of SOEs wherein central SOEs were previously under the direct supervision of various ministries prior to the corporatization reform¹³² — provides a strong impetus for the central government to favor SOEs. An example of this bias was pointed out by the

126. See Pearson, *supra* note 125, at 308 & Zhang, *supra* note 30, at 213.

127. See Szamosszegi & Kyle, *supra* note 71, at 75 & Wang, *supra* note 86, at 660.

128. See Pearson, *supra* note 126, at 308.

129. Ng, *Socialist Principles*, *supra* note 13, at 364 & Wendy Ng, *The independence of Chinese competition agencies and the impact on competition enforcement in China*, J. ANTITRUST ENFORCEMENT, Volume No. 4, Issue No. 1, at 10 [hereinafter Ng, *Independence*].

130. Liu & Zhang, *supra* note 54, at 131.

131. See Lin & Milhaupt, *supra* note 29, at 726 & Szamosszegi & Kyle, *supra* note 71, at 66-67. See generally Pearson, *supra* note 126, at 302-03 & Wang, *supra* note 86, at 639-44.

132. Liu & Zhang, *supra* note 54, at 131.

World Bank, which reported that central SOEs are usually dominating key industries not because they are more efficient compared to their non-SOE counterparts, but because the central government exclusively reserves these industries for them.¹³³ According to the World Bank, the source of administrative monopoly in China, at least with respect to central SOEs, are the official lists that grant them “an exclusive or privileged role in certain sectors.”¹³⁴ These lists are divided into two categories: (1) the strategic or monopolistic industries where the state exercises “absolute control” and (2) the “pillar industries” where the state remains greatly influential.¹³⁵ Non-SOEs, in this regard, cannot operate in the identified monopolistic sectors whilst, on the other hand, they can enter and compete against SOEs operating in the pillar industries although they face a wide range of constraints and regulatory barriers in these industries which central SOEs do not face.¹³⁶ The World Bank noted the extensiveness of the sectors included in the lists and reported that some of these identified sectors are usually open for competition in other developed countries.¹³⁷ While it is true that a number of the sub-set markets under the monopolistic industries are already open for competition,¹³⁸ the problem is that central SOEs are usually vertically integrated and that they leverage their dominance in the monopolistic market in order to distort competition in the competitive markets, thus making it hard for private enterprises to compete with them in segments that are already open for competition.¹³⁹

133. WORLD BANK & DEVELOPMENT RESEARCH CENTER OF THE STATE COUNCIL, THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 100, at 105.

134. *Id.*

135. *Id.* at 105-06 (citing Owen, et al., *supra* note 23, at 16).

136. WORLD BANK & DEVELOPMENT RESEARCH CENTER OF THE STATE COUNCIL, THE PEOPLE’S REPUBLIC OF CHINA, *supra* note 100, at 105-06.

137. *Id.* at 106-07.

138. *See* Gang & Hope, *supra* note 28, at 13.

139. *See* Jefferson, *supra* note 30, at 19 (citing Curtis J. Milhaupt & Wentong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, *available at* <http://web.law.columbia.edu/node/5344/beyond-ownership-state-capitalism-and-chinese-firm-curtis-j-milhaupt-and-wentong-zheng> (last accessed Nov. 30, 2019)).

C. *The Interface Between Local Governments and Local SOEs*

On the other side of the spectrum are local SOEs. To recall, local SOEs are owned by the local SASAC and are often smaller compared to central SOEs,¹⁴⁰ although in reality, it is the local government which controls their daily operations.¹⁴¹ They usually operate in competitive industries¹⁴² and enjoy immense support from their respective local governments.¹⁴³ As noted earlier, the devolution by the central government of much of its control on the economy to local governments changed the way local governments generate their income.¹⁴⁴ During the time when the economy was still centrally planned, local governments rely on disbursements from the central government to fund their operations.¹⁴⁵ However, after China instituted the economic reforms discussed in Part II, the central government's involvement in local matters rapidly declined and, expectedly, monetary disbursements from it became increasingly scarce.¹⁴⁶ As such, local governments were forced to generate their own income and fend for themselves.¹⁴⁷

