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Due Process and Procedural Rights Under the China Anti-Monopoly Law

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I. INTRODUCTION

In her keynote address recently delivered at the Antitrust in Asia conference in Beijing, FTC Chairwoman Edith Ramirez emphasized the importance of fair and transparent procedures to the development of an effective antitrust enforcement regime.[2] She noted how such procedures benefit agencies: (i) by allowing agencies to focus on substantive competition issues rather than process, (ii) ensure the quality and accuracy of agency decisions, (iii) increase respect for those decisions thus benefiting the agency's credibility, and (iv) help ensure effective and, to the extent possible, consistent international enforcement in matters affecting multiple jurisdictions.

Chairwoman Ramirez's timely remarks came in the wake of a number of expressions of concern about due process and procedural rights in matters under the China Anti-Monopoly Law ("AML"), before the Chinese Anti-Monopoly Enforcement Authorities ("AMEAs"), and before the Chinese courts. Such concerns followed several incidents, as detailed below, but it is important to put these concerns in the context of the Chinese legal, economic, and political systems.

II. CONCERNS BY SPECIFIC SECTOR

A. NDRC

In perhaps the best publicized example, numerous articles reported that a senior Chinese official at NDRC[3] had "put pressure on around 30 foreign firms . . . to confess to any antitrust violations and warned them against using external lawyers to fight accusations from regulators," citing unnamed sources.[4]

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[2] FTC Chairwoman Edith Ramirez, *Core Competition Agency Principles: Lessons Learned at the FTC, Keynote Address by FTC Chairwoman*, Antitrust in Asia Conference, co-sponsored by the ABA Section of Antitrust Law and the Expert Advisory Committee of the Anti-Monopoly Commission of the State Council, (May 22, 2014), Beijing, *available at*: http://www.law360.com/competition/articles/544997?nl_pk=10d927b3-62ab-472b-a51e-1ff698416e82&utm_source=newsletter&utm_medium=email&utm_campaign=competition

[3] The Price Regulation and Anti-Monopoly Bureau of the National Development and Reform Commission.

[4] Michael Martina, *Tough-talking China Pricing Regulator Sought Confessions from foreign firms*, REUTERS, (Aug. 21, 2013), *available at* http://www.reuters.com/article/2013/08/21/us-china-antitrust-idUSBRE97K05020130821.

This report engendered expressions of concern about due process, as well as questions about whether NDRC, and possibly other AMEAs, apply the AML with equal rigor in matters involving domestic companies as in those involving foreign entities. The Director-General of the NDRC quickly responded to the uproar, denying that the NDRC was targeting foreign companies.[5] It was later suggested that the official who allegedly made the statement had "merely intended to warn meeting participants against the dangers of hiring 'unscrupulous lawyers' who promised they [can] make investigations go away."[6]

Later, questions were raised about whether NDRC's investigations of Qualcomm and Interdigital might reflect a desire to lower domestic IT costs as China rolls out its fourth-generation mobile telecommunications networks. These questions were also quickly met by a similar denial from the Director-General, stating that there was no "background" to those investigations and that they "stemmed from complaints and have nothing to do with 3G or 4G standards."[7]

B. MOFCOM And Merger Control Decisions

The AMEA responsible for merger reviews under the AML, MOFCOM, had no choice but to begin accepting, reviewing, and rendering merger control decisions that met the mandatory filing thresholds as soon as the AML became effective in August, 2008. Understandably, early on, many questions and concerns were raised about the lack of established and transparent procedures to be applied during merger reviews. However, many noted, within three years thereafter, that "MOFCOM . . . made impressive progress in promulgating rules and regulations to provide guidance on the procedural aspects of the merger review process."[8]

Concerns of a different kind have been expressed with regard to the transparency, or lack of same, of the procedures used by MOFCOM[9] in the course of its review of mergers, acquisitions, and joint ventures. FTC Commissioner Maureen Ohlhausen noted that during the course of the first five years of the AML, MOFCOM has shown that it is taking steps to increase transparency for those procedures, noting in particular the fact that MOFCOM had recently decided to exceed the disclosure requirements of the AML by publishing not only prohibited transactions and transactions with conditional approvals, but also releasing information on all cases cleared without condition and updating that data on a periodic basis.[10]

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[5] Lan Lan, *Antitrust "Not Target" Foreign Companies*, PEOPLE'S DAILY, (Aug. 27, 2013), *available at* http://english.people.com.cn/90778/8378624.html.

