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CONSTRUCTING COMPETITION LAW IN CHINA: THE POTENTIAL VALUE OF EUROPEAN AND U.S. EXPERIENCE

DAVID J. GERBER*

China will develop its own competition law on its own terms and on the basis of its own institutions, traditions, and goals, as it has in other recent contexts.¹ It is unlikely to accept any foreign model of competition law as its own. In making choices about what kind of competition law to create, however, Chinese decision makers are likely to make at least some use of concepts and institutions that have been developed elsewhere. In this brief Essay, I examine several of the key decisions to be made in constructing a competition law for China and consider ways in which foreign experience may be of value to Chinese decision-makers.

I do not here suggest to Chinese decision-makers what they should do. The role I envision is much more modest. It is to comment on the two systems from which the Chinese are most likely to borrow concepts and institutions—that is, European and U.S. competition law—and to suggest ways in which information about them may be useful in the construction of a competition law regime for China. In particular, I review European and U.S. experiences in constructing and developing the goals and institutions of competition law in light of the potential relevance of those experiences for China's decisions about competition law.

I. CONSTRUCTING COMPETITION LAW: THE ROLE OF BORROWING

Borrowing language and institutions from foreign sources has obvious attractions for Chinese decision makers.² It is easier and more efficient than creating entirely new ones. Borrowed language has already been

* This Essay is based on a presentation I gave at a conference entitled "Competition Law and Economic Development" held in September, 2002, in Beijing, China. The conference, hosted by the Chinese Academy of Social Science, was addressed primarily to Chinese administrators, academics, and political leaders. For purposes of publication, I have added footnotes and made a few minor textual changes. The text as presented at the conference was translated into Chinese and published by the Chinese Academy of Social Science.

1. For a discussion of recent Chinese reform projects in relation to international developments, see generally PITMAN B. POTTER, *THE CHINESE LEGAL SYSTEM: GLOBALIZATION AND LOCAL LEGAL CULTURE* (2001).

2. For discussion of the borrowing and adaptation of foreign legal elements in recent Chinese experience, see Pitman B. Potter, *Globalization and Economic Regulation in China: Selective Adaptation of Globalized Norms and Practices*, 2 WASH. U. GLOBAL STUD. L. REV. 119 (2003).

given meaning by institutions in one system, and this is likely to increase the level of predictability in interpreting such language in the new system. Similarly, institutions that already exist have a record that can be examined and evaluated before putting them into operation in a new system. The experiences provide a basis for evaluating how language and institutions can be expected to function in the new system. In addition, the use of language and institutions that are widely known internationally can increase their perceived legitimacy and acceptance among lawyers, government officials, and businesses outside China.³

However, effective borrowing of language and institutions is difficult, because it extracts them from the context in which they have been used.⁴ It is akin to using tools without knowing what they were designed for or exactly how they have been used in the past. In order to assess the value and utility of these legal tools and to use them effectively, therefore, it is important to “recontextualize” them by examining how and why they were created, how they have developed, what their relationship is to other elements of the system, and what consequences they have produced. This kind of knowledge is particularly important when a competition law system is being constructed. Once the basic goals are established and the basic institutions are created, such things will not be easily changed.

In this Essay, I focus on two elements of this construction process—the establishment of goals for the system and the creation of institutions. These two elements are central to the operation of a competition law system, and thus borrowing them takes on special value. For both European and U.S. legal systems, I examine how the central goals and basic institutions were established and how they have developed. I then comment on the potential value of this information for Chinese decision makers.

II. U.S. ANTITRUST LAW EXPERIENCE: GOALS AND METHODS

A. *Constructing the U.S. System*

U.S. antitrust law was created in 1890 in response to populist political pressure. Several large “trusts” (integrated groups of companies) were perceived to be using their economic power to force their competitors out

3. This issue has been an important impetus for the development of competition law in China, particularly since China’s entry into the World Trade Organization in 2001.