The decentralization of control to local governments led to a high degree of regional protectionism, such that to generate more revenues local governments started abusing their administrative power by issuing regulations protecting and favoring their local SOEs.¹⁴⁸ Moreover, intense competition among local governments — to the extent that they are competing amongst themselves to gain more domestic market share — further drove them to abuse

140. Gang & Hope, *supra* note 28, at 8-9.

141. Jefferson, *supra* note 30, at 3. See also Xiongyuan Wang & Shan Wang, *Chairman's government background, excess employment and government subsidies: Evidence from Chinese local state-owned enterprises*, CHINA J. ACCOUNTING RES., Volume No. 6, Issue No. 1, at 52.

142. Zhang, *supra* note 30, at 204-05 & Ng, *Independence*, *supra* note 129, at 9.

143. Ng, *Socialist Principles*, *supra* note 13, at 365.

144. Schneider, *supra* note 32, at 872-73 (citing BERGSTEN, ET AL., *supra* note 89, at 76-77).

145. Schneider, *supra* note 32, at 873 (citing BERGSTEN, ET AL., *supra* note 89, at 76).

146. Cheng, *supra* note 7, at 171.

147. *Id.*

148. *Id.*

their administrative power and unduly favor their SOEs.¹⁴⁹ These abuses are known as local or regional protectionism which manifest in the form of artificial trade barriers erected by local governments that are designed to protect their local SOEs and other abuses of a similar nature.¹⁵⁰

IV. CHINA'S ANTI-MONOPOLY LAW AND FAIR COMPETITION REVIEW SYSTEM: WHAT COULD BE FURTHER IMPROVED TO PREVENT AUTHORITIES FROM ABUSING THEIR ADMINISTRATIVE POWER?

Although abuse of administrative power is prevalent in China, it is inaccurate to state, or even suggest, that the country remains oblivious to the harm that such abuse causes to the market. The truth is that China has already recognized the harm caused by abuses of administrative power¹⁵¹ and, in fact, has taken the necessary steps towards preventing the same by passing the Anti-Monopoly Law of the People's Republic of China (AML) and Fair Competition Review System (FCRS). This Part discusses the AML and FCRS in the context of preventing instances of abuse of administrative power in China and posits a number of recommendations regarding what China can further improve to be more successful in its war against such abuse.

A. *The Anti-Monopoly Law of the People's Republic of China*

Article 8 of the AML prohibits “[a]dministrative authorities and organizations authorized by laws or regulations to perform ... public [functions]” from abusing their administrative power that lessens or eliminates competition.¹⁵² Chapter V of the AML builds on the blanket prohibition found in Article 8 by providing for a non-exhaustive list¹⁵³ of acts or instances when the exercise

149. See Chenxia Shi & Kaijun Dong, *The Proposed Antitrust Law and the Problem of Administrative Monopolies in China*, 12 TRADE PRACS. L.J. 106, 110 (2004) (citing MAR PCM & RICHTER HJ, CHINA ENABLING A NEW ERA OF CHANGES 104 (2003)).

150. *Id.* at 187 & Gang & Hope, *supra* note 28, at 14.

151. Ng, *Socialist Principles*, *supra* note 13, at 377.

152. Anti-monopoly Law of the People's Republic of China, art. 8.

153. See Sun Jin, *On the Defects of Administrative Monopoly in China's "Anti-Monopoly Law" and Its Improvement*, CAN. SOC. SCI., Volume No. 6, Issue No. 2, at 3.

by an authority of its administrative power may be considered abusive.¹⁵⁴ Moreover, Article 51 provides for the penalties that shall be imposed against authorities who are found guilty to have abused their administrative power, i.e., the following:

- (1) their superior authorities shall order them to correct the illegal act, and
- (2) a disciplinary penalty shall be imposed on the supervising official directly responsible or other officials directly responsible for the conduct.¹⁵⁵