[6] J. O'Connell, *Rabbit, Revisited –Antitrust Enforcement in China*, 28 ANTITRUST 6 (2014)

[7] Zheng Yangpeng, *Probes "Not Targeting" Foreign Firms: Official*, CHINA DAILY, (Feb. 2, 2014), *available at* http://ww.chinadaily.com.cn/china/2014-02/20/content_17292983.htm.

[8] Angela Huyue Zhang, T*he Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULL. 3, 631 (2011).

[9] The Anti-Monopoly Bureau of the Ministry of Commerce.

[10] Commissioner Maureen K. Ohlhausen, *Taking Notes: Observations on the First Five Years of the Chinese Antimonopoly Law*, Competition Committee Meeting, United States Council for International Business, Washington, DC, (May 9, 2013), *available at* http://www.ftc.gov/public-statements/2013/05/taking-notes-observations-first-five-years-chinese-anti-monopoly-law.

However, Commissioner Ohlhausen also said in this context "China still is considered a 'black box' by many practitioners. . . ."[11] The concerns that remain seem to primarily relate to: (i) the length of MOFCOM's reviews of many foreign transactions, (ii) the lack of early transparency regarding any substantive competition concerns MOFCOM believes may be raised by a notified concentration, and (iii) the extent and nature of the apparently frequent involvement of other government authorities in merger reviews, including most notably NDRC, MIIT, and sectoral regulators responsible for non-AML regulation of sectors of Chinese businesses and industries that include relevant markets in which the parties to a transaction may compete.[12]

Finally, concerns continue to be expressed about whether MOFCOM treats major foreign-to-foreign concentrations in the same manner that it treats purely domestic transactions. There are several well-publicized MOFCOM decisions that have imposed various types of behavioral obligations on the parties as conditions of permitting a merger or acquisition to proceed. Some of these obligations include the imposition of a FRAND-like obligation to license patents, including in at least one instance certain non-standard essential patents not subject to any previous FRAND commitment, but which were deemed by MOFCOM to be important to a certain Chinese industry.

Many of these behavioral remedies strike non-Chinese practitioners and scholars as inconsistent with the approach to remedies by merger control regimes in other major economies. Such decisions have heightened concerns about the extent to which China's industrial policy (perhaps favoring Chinese industries over foreign companies, or seeking to foster or create conditions ripe for the creation of so-called "national champions" in key industries) may affect MOFCOM's substantive analysis of certain mergers.[13] One well-informed scholar of the AML wrote that, as a result of such pressures, "merger control is not merely industrial policy based on the current Chinese players but also based on the potential for future Chinese entry."[14]

C. SAIC

The third AMEA, the SAIC,[15] has also suffered some criticism about procedural fairness, including transparency of its decision-making process. However, it is difficult to assess the fairness of SAIC's procedures because, to date, it has handled a relatively small number of matters compared to those handled by MOFCOM and NDRC.

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[11] *Id.*

[12] The Ministry of Industry and Information Technology.

[13] Yuni Han Sobel, 13 ANTITRUST SOURCE 1 (2014).

[14] D. Daniel Sokol, *Merger Control Under China's Anti-Monopoly Law*, 10 N.Y.U. J. L. & BUS. 1, 23 (2013). *See* also Nathan Bush & Yue Bo, *Disentangling Industrial Policy and Competition Policy in China*, 10 ANTITRUST SOURCE (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/2011_build/antitrust_law/feb11_fullsource.authcheckdam.pdf.

[15] The State Administration for Industry and Commerce.