4. For an analysis of Chinese experience in the related area of corporation law that is sensitive

of business, gain unfair terms from their suppliers, and raise prices to consumers. This led to widespread popular resentment in some parts of the country and demands for constraints on the anticompetitive activities of big business.⁵

In response to these demands, Congress enacted a simple statute, the Sherman Act, that made "restraint of trade" and "monopolization" violations of federal law.⁶ Both concepts were already part of the common law tradition that originated in England and was the basis of the United States legal system.⁷ These concepts, however, had been seldom applied in the nineteenth century either in the United States or England. The Sherman Act merely incorporated the concepts into federal law and attached penalties for their violation. It contained extremely general language and failed to provide guidance as to the goals to be used in interpreting it. In addition, the Sherman Act did not create new institutions, procedures, or methods to apply the law. The Statute provided for government and private lawsuits to enforce it. Private lawsuits were encouraged by providing treble damage awards for successful plaintiffs.

These initial decisions set the course for the development of antitrust law in the United States. Given that the language of the statute was very general and that there was virtually no guidance in the Statute about how it should be interpreted, judges had to articulate goals in specific cases. Moreover, because no new institutions were created, the operation of the antitrust system would have to depend on general institutions and procedures of the legal system.

B. Evolution of the System

The evolution of goals and institutions in the United States provides potential experience that can be of general value to Chinese decision-makers. Yet, the vast difference between the context of development in the United States and the current situation in China means that the U.S. experience is rarely specifically applicable to Chinese decisions. Although

5. For leading discussions of the development of U.S. antitrust laws, see HERBERT HOVENKAMP & GEOFFERY HOSKING, *ENTERPRISE AND AMERICAN LAW 1836-1937* (1991); WILLIAM LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1981); RUDOLPH PERITZ, *COMPETITION POLICY IN AMERICA 1888-1992* (1996); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where are we coming from? Where are we going?* 62 N.Y.U.L. REV. 936 (1987); William Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

6. 15 U.S.C. § 1 (2001).

7. See LETWIN, *supra* note 5, at 18-52.

I only refer here to the legal context, there are obviously extensive political, demographic, and social differences as well.

1. *Articulating Competition Law Goals*

Throughout the development of the U.S. system, the federal courts have articulated the goals of the system. This process has produced a diverse body of stated goals that refers to economic, social, and political values. At various times, for example, concerns for fairness (particularly for small and medium-sized firms), equality of opportunity, and economic liberty have been deposited in this substrate.⁸ The stated goals of the system have changed over time, but until recently they represented a relatively broad amalgam to which judges could refer in order to justify their antitrust decisions.⁹

In recent years, however, the goals of U.S. antitrust law have changed radically, as have the influences on the goal articulation process. Since the late 1970s, scholars identified with the “law-and-economics” movement have superimposed a different conception of antitrust goals on the existing caselaw background.¹⁰ Such scholars have argued that the goals of antitrust should be defined much more narrowly than they have traditionally been defined and that they should be determined *solely* by reference to economic theory.¹¹ Their theories regarding goals quickly won acceptance during the 1980s, thus fundamentally reorienting competition law. This law-and-economics “revolution” is central to our analysis. As with most victories, it is partial and not always what it seems, but it has nonetheless been an impressive “victory.”

2. *Methods and Institutions*

The basic institutional structure of U.S. competition law has not been significantly altered since its inception. An administrative agency, the Federal Trade Commission (FTC), was added to the structure in 1914, but in most basic institutional respects, the system remains little changed. The

8. For classic discussions of these issues, see Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

9. See DAVID J. GERBER, *Competition*, in OXFORD BOOK OF LEGAL SCHOLARSHIP (forthcoming 2003).

10. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998).

11. For the now-classic statement of this position, see generally ROBERT BORK, *THE ANTITRUST PARADOX* (1978).

courts are still the prime decision-makers for the most part, they still use general civil procedures rather than special competition-law-related procedures; and the Justice Department is still the most important enforcement office.