Notice that although the Anti-Monopoly Enforcement Authority (AMEA) can recommend to the relevant superior authority what penalties may be imposed against the abusive official, it is not required for the superior authority to adopt such recommendation.¹⁵⁶ This, in effect, limits the role of the AMEA in cases involving abuse of administrative power because it could only identify the abuse committed by the authority concerned and submit its proposed penalties to the superior authority.¹⁵⁷ Understandably, Article 51 of the AML has been extensively criticized for being toothless or soft in deterring and penalizing instances of abuse of administrative power because the relevant superior authority clearly lacks any incentive to discipline and penalize his or her subordinate given that such authority is highly likely to have benefited from the abuse as well.¹⁵⁸ It is not surprising, however, to find this two-fold penalty mechanism (i.e., admonishment and imposition of disciplinary sanctions against the lower-level government official) in the AML because it

154. See Anti-monopoly Law of the People's Republic of China, ch. V. This chapter contains provisions on the abuse of administrative power to eliminate or restrict competition. *Id.*

155. Anti-monopoly Law of the People's Republic of China, art. 51.

156. *Id.* See Jin, *supra* note 153, at 10 & Susan Ning, China's Anti-Monopoly Law and Its Enforcement against State Monopolies: Achievements and Limitations (A Conference Paper for Antitrust in Emerging and Developing Countries) at *9, available at [http://awa2017.concurrences.com/IMG/pdf/china_aml_and_its_enforcement_against_state_monopolies_achievements_and_imitations.pdf](http://awa2017.concurrences.com/IMG/pdf/china_aml_and_its_enforcement_against_state_monopolies_achievements_and_limitations.pdf) (last accessed Nov. 30, 2019).

157. Ning, *supra* note 156, at *4.

158. Cheng, *supra* note 7, at 184.

closely resembles those found in earlier laws and regulations (e.g., Article 30 of the Anti-Unfair Competition Law).¹⁵⁹

B. The Opinion of the State Council on the Establishment of a Fair Competition Review System in the Development of a Market System

Complementing the AML is the FCRS, a competition review system requiring government authorities, both in the central and local levels, to evaluate any of their proposed regulation or policy and ensure that it does not distort competition prior to adoption.¹⁶⁰ By issuing the FCRS, China has recognized the harm caused by abuses of administrative power in the market and, as a result of such recognition, has provided a clear guidance for government authorities on what kind of self-assessment and review they should conduct prior to adopting any proposed regulation or policy.¹⁶¹ Whilst the AML supervises government authorities on how they should exercise their administrative power — as it mainly deals with existing regulations that are deemed to have been issued in abuse of administrative power — the FCRS is an *ex-ante* review system which means that it deals with proposed policies and regulations to ensure that none of these, if adopted, would distort competition in the market.¹⁶² The FCRS, in this respect, enhances and complements the AML¹⁶³ because it does not only require government authorities to conduct a self-assessment of their proposed policies and regulations prior to adoption, but it also serves an advocacy purpose by forcefully making these authorities self-aware of the harm that they can potentially cause to the market whenever they abuse their administrative power.

C. What Can China Do to Further Improve Its Efforts of Arresting Abuses of Administrative Power?

159. *Id.* See also Shi & Dong, *supra* note 149, at 111. Compare Anti-monopoly Law of the People's Republic of China, art. 51, with Law Against Unfair Competition of the People's Republic of China, Order No. 10, art. 30 (1993) (China).

160. Ng, *Socialist Principles*, *supra* note 13, at 379.

161. See Guo Fa [2016] No. 34.

162. Ng, *Socialist Principles*, *supra* note 13, at 379.

163. *Id.* at 379-80.