D. The Courts

Other concerns have been raised about AML cases brought before the Chinese court system. Some cases were filed immediately after the AML became effective, though no AML-specific procedures had been promulgated. Subsequently, the Supreme People's Court ("SPC") has allocated AML cases to the special IP Tribunals that exist in many lower courts—an approach that many Chinese and foreign practitioners have welcomed, as those tribunals are seen to include many of China's leading jurists, and because those judges have been undergoing special training on antitrust and economic concepts as well as the approaches courts have developed towards various antitrust issues over many years in foreign jurisdictions with much older antitrust laws.

The SPC also issued Judicial Rulings (essentially rules to be followed by lower courts) on the handling of private civil AML cases (as contrasted with appeals of AMEA decision), which augment the provisions of the Civil Procedure Law and other general laws and regulations governing court proceedings.[16] However, one Chinese scholar has noted that, while the SPC has issued procedural rules for AML cases in the civil courts, no such rules have been established for cases in the administrative courts, which have jurisdiction over appeals of AMEA decisions.[17]

And there remain frequently expressed concerns about the perceived lack of independence of the Chinese courts, which fall under the aegis of the Ministry of Justice, and are therefore an executive agency, not a separate branch of government. The courts can also at times be subject to directions from the State Council and, at least in theory, the Communist Party of China ("CPC").

III. PUTTING THESE CONCERNS IN CONTEXT

All of these concerns, and possible ways to address them, are better understood by viewing them in the context of the Chinese legal, economic, and political systems. Much has been written about the uniqueness, among the nations of the world, of many aspects of China's legal system.[18] Any substantial consideration of all those unique characteristics, and their possible sources and consequences, is well beyond the scope of this brief article. But in the context of procedural fairness in matters—whether before an agency or court—involving so-called "economic law" (which includes antitrust law), it must be noted that many scholars of the China legal system have long noted that China has gradually developed toward a truer "rule of law" system as China's economic system has moved (though not always continuously) in the overall direction of a more market-oriented system since the founding of the People's Republic of China

[16] The Supreme Court Judicial Rulings on Several Issues for the Application of Law Concerning the Proceeding of Unfair Competition Civil Cases (Fa Shi [2007] No. 2).

[17] Angela Huyue Zhang, *Bureaucratic Politics and China's Anti-Monopoly Law*, 48 CORNELL INTL. L. J. 1, and 15 PEKING UNIVERSITY L. REV. (in Chinese)(2014).

[18] *See* generally, Xiao Li, L*egal and Economic Development with Sui Generis Chinese Characteristics: A Systems Theorist's Perspective*, 39 Brook. J. INT'L L. 159 (2014).

in 1949.[19] The very enactment of the AML, as well as the steps that the AMEAs and the SPC have already taken to establish AML procedures, are instances of this trend.

A leading Chinese expert has written "[t]he direction of causation runs from politics to economics, not the other way around."[20] Perhaps similarly showing in turn that the direction of causation runs from economics to law, not the other way around—including in particular with regard to the AML—another noted Chinese scholar has written that "scholars and practitioners observe that the effort to draft the AML was suddenly revived and accelerated after China's entry into the World Trade Organization (WTO) in 2002 and that there appeared to be a 'broad consensus' at the time that China needed the AML to protect against the anticompetitive practices of multinational firms."[21]

So, taking first the influence of economics on the AML, if the law is likely to more or less evolve in the direction of international norms as China liberalizes its markets, those with concerns about procedural (and substantive, for that matter) fairness likely welcome certain statements and decisions made in conjunction with the Third Plenary Session of the 18th CPC Central Committee, held in November, 2013. On that occasion, President Xi and the CPC announced numerous notable reforms to the Chinese economic system, including:

- greater reliance on market forces;
- judicial reforms;
- continued development of AML enforcement and institutions;
- broader access to the Chinese markets, both internally and internationally, and including sectors heretofore subject to significant restrictions such as finance, education, and health care;
- possible creation of separate intellectual property courts (query whether they would have jurisdiction over AML matters as do the IP Tribunals within existing courts); and
- reforming the administrative judicial system, among others.