The actual operations of the system have, however, changed fundamentally. Many of the most significant changes in the operation of the system have resulted not from a consideration of the needs of the antitrust law system, but from changes in the general procedures of the courts. The fact that U.S. antitrust law relies heavily on the regular courts for its implementation and enforcement means that changes in the procedures of those courts change the way the antitrust system operates.

Perhaps the most important of these procedural changes has been the expansion of procedural discovery rights since the 1940s. This development has led to a procedural environment in which each party has extensive rights to demand information from the other party and to some extent from third parties. In principle, a party is permitted to demand any information that can reasonably be expected to lead to evidence that is admissible in court. This contrasts sharply with the procedures in most other systems, where typically information can be demanded only by a court and only where there is a reasonable expectation that the information *itself* will be admissible as evidence.¹²

This difference in standards is often of great significance for antitrust law, because U.S. procedure often brings extensive amounts of information to the decisional process that would not be available elsewhere. This phenomenon affects the way judges evaluate factual allegations and creates legal doctrines that are highly nuanced and fact-specific. It also tends to create far more complex and expensive competition-law litigation than exists elsewhere.

3. *Relevance for China*

There are two basic ways of looking at the possible relevance of this experience for China today. One is to see U.S. development as an evolutionary process that has produced "the best" approach. This perspective is commonly assumed in discussions of antitrust by U.S. experts.¹³ Here the argument is that the United States has experimented

12. For discussion from a comparative perspective, see generally David J. Gerber, *Extraterritorial Discovery and the Conflict of Procedural Systems: Germany and the United States*, 34 AM. J. COMP. L. 745 (1986).

13. For a sophisticated treatment of U.S. legal "models" and attitudes regarding them in the

with competition law longer than have other systems, that “trial and error” experience has led to the rejection of approaches that have been shown to be ineffective, and that this process has generated a superior system that should be copied by others. In this view, the current U.S. version of law-and-economics doctrine should guide China’s goals, and China should create an institutional system that centers on judges and economists. This perspective is universalist, implying that the U.S. experience is relevant to China in the same sense that it is relevant to all other countries. However, this universalist perspective disregards differences in circumstances and political objectives.

From this universalist perspective, U.S. experience in competition law can be of much value. U.S. courts have looked at complex problems from many angles, and thus the study of U.S. cases and doctrines can provide much insight into issues of legal and conceptual development. This body of case law can be of value in constructing the system, but it will become particularly important as Chinese courts and administrators are forced to apply concepts and doctrines to specific problems. Recent U.S. law-and-economics scholarship also provides sophisticated analysis of the potential economic effects of particular agreements and conduct, and this can also be of value in developing China’s competition law. The so-called “rational actor” assumptions that underlie its application may, however, be of less value in some Chinese contexts than they are seen to be in the U.S. context.

A second view examines whether the U.S. experience is *specifically* relevant to the Chinese situation. Does US experience in setting goals and creating and maintaining institutions relate specifically to the situation in China? Here the answer seems to be that the U.S. experience has limited relevance.

The circumstances surrounding the creation of the U.S. system have little in common with China’s situation today. First, legislatively-enacted competition law did not exist anywhere at the time the U.S. system was established.¹⁴ There were no foreign models or experience to which Congress could look in fashioning a competition law system. Congress did not carry out serious comparative analysis and investigation because there

United States and in post-communist countries, see generally Jacques de Lisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179 (1999).