1. Strengthening the AML

As noted above, the AMEA takes a backseat in enforcing the AML against authorities which abuse their administrative power.¹⁶⁴ The enforcement mechanism in Article 51 was designed to be rank-based probably because the power play in Chinese politics follows a hierarchical ladder-like structure wherein an agency's ranking within the bureaucracy predetermines the extent of its political power or influence in the society such that only higher-ranked agencies can discipline and penalize lower-ranked ones.¹⁶⁵ As mentioned earlier, some scholars have criticized the weak or toothless penalty found in Article 51 because superior authorities rarely have an incentive to punish their subordinates.¹⁶⁶ To strengthen the penalty embodied in Article 51, this Article suggests two reforms that can enhance the effectiveness of AML against instances of abuse of administrative power. It should be noted that these proposals were posited keeping in mind China's unitary state structure and highly rank-based bureaucratic system. In an ideal scenario, however, the enforcement of the entire AML, including penalties for abuses of administrative power, should be exclusively vested with the AMEA.¹⁶⁷

The first proposal is for China to issue guidelines that would determine, based on clear standards, the relevant superior authority¹⁶⁸ who would enforce the AML against officials who abused their administrative power. The guidelines would ensure that the superior authority concerned does not have a conflict of interest or a natural bias in favor of the erring officials. This proposal would minimize instances wherein the superior authority in charge of enforcing the AML is put in an awkward position of having to punish his or her subordinates for committing an act from which he or she may have benefitted as well.

The second proposal is to make the AMEA's recommendation, with respect to the proposed penalties that would be imposed against authorities

164. See Ning, *supra* note 156, at *4.

165. See Ng, *Socialist Principles*, *supra* note 13, at 363 & Ng, *Independence*, *supra* note 129, at 7.

166. See, e.g., Cheng, *supra* note 7, at 184; Ning, *supra* note 156, at *9 & Jin, *supra* note 153, at 10.

167. WANG, *supra* note 35, at 49-50 & Jin, *supra* note 153, at 15.

168. See Jin, *supra* note 153, at 10.

who abused their administrative power, binding to the relevant superior authorities.¹⁶⁹ In other words, this proposal upgrades the status of the AMEA's suggestion from being recommendatory to compulsory, which means that the only function of the superior authorities under this proposal is to enforce the AMEA's recommendation. In due deference to the consensus system in China,¹⁷⁰ however, the AMEA should consult with the superior authority in determining the proposed penalties prior to issuing its order. In case the AMEA outranks the superior authority and they disagree on the proposed penalties, the AMEA's decision should prevail but the superior authority would be given a chance to elevate its concern to the State Council or judicial authorities¹⁷¹ concerned. On the other hand, if the superior authority outranks the AMEA and they disagree on the proposed penalties, the matter should be immediately elevated to the State Council or relevant judicial authorities and either of these organs would decide the penalties that would be imposed against the erring official after reviewing the proposal of both the AMEA and superior authority.

2. Clarify and Narrow Down the Scope of the Sectors Included in the List of Strategic and Pillar Industries

Pursuant to the backward and forward approach, China identified seven strategic industries in 2006 where central SOEs would retreat and completely dominate.¹⁷² Non-SOEs are absolutely prohibited from entering and operating in these industries.¹⁷³ In addition, China also identified several pillar industries in which the state, through its SOEs, would remain influential.¹⁷⁴ The World Bank reported that the scope of these lists is too broad because it gives undue comparative advantage on SOEs operating in a wide range of

169. *Id.* at 15.

170. Ng, *Independence*, *supra* note 129, at 6.

171. See Jin, *supra* note 153, at 16-17.

172. WORLD BANK & DEVELOPMENT RESEARCH CENTER OF THE STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 100, at 105.

173. *Id.* at 105-06.

174. *Id.* at 106. (citing Owen, et al., *supra* note 23, at 16).

industries.¹⁷⁵ In this respect, the World Bank recommends for China to revisit the policy reason behind selecting the industries included in the lists and remove those which are already open for competition in other developed countries.¹⁷⁶ However, aside from simply reviewing the sectors in the list and removing those which should already be open for competition, China should also issue regulations clarifying which industries are exempted from the coverage of the AML in order to remove any misconception that SOEs operating in the strategic and pillar industries are automatically exempted from antitrust enforcement.¹⁷⁷

V. REFORMING PHILIPPINE GOCCS: CAN THE PHILIPPINES APPLY THE LESSONS FROM CHINA IN ARRESTING ABUSES OF ADMINISTRATIVE POWER?