According to a CPC document, the judicial reforms are aimed at preventing miscarriages of justice and better protecting human rights. President Xi noted that the "[j]udicial system is a major component of the political system"[22] adding that the public have long complained about miscarriage of justice, and that lack of judicial credibility is largely related to the unreasonable judicial system and working mechanism.

So we have drilled down to bedrock, to the third fundamental influence on China's legal system, including on the state of procedural fairness under the AML; namely, the political system

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[19] *See* generally, RANDALL PEERENBOOM, CHINA'S LONG MARCH TOWARD THE RULE OF LAW (Cambridge, 2002).
[20] YASHENG HUANG, INFLATION AND INVESTMENT CONTROL IN CHINA, xix (1996).
[21] Zhang, *supra* note 17.
[22] *Xi Expounds New Judicial Reform Measures*, GLOBAL TIMES (November 16, 2013), *available at* http://www.globaltimes.cn/content/825300.shtml

of China. The single-party system in China, and its long reliance on central planning, must be seen in the context of recent ongoing, but incomplete, economic reforms driven by the political desire to maintain growth, develop technologies, and participate at higher levels in global politics, trade, and economics. Political leaders in recent decades have demonstrated greater sophistication in economic policy and apparently a greater recognition of the incalculable value to China of developing legal and administrative systems, institutions, officials, and judges that are regarded as professional, reliable, expert, consistent, and, most importantly, committed to the rule of law.

Many of the challenges to reaching that goal are, I believe, rooted in China's political system. Many of the needed procedural reforms in AML policy and enforcement appear to be rendered more difficult, if not impossible, by certain so-called "bureaucratic politics." The leading paper on this subject delves deeply into such political and bureaucratic influences.[23] While the CCP has supreme power over all political decisions and policies, the vastness of the country and its economy require extensive delegation by the CCP to administrative agencies.

For example, the State Council has delegated the implementation of the AML to the State Council, which in turn delegated the implementation to an umbrella interim policy body, the Anti-Monopoly Commission ("AMC") and, ultimately, to three AMEAs seated within already established larger administrative bodies—NDRC, SAIC and MOFCOM—which have distinct cultures, missions, and policy goals. It appears that, at least in some instances, these differences affect the AMEAs varying approaches to enforcement and may explain inconsistencies in certain rules established by the agencies. To illustrate, the NDRC rules regarding its AML leniency program provides the NDRC with complete discretion in deciding whether to grant leniency to an applicant, whereas the SAIC leniency rules require SAIC to grant leniency when an applicant fulfills certain requirements.

There have also been differences in the interpretations of AML provisions by the AMEAs as well as the courts. For example, in 2013, NDRC issued the largest AML fines to date at that time against foreign companies engaged in resale price maintenance ("RPM"). Within the same week that that decision was announced, the Shanghai Higher People's Court found that a U.S. company had violated the AML by engaging in RPM. The court decided that engaging in resale price maintenance is not *ipso facto* an AML violation absent the consideration of certain factors such as the level of competition in the market, the defendant's market position, the motives for implementing resale price maintenance, and anticompetitive effects, if any, of the practice.

The approach taken by the court is very similar to the rule of reason as applied by U.S. courts and agencies under the U.S. antitrust laws. While the NDRC decision is less detailed than that of the court, it appears that the NDRC did not consider any pro-competitive justifications of the practice as relevant to its analysis. While commentators have interpreted the NDRC decision in various ways, many see it as closer to the U.S. *per se* rule than to the rule of reason.

[23] *Id.*

IV. CONCLUSION

Ameliorating the pernicious effects of bureaucratic politics on AML policy and procedures requires political will and political action towards that end. The apparently gradually increasing recognition of the economic benefits to China and the Chinese people through greater AML procedural fairness—by both the CCP and the ministries that house the AMEAs—augurs well for the future in this connection. Continued engagement both at the political level and among antitrust enforcement authorities to emphasize the need for such reforms in order to ensure the continued growth of trade with and investment in China by foreign enterprises is key to moving the political levers that move the economic levers that move the levers in the legal and administrative systems of China.