14. A Canadian statute had been enacted the prior year, but it was to play a decidedly secondary role in the subsequent story of competition law development. See Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade, S.C. 1889, ch. 41 (Can.).

was nothing to investigate. In contrast, Chinese decision-makers today have much foreign experience to examine in making their decisions. They also have time to consider this experience carefully. Second, concepts relating to the protection of competition were already available in the United States. Thus, Congress was able to simply “federalize” existing common law concepts. There are no similar general principles in current Chinese law. Third, the process of competition was itself highly valued in the United States, and the idea of individual economic opportunity was firmly rooted in U.S. society. In China, in contrast, the process of competition and associated values appear to be less well embedded. Finally, in the United States the independence of judges as well as their role in law-making were already well established. This enabled those developing the system to rely on judges to play certain roles that they cannot play where they are neither independent nor perceived to be independent. This independence of the judiciary is not yet fully established in China, although there have been and still are efforts to develop it.¹⁵

The evolution of the U.S. system also provides relatively little that is specifically relevant to the Chinese situation. Its reliance on judges to articulate the goals of the system is probably not politically acceptable in China, in part because the status, experience, and role of judges in China provides little basis for expecting them to perform that function. Moreover, the narrow competition law goal of pursuing economic efficiency does not correspond to the political expectations supporting the drive for competition law in China. The goals posited for competition law in China include conceptions of “fairness” that are not considered appropriate in current U.S. antitrust thinking.¹⁶ Similarly, institutional reliance on the regular courts and on general procedures for the application and enforcement of competition law in the United States appears inconsistent with the role that courts play in China and with the procedures they follow.

15. See, e.g., *THE LIMITS OF THE RULE OF LAW IN CHINA* (Karen Turner et al. eds., 1999).

16. For discussion of contemporary Chinese thinking about competition law and prospects for the enactment of a competition law statute, see Wang Xiaoye, *The Prospect of Anti-Monopoly Legislation in China*, 1 WASH. U. GLOBAL STUD. L. REV. 201 (2002).

III. THE EUROPEAN COMPETITION LAW EXPERIENCE: GOALS AND METHODS

The European experience in constructing the goals and tools of competition law presents a picture that is both different from U.S. experience and potentially more relevant to the construction of competition law in China.¹⁷ In it, the goals and methods of competition law have evolved gradually over a century, as national and regional (European Union-E.U.) decision-makers have sought to construct and protect market economies and develop and protect democratic political systems.

A. Evolution of a European Competition Law Model

The idea of using law to protect the competitive process emerged in Europe in the 1890s at approximately the same time that the United States enacted its first antitrust statute. In Austria, a group of scholars and administrators articulated the idea of using law to encourage economic growth and competitiveness, reduce antagonisms between workers and owners and among regional ethnic groups. It would also give the administrative elite a voice in economic development without giving them excessive opportunities to interfere with business decision-making.¹⁸ The proposed legislation was discussed and almost enacted, but political turmoil within the empire in 1897 prevented its enactment.

Before the First World War, politicians in Germany, particularly those representing smaller businesses, picked up and widely promoted these ideas. However, the German Kaiser, not willing to allow interference with his plans for industrial and military development, prevented enactment of such legislation. After the war and the creation of a German republic, supporters of the idea succeeded in enacting an early form of competition

17. I will here refer to Europe as one system and to the European experience as one experience. In a technical sense, this has not been true until very recently, but, as I have shown elsewhere, European competition experiences have been interrelated and interwoven throughout the development of each individual system.

For a discussion of this development and the interweaving of national and regional (European Union) competition law systems, see DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998) [hereinafter, GERBER, *LAW AND COMPETITION*]. A summary is contained in David J. Gerber, *Europe and the Globalization of Antitrust Law*, 14 CONN. J. INT'L LAW 15 (1999) from which I have borrowed in preparing this Essay.

18. I recount this development in detail in David J. Gerber, *The Origins of the European Competition Law Tradition in Fin-de-Siècle Austria*, 36 AM. J. LEG. HIST. 405 (1992). See also GERBER, *LAW AND COMPETITION*, *supra* note 17, at 43-68.

law in the so-called *Kartellverordnung* (1923), which became a significant part of German economic and legal life during the Weimar period.¹⁹ The goals sought by the supporters of this legislation were similar to the Austrian goals. The principal aim of such legislation was to control the capacity of powerful corporations to distort the competition process and thereby harm both consumers and smaller competitors. Institutionally, administrators were entrusted with authority to take action in support of this goal, although in practice their authority was insufficient to pursue these goals effectively in most situations. The legislation also aimed to bolster political support for the government by demonstrating that large enterprises were “under the control” of the government.