The National Economic Development Authority of the Philippines (NEDA), the department in charge of planning the social and economic affairs of the country, recently recognized the importance of reforming GOCCs (or SOEs)¹⁷⁸ that exercise both regulatory and commercial functions¹⁷⁹ because their dual roles often distort competition in the market.¹⁸⁰ These GOCCs

175. WORLD BANK & DEVELOPMENT RESEARCH CENTER OF THE STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 100, at 110.

176. *Id.*

177. *See* Yanbei, *supra* note 26, at 170.

178. *See* World Bank Group, *Fostering Competition in the Philippines: The Challenge of Restrictive Regulations* (A Report Published Online by the World Bank Group) at 1 & 47, available at <http://documents.worldbank.org/curated/en/478061551366290646/pdf/Fostering-Competition-in-the-Philippines-The-Challenge-of-Restrictive-Regulations.pdf> (last accessed Nov. 30, 2019). The NEDA participated in the data collection and validation of the report. *Id.* at ii.

179. *See* Jinkee Bantug, *A Critique of Recent Governance Reforms of State-Owned Enterprises in the Philippines and Their Propose Improvements*, 12 ARELLANO L. & PUBLIC POL'Y J. 1, 11 (2014) & Mayvelin U. Caraballo, *GOCC reforms 'have to be defined'—NEDA*, MANILA TIMES, Apr. 16, 2018, available at <https://www.manilatimes.net/2018/04/16/business/gocc-reforms-have-to-be-defined-neda/392855/392855> (last accessed Nov. 30, 2019).

180. National Economic and Development Authority, NEDA: Private and State-Owned Firms Should Compete on Equal Terms, available at

wear various hats depending on the situation, and this creates a fertile ground for abuses to flourish because they have an innate incentive to exercise their regulatory power in a way that is harmful for their non-GOCC competitors.¹⁸¹ This Part discusses the special relationship of the Philippine government with GOCCs that exercise both regulatory and proprietary functions. It also briefly discusses the role of the Philippine Competition Commission (PCC) in reforming this type of GOCC and examines whether the Philippines can apply the lessons from China in preventing abuse of administrative power. It must be emphasized at the outset that this Part only focuses on GOCCs which exercise dual roles considering that there are some Philippine GOCCs which only exercise purely commercial functions.¹⁸²

A. Defining a GOCC Under the Philippine Context

According to the GOCC Governance Act of 2011 of the Philippines (GGA), a GOCC refers to

any agency organized as a stock or non[-]stock corporation vested with functions relating to public needs whether governmental or proprietary in nature, and owned by the Government of the Republic of the Philippines directly or through its instrumentalities either wholly or, where applicable as in the case of stock corporations, to the extent of at least a majority of its outstanding capital stock[.]¹⁸³

To recall, the OECD notes that an SOE may still be considered state-owned regardless of ownership so long as the state has the ability to influence its operations.¹⁸⁴ GOCCs, in this respect, are somehow similarly defined in the Philippines although the GGA puts more emphasis on ownership rather

<http://www.neda.gov.ph/neda-private-and-state-owned-firms-should-compete-on-equal-terms> (last accessed Nov. 30, 2019).

181. See National Economic and Development Authority, *supra* note 180 & Caraballo, *supra* note 179.

182. See Cesar L. Villanueva, *The Corporate Governance System for the GOCC sector compared with that for PHCs*, BUSINESSWORLD, Mar. 5, 2018, available at <https://www.bworldonline.com/corporate-governance-system-gocc-sector-compared-phcs> (last accessed Nov. 30, 2019).

