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China's Antitrust Regime: A New Statute Announces The Country's Increasing Importance In The Global Economy

The Editor interviews ***Peter J. Wang****, Partner, Jones Day, Shanghai*.

Editor: Mr. Wang, would you tell our readers something about your background and professional experience?

Wang: My family is originally from China, having emigrated first to Taiwan and then to the U.S. I was born and raised in Pennsylvania, while spending summers in Taiwan, went to Princeton and then the University of California at Berkeley Law School, Boalt Hall. From Berkeley I went to Jones Day, first as a summer associate and then, after graduation, as an associate, then partner, in the Washington, DC office. I have been with the firm for my entire career, eleven years in Washington and four years in Shanghai.

Editor: What were the things that attracted you to Jones Day?

Wang: When a person goes through the law school recruiting process, the initial focus is on the firm's reputation and the strength of its practice areas. Once you have an opportunity to work at the firm, things such as its workplace culture, the people you encounter and the sophistication of the practice become important considerations. On all of these counts, my experience at Jones Day has been very positive.

Editor: You are head of Jones Day's China antitrust practice. Would you give us an overview of the practice?

Wang: The practice was begun some four years ago around the time of my arrival in China. As merger control has become more important in the greater China region, a practice with the capability of navigating this area is increasingly important. Taiwan has a fair trade statute, and regulatory regimes are in place in Hong Kong. Since 2003 China has had a provisional merger control regulation, then a final one. These are the major jurisdictions in the region.

Peter J. Wang

Editor: Who are the practitioners?

Wang: The practice consists of Chinese lawyers and a few American lawyers, myself included. The Chinese lawyers tend to handle a variety of in-bound transactions, including matters for multinational companies with China issues. We also deal with Chinese enterprises with a concern for antitrust issues transcending the local issues. Many of them have product sales around the world, and U.S. and European and Japanese antitrust expertise come into play in addressing their concerns.

We recruit our Chinese lawyers at different levels. Some of them come to us as top students just out of Chinese law schools. Others have practiced with Chinese law firms prior to joining us. Very often a Chinese lawyer will come to us with some U.S. experience, including an American J.D. or LL.M. degree. Antitrust practice in China is still in a nascent phase, and where we find someone with the appropriate antitrust expertise we will attempt to recruit them specifically for the practice.

Editor: Where does the practice reside?

Wang: The practice is both Shanghai- and Beijing-based, with Taipei covering the Taiwan component, and our work extends across the entire region. One of our Beijing members currently is working in the firm's Washington, DC office for a year.

Editor: What kinds of service does the practice provide its clients?

Wang: There are two major aspects to the practice now. The main one concerns merger control. We handle regulatory clearance for