Over the course of the following decade, the issue of competition law was widely discussed in Europe, and additional statutes similar to the German legislation were enacted in several smaller European states.²⁰ In Norway, Social democratic leaders developed and promoted competition law as a means of achieving economic growth as well as protecting workers, both as employees and as consumers.

By late in the decade there was widespread agreement in Europe about both the need for competition law and what its basic features should be. Neutral and expert bureaucrats would develop and enforce general principles designed to prevent economic actors with significant economic power from using that power to harm the economic process. I refer to this as an “administrative control model” of competition law, and its basic features remain central to competition law in Europe.

After the end of the Second World War, many European governments turned to competition law as a means of encouraging economic revival, reducing class antagonisms, undergirding recently re-acquired and still fragile freedoms, and achieving political acceptance of postwar hardships.²¹ Virtually all of these competition law systems were based on the thought and experience of the interwar period. In most of these systems, however, competition law was embedded in economic regulatory frameworks that impeded its effectiveness and it was seldom supported by significant economic, political, or intellectual resources. As a result, these systems remained a rather marginal component of general economic policy, and some have only gradually developed beyond that point.

In postwar Germany, competition law took a different turn—one that played a key role in the process of European integration and had far-

19. See GERBER, LAW AND COMPETITION, *supra* note 17, at 69-114.

20. See *id.* at 153-62.

21. See *id.* at 165-231.

reaching consequences for the course of postwar European history.²² During the Nazi period, a group of neo-liberal thinkers initiated this change of direction. They secretly, and often at great personal risk, developed ideas of how Germany should be reconstituted after the defeat of the Nazi regime. In their “ordoliberal” vision of society, economic freedom and competition were the sources of prosperity and political freedom, and thus the law had to protect the competitive process. Moreover, competition law could accomplish that goal only if it operated primarily according to juridical principles and procedures rather than on the basis of administrative discretion.

These ideas became the basis in 1957 for the new German competition law (GWB—*Gesetz gegen Wettbewerbsbeschränkungen*), which, with limited modifications, is still in force in Germany.²³ This legal framework was a key tool in the creation of an effective and socially responsible market economy. It was a key feature of the “social market economy,” and, as such, it played a key role in some of postwar Europe’s most impressive economic and political successes.²⁴

The creation of the European Economic Community in 1957 created additional roles for competition law and placed it at the center of postwar European history.²⁵ One role included the task of eliminating obstacles to trade across national borders and creating the conditions for a successful and attractive “European” market. The system that was created to develop and enforce this competition law follows in many respects the administrative model just discussed. That system gives primary responsibility to the European Commission to develop rules and principles of competition law and to enforce those laws. The actions of the Commission are, however, subject to review and control by the European Court of Justice and the Court of First Instance. These courts have played a major role in the competition law system. However, private enforcement suits have been extremely rare. Although the system will change in important ways in 2004, the Commission and the European courts will continue to be at its center. These two institutions have fashioned a European Community competition law that is generally considered to be

22. See David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the “New Europe,”* 42 AM. J. COMP. L. 25 (1994).

23. *Gesetz gegen Wettbewerbsbeschränkungen* [Law Against Restraints of Competition], v.27.7.1957 (BGB1.I S.1081).

24. For an overview of this development, see HERBERT GIERSCH ET AL., *THE FADING MIRACLE: FOUR DECADES OF MARKET ECONOMY IN GERMANY* (1992).

25. See GERBER, *LAW AND COMPETITION*, *supra* note 17, at 334-91.

effective in accomplishing the dual goals of protecting competition and creating a regional market.