183. GOCC Governance Act of 2011, § 3 (o).

184. OECD Directorate for Financial and Enterprise Affairs Competition Committee, *supra* note 24, at 5 & 29.

than control; this means that the government's control over GOCCs emanates from the fact that they are wholly owned or majority of their shares are owned by the government.¹⁸⁵

B. Special Relationship of GOCCs with the Philippine Government

The President of the Philippines oversees the performance of GOCCs through the Governance Commission for GOCCs (GCG), an agency attached to the Office of the President¹⁸⁶ and is in charge of monitoring and evaluating the performance of GOCCs.¹⁸⁷ In addition to being supervised by GCG, GOCCs that exercise multiple roles are commonly attached to and directly under the supervision of various ministries or departments.¹⁸⁸ As a consequence, their charter requires department secretaries to sit as *ex-officio* members of their board.¹⁸⁹ This set-up is clearly problematic because cabinet secretaries are primarily heads of various regulatory agencies, yet they are forced by law to be involved with the operations of GOCCs that exercise proprietary functions.¹⁹⁰ The organizational structure of GOCCs clearly reveals their closeness to the departments that regulate them, and this poses a harm for competition since a conflict of interest arises whenever such GOCCs decide on matters requiring the exercise of their proprietary function.¹⁹¹ To recall, this type of organizational structure is similar to the structure of Chinese SOEs prior to the implementation of the corporatization reform in which SOEs that were previously under the supervision of their parent ministries were transformed into joint-stock corporations.¹⁹²

Moreover, the charters of these GOCCs also expressly mandate them to embrace conflicting roles.¹⁹³ For example, the charter of the Philippine

185. See GOCC Governance Act of 2011, § 3 (o).

186. GOCC Governance Act of 2011, § 5.

187. *Id.* § 5 (a).

188. Bantug, *supra* note 179, at 26.

189. *Id.* at 16.

190. *Id.* at 18.

191. *Id.* at 26.

192. Lin & Milhaupt, *supra* note 29, at 735 & Liu & Zhang, *supra* note 55, at 131.

193. Bantug, *supra* note 179, at 11.

National Oil Corporation directs it to “engage in, control, supervise and regulate” any activity relating to the production, refining[,] and selling of oil pursuant to its policy objective of providing and maintaining “an adequate and stable supply of oil and petroleum products for the domestic requirement.”¹⁹⁴ The lack of clear boundaries on how these GOCCs should exercise their conflicting roles often distorts competition, and this unfortunate scenario can be seen in the ports industry wherein the World Bank reported that the exercise by the Philippine Ports Authority of its various roles of regulating port activities, owning several ports in the Philippines, and bidding out to private enterprises contracts that would enable them to operate their own ports reduced competition in port operations.¹⁹⁵

C. Whether the Lessons from China Can be Applied to the Philippines

Although the Philippines faces a problem in reforming the dual roles of GOCCs, its GOCCs are not as entrenched in the Philippine economy compared to the SOEs of China. There are only twelve GOCCs which are attached to various departments and, unlike in China, these GOCCs are only operating in limited sectors.¹⁹⁶ Moreover, the tripartite governance system in the Philippines is entirely different from China’s unitary state structure, hence a direct transplantation of China’s lessons to the Philippine context has a significant caveat. Regardless, the Author believes that the Philippines can still learn from the lessons of China despite these differences because: (1) although the Philippine government subscribes to a tripartite form of governance where government powers are equally allocated among the three co-equal branches of government (executive, judiciary and legislative) — unlike in China where the CPC dominates every facet of political and economic matters¹⁹⁷ — the weak judicial and legislative institutions in the Philippines make it possible for the executive to overpower the other two branches thereby enabling the President to control a huge facet of the country’s political and economic

194. *Id.* See also Creating the Philippine National Oil Company, Defining Its Powers and Functions, Providing Funds Therefor, and For Other Purposes [Charter of the Philippine National Oil Company], Presidential Decree No. 334, § 4 (1973) (as amended).

195. World Bank Group, *supra* note 178, at 11.

196. Bantug, *supra* note 179, at 17.

197. See Communist Party of China, *supra* note 80, General Program.

direction;¹⁹⁸ and (2) the conflicting roles of GOCCs stem from their attachment to various departments, and this structure is reminiscent of the previous organizational structure of Chinese SOEs prior to the economic reforms. In this respect, the Philippines can apply the lessons of China on SOE reformation and arresting abuse of administrative power in a number of ways as discussed below.