National competition laws that had been developed according to the administrative control model in the first two decades after the end of the Second World War have been gradually “juridified.” In this process, juridical factors such as greater independence of decisionmakers and greater specificity of norms have come to play increasingly central roles in such systems, while the role of administrative discretion has decreased.²⁶ Moreover, the central place that competition law has assumed in the European Union has encouraged many member states to align their competition law regimes with that of the European Union. During the 1980s and early 1990s, many member states either introduced competition laws for the first time (for example, Italy) or revised and strengthened existing laws to make them more like E.U. competition law (for example, France).

B. Potential Relevance of European Experience for China

The European experience in establishing the goals and institutions of competition law may be instructive for Chinese decision-makers as they consider the creation and development of competition law in China. At many points, Europeans have faced similar problems, and they have often had similar legal materials from which to fashion responses. The claim here is not that the European experience reveals a model of competition law that is “better” in some universalistic sense than others. I suggest rather that similarities between that experience and the situation that China faces may make that experience particularly valuable for Chinese decision-makers. It can, for example, highlight problems that Chinese decision-makers will face and demonstrate the potential effects of certain kinds of decisions. Using that experience effectively, however, requires careful analysis and awareness of the contexts in which decisions were taken and their effects produced.

1. Goals

The process of articulating goals is itself a central factor in the operation of the system. That process has been primarily judicial in the United States, but it has been primarily legislative in Europe. China will almost certainly rely primarily on the legislative process in articulating

26. For review of this process, see *id.* at 392-416.

competition law goals. Thus, it will establish goals in much the same way that they have been articulated in Europe.

The means by which goals are articulated affects the way in which they are conceived and understood. European competition law systems have generally conceived the goals of competition law broadly, embracing not only concerns about economic efficiency, but also issues of fairness and the relationship between the competitive process and the society in which it is embedded. Current U.S. law, in contrast, has reduced the legitimate objectives of competition law to economic efficiency. Given that China is also likely to expect competition law to serve a variety of objectives, the European experience is likely to be more instructive to Chinese decision-makers in this regard than is recent U.S. experience. Several such goals are likely to be important in the Chinese context.

A central goal of competition law in Europe has been the construction and maintenance of markets, and China's economic reforms have placed great emphasis on this objective.²⁷ In this context, Chinese policymakers have also acknowledged the potential value of using law to protect the process of competition.²⁸ In 1993, for example, the Chinese government enacted a statute entitled "An Act Against Unfair Competition."²⁹ It represented the first significant attempt to introduce competition protection issues into the Chinese legal system. The coverage of the act is relatively broad, including some kinds of conduct (for example, predatory pricing) that is considered to fall within competition law statutes in other systems.

Many factors are involved in the construction of markets, but I will limit my comments here to two examples of this goal. One aspect of the process of constructing markets is the reduction of government controls on economic activity. In order for markets to operate effectively, economic actors must have the freedom to engage in competitive strategies directed at maximizing profits rather than meeting political objectives. Economic actors must be free to decide what they produce, how they produce it, how they sell it, and at what price. When government decision-makers prevent

27. China's ultimately successful campaign to become a member of the World Trade Organization both reflected this policy goal and reinforced specific efforts in this direction. See CHINA IN THE WORLD TRADING SYSTEM (Frederick M. Abbott ed., 1998).

28. See Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 413-23 (1995). There was also discussion of an anti-monopoly law in this context, and there were informal reports that such a law was expected to be enacted without relatively little delay. Recent informal reports are that it is labeled a "priority" item for Chinese law-makers.

29. Law Against Unfair Competition of the People's Republic of China (1993), <http://www.ultrachina.com/English/doc.cfm?OID=274> (last visited Dec. 19, 2003). See generally CHAOWU JIN & WEI LUO, COMPETITION LAW IN CHINA (2002).

or constrain such decision making, they may inhibit the creation of markets or impair market operations.

In Europe, the desire to eliminate government interference in markets has often provided a significant impetus for competition law development. Virtually all European states have had significant government control of economic production at some point in the last century, either as a result of wartime controls or as part of general economic policy, and competition law has often been used to facilitate the reduction of these controls. It has been used to create a legal framework to deter distortion of markets by single firms or groups of firms, particularly those that have recently enjoyed government support or protection.

This goal is consistent with China's economic reform proposals, which focus on gradually increasing the extent to which the economy operates on market principles rather than on the basis of government controls.³⁰ This process has moved quickly over the last twenty years, but in many markets, government influence remains significant.

Another market-construction factor involves the elimination of artificial borders that inhibit competition and the exchange of goods and services. This market-integration objective been central to the development of competition law in the European Union, and the planned eastern expansion of the European Union assures that it will remain a priority of E.U. competition law for many years. Although China is a unified polity, the reduction and elimination of artificial regional and other borders is generally considered to be an important factor in policy decisions regarding Chinese economic development.

Related to the goal of market construction and integration is the objective of securing political and community support for market activities. I refer to this as a communitarian objective, because it stresses the importance of perceptions of market activity within the communities in which they operate. To the extent that markets are perceived as "unfair" or large enterprises are perceived as "exploitative" of consumers or workers, the public and business support necessary for the operation of markets is likely to diminish.

This form of communitarian goal has often been important in the development of competition law in Europe. In the 1950s and 1960s, for example, issues of economic justice and distributive fairness were politically prominent. Social democratic parties either controlled or significantly influenced many governments, and they tended to put

30. See Wang, *supra* note 16, at 220-22.

particular emphasis on such issues. Competition law was often used to assure the public that large corporations would not “abuse” their economic power by either exploiting consumers or unfairly impeding the competitive opportunities of rivals and potential rivals.³¹ This role was most prominent in Germany, where competition law was a centerpiece of the “social market economy” that was so successful in creating economic well-being together with social justice during the postwar decades. This concept was of central importance in the German “economic miracle” of the 1950s and 1960s. Similar communitarian goals continue to be important in many European countries.

In China’s socialist market economy, this communitarian goal is likely to be particularly important. According to Professor Wang Xiaoye, a leading competition law scholar in China: “Laws adapted to the market economy must regulate, restrain and safeguard the socialist market economy. Among these laws, the most important are those that protect fair and free competition.”³² The term “socialist market economy” closely resembles the term “social market economy” referred to above, and the goal is similar: to develop a market economy, but to emphasize that it serves societal needs.

Another related goal of competition law has been to foster rapid economic growth, a prominent goal of current Chinese economic policy. In Europe, this was particularly important during the postwar decades, and it remains important today. During the postwar period in Europe, there were often shortages, and inflation was often an important concern.³³ In addition, there was fear that powerful firms that had recently been protected from competition by national governments would be in a position to manipulate markets to their advantage and thus cripple development. Competition law was seen as a way of spurring economic growth and thus reducing inflation by combatting the growth-inhibiting effects of cartel agreements and monopolistic conduct.

Although these features of European experience appear to render it particularly useful to Chinese decision makers, a word of caution is required in evaluating that experience. These similarities relate to what we can refer to as “instrumental” goals of competition law, because they are external to competition itself. In them, competition law achieves some political or economic policy “good.” It is important to recall, however, that

31. This was the case at time in Germany, for example. See GERBER, LAW AND COMPETITION, *supra* note 17, at 270-87.

32. Wang, *supra* note 16, at 201-02.

33. See GERBER, LAW AND COMPETITION, *supra* note 17, at 165-231.

competition law in Europe has also been associated with intrinsic goals and values. For example, the value of economic freedom for its own sake has been part of the goal structure of competition law in both Germany and the European Union, and it has been a factor in achieving support from some groups.³⁴ In this respect, there may be significant differences between some European experiences and China, where such intrinsic competition-related values may play a far more limited role.