First, the Philippines could follow China's footsteps in separating GOCCs from their departments and centralizing their ownership into one central authority¹⁹⁹ like what China did when it established SASAC. Separating the attached GOCCs from their parent departments would demarcate the line between their proprietary and regulatory functions, and ensure that the various departments would not be able to influence GOCCs whenever they exercise their proprietary functions.²⁰⁰ In addition, centralizing and consolidating the ownership of these GOCCs into a single and neutral agency would eliminate, or at least lessen, the potential conflict of interest that is bound to arise in the current set-up wherein the decision-making power of GOCCs can be easily influenced by the political or regulatory goals of their respective departments.²⁰¹ To recall, China separated SOEs from their parent ministries and created SASAC in order to give more autonomy to the SOE managers and avoid the precarious situation in which the Philippines similarly faces today — the problem caused by the conflicting roles of GOCCs in carrying out both their regulatory and proprietary functions.²⁰² Although China has not been entirely successful in eliminating the issue of SASAC having dual roles of a regulator and a majority shareholder,²⁰³ such a shortcoming is clearly understandable, given China's linear and unitary bureaucratic structure in which the CPC dominates various aspects of Chinese polity and economy.²⁰⁴

198. Aquilino Q. Pimentel, Jr., *The Presidential Form of Government in the Philippines: A Critique*, available at https://www.senate.gov.ph/press_release/2008/0213_pimentel2.asp (last Nov. 30, 2019).

199. *See* Bantug, *supra* note 179, at 26-27.

200. *Id.* at 18-19 & 26.

201. *Id.* at 27-28.

202. *See generally* Szamosszegi & Kyle, *supra* note 71, at 72-73.

203. Cheng, *supra* note 7, at 174.

204. *See* Communist Party of China, *supra* note 80, General Program.

Second, the PCA must be amended to include sections prohibiting and penalizing administrative authorities from abusing their administrative power, similar to Article 8 and Chapter V of the AML. Like many other competition laws, the PCA is only enforceable against GOCCs or government agencies insofar as they are engaged in an economic activity.²⁰⁵ Hence, the PCC can only advise government agencies or GOCCs against adopting any proposed anti-competitive policy but it cannot prohibit them from issuing such policy if it was adopted pursuant to their regulatory powers.²⁰⁶ In other words, the PCC's role on instances that may be considered an abuse of administrative power in China is limited to an advocacy and advisory capacity because a government agency or GOCC can entirely disregard PCC's advice and proceed to adopt an anti-competitive policy even if they were already aware of the harm that such policy may cause to the market. Unlike the soft penalty incorporated in Article 51 of the AML,²⁰⁷ however, the penalty that should be imposed against an authority which abuses its administrative power under the proposed amendment to the PCA should be the same with those that can be imposed against private enterprises whenever they engage in an anti-competitive conduct. This is to give more teeth to the law so that authorities would refrain and be deterred from abusing their regulatory powers.

Finally, the Philippine government (through the Office of the President) should also craft and issue a fair competition review system that government agencies and GOCCs would conduct prior to adopting any proposed policy, similar to the competition review system incorporated in the FCRS. As PCC Chairman Arsenio M. Balisacan²⁰⁸ has pointed out, ensuring competition in a market society is a government-wide effort and is not just the business of the

205. Philippine Competition Act, §§ 3 & 4 (h). See also Ng, *Socialist Principles*, *supra* note 13, at 357-58.

206. See Philippine Competition Act, § 12 (r).

207. Cheng, *supra* note 7, at 184.

208. Arsenio M. Balisacan is the first chairman of the Philippine Competition Commission. Cai Ordinario, *Balisacan gets new job as first PCC chairman*, BUS. MIRROR, Jan. 26, 2016, available at <https://businessmirror.com.ph/2016/01/26/balisacan-gets-new-job-as-first-pcc-chairman> (last accessed Nov. 30, 2019).

competition agency alone.²⁰⁹ In this respect, the NCP of the Philippines should also provide a review system analogous to the system in FCRS which would require Philippine government agencies or GOCCs to assess the potential anti-competitive effects of their proposed policies prior to adoption.²¹⁰ If the government agency or GOCC concerned did not conduct the necessary pre-assessment prior to adopting a policy, such a policy under this proposal would be considered null and void for its failure to observe the self-review requirement.