2. Institutions

European experience in constructing the institutions of competition law may also be instructive to Chinese decision-makers. The administrative control model of competition law typical of European competition law was developed in pursuit of the goals noted above, and both the circumstances that recommended this institutional framework and the legal materials available for constructing it have close parallels with the situation in China. Two sets of factors may be particularly noteworthy for the construction of competition law in China: the institutional starting point for constructing the institutions and the systemic context of institutional development.

a. The Starting Point

The institutional decisions that led to the development of an administratively-centered competition law model in Europe were often made under circumstances similar to those currently facing Chinese decision-makers. Consequently, the starting points for the development of competition law institutions in Europe may be particularly instructive for Chinese decision-makers. The starting point for competition law development in Europe often included extensive economic controls applied by a cadre of administrators that enjoyed high social status and extensive political power. For those constructing competition law institutions (a group that often included many of these administrators), this phenomenon created important incentives to rely on administrative procedures and decision-making. The administrative elite provided important, perhaps necessary, political support for the development of competition law. Moreover, the support of this elite tended to minimize the extent to which competition law would threaten existing power positions and political relationships.

34. *Id.* at 232-65.

The administrative control model they developed also had other advantages. It could be enacted with relatively low cost and effort. Administrative officials could simply be assigned to a new office. Moreover, these officials did not necessarily have to do much. They could move very slowly when the political circumstances were unfavorable to rigorous enforcement of competition law principles. In general, the administrative control framework created opportunities to constrain some conduct of powerful firms and to reduce restraints on competition, but it allowed for gradual development of expertise and confidence in the competition-protection project.

The starting point for China's decision-makers is similar in several ways. First, the administrative bureaucracy has extensive influence over economic development and, frequently, individual firm conduct.³⁵ To eliminate its regulatory role completely, and immediately create a U.S.-style court-oriented system is likely to be politically difficult, if not impossible. Such a move would be made particularly difficult by the fact that China's bureaucracy has power and status. It is central to the political system, and it would be in a position to undermine competition law development if that were seen to be inimical to its interests. Finally, as in many European contexts, those who make competition law decisions will need time and experience to develop their understanding of competition law principles, and they will have a major task of educating business decision makers about those principles.

b. System Conformity

The broader issues of system conformity also make the European experience relevant to China's situation. China's legal culture is based largely on the interpretation of statutory texts. These texts, together with administrative, political, and judicial interpretations, structure and frame the operation of the legal system. The same is generally true in European legal systems. While judicial or scholarly interpretations play far greater roles in some countries than they may in China, this text orientation, in addition to the educational, cognitive and institutional practices that accompany it, represent the basic operational mechanism of law. Thus, the materials that Europeans have had available in constructing their

35. For discussion of the role of administrators in the Chinese economy, see generally Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People's Republic of China*, 19 BERKELEY J. INT'L L. 161 (2001).

competition law systems are similar to those available today to China's decision-makers.

Analysis related to system conformity must, of course, take into account the role of the Communist Party in China. This role distinguishes the Chinese institutional and political situation from the situation in Europe. It adds a layer of complexity and indeterminacy that may reduce the value of comparisons with European systems. Nevertheless, the basic similarities in institutional structures and legal materials make European experience highly relevant for Chinese decision-makers.

IV. CONCLUDING COMMENTS: EVALUATING THE RELEVANCE OF U.S. AND E.U. EXPERIENCE FOR CHINESE DECISION-MAKERS

This brief review of the development of goals and methods in U.S. and E.U. competition law suggests the potential value of this type of analysis for those constructing the Chinese competition law system. It provides a means of recontextualizing information about the two systems, placing concepts and institutions in the context of their use so that they can be more effectively evaluated and related to the needs of Chinese society.

This Essay suggests that Chinese decision-makers can expect value from analyzing both E.U. and U.S. competition law experiences. In particular, however, it reveals the extent to which European experience with competition law may be particularly likely to have significant value for constructing and operating competition law in China.

Chinese decision-makers will decide whether and how to use materials from foreign sources. They will form the goals, concepts, and institutions of the Chinese system by reference not only to their own perceived needs, but also by reference to foreign materials. This Essay suggests that careful analysis of E.U. and U.S. experience may be of significant value in that effort.