VI. SUMMARY AND CONCLUSION

SOEs in China remain deeply rooted in the country's economy and will continue to do so in the coming years given that they are the foundation of China's socialist market economy.²¹¹ In understanding the prevalence of abuse of administrative power in China, this Article veered away from the simplistic assessment that such abuse solely emanates from the ownership relation between the government and SOEs. Rather, it examined the historical context of SOE reformation in China and the existence of various institutional bridges in attempting to explain why administrative authorities tend to adopt regulations favoring their SOEs. Regarding central SOEs, this Article discussed the various institutional bridges linking them and the central government,²¹² and their previous organizational structure (i.e., the fact that they were under the direct supervision of various ministries)²¹³ to explain why the central government has the tendency to abuse its administrative power in favor of its SOEs. With respect to local SOEs, this Article discussed the devolution of control on the economy from central to local governments, which led to the

209. Arsenio M. Balisacan, *Competition: A whole-of-government effort*, BUS. MIRROR, Sep. 12, 2018, available at <https://businessmirror.com.ph/2018/09/12/competition-a-whole-of-government-effort> (last accessed Nov. 30, 2019).

210. See, e.g., Guo Fa [2016] No. 34.

211. Communist Party of China, *supra* note 80, art. 33, para. 2.

212. Lin & Milhaupt, *supra* note 29, at 726 & Szamosszegi & Kyle, *supra* note 71, at 66-67. See generally Pearson, *supra* note 126, at 302-03 & Wang, *supra* note 86, at 639-44.

213. Liu & Zhang, *supra* note 55, at 131.

rise of regional protectionism as disbursements coming from the central government became increasingly scarce.²¹⁴

As noted earlier, China is quite aware of the harm that an abuse of administrative power may cause to the market more so that the country is now increasingly relying on the market to efficiently allocate resources.²¹⁵ In fact, to combat this type of abuse, China passed the AML and FCRS which complement each other as the AML supervises the authorities in the exercise of their administrative power whilst the FCRS provides for an *ex-ante* review system that prevents administrative authorities from adopting proposed anti-competitive policies.²¹⁶ However, the toothless penalty found in Article 51 of the AML²¹⁷ and the extensiveness of the sectors included in the lists reported by the World Bank²¹⁸ continually hamper China's effort in arresting instances of abuse of administrative power. Thus, this Article provides a number of recommendations on what China could further improve to make its war against such abuse more successful.

Finally, this Article discussed the ongoing effort of the Philippines in reforming the dual roles of GOCCs to level the playing field between public and private enterprises.²¹⁹ It also fleshed out the special relationship between GOCCs and the Philippine government²²⁰ and noted that the charter of these GOCCs actually enable them to exercise conflicting roles²²¹ which thereby distorts competition in the sectors they operate.²²² Given this context, this Article provided several areas wherein the Philippines can learn from China's experience and, in the process, discussed the role of both the PCC and Philippine government in safeguarding competition and deterring government

214. Schneider, *supra* note 32, at 873 & Cheng, *supra* note 7, at 171.

215. See, e.g., Guo Fa [2016] No. 34.

216. Ng, *Socialist Principles*, *supra* note 13, at 379.

217. Cheng, *supra* note 7, at 184.

218. WORLD BANK & DEVELOPMENT RESEARCH CENTER OF THE STATE COUNCIL, THE PEOPLE'S REPUBLIC OF CHINA, *supra* note 100, at 105-06.

219. National Economic and Development Authority, *supra* note 14, at 245-46.

220. Bantug, *supra* note 179, at 26.

221. *Id.* at 11.

222. World Bank Group, *supra* note 178, at 11.

agencies and GOCCs alike from adopting policies that are harmful to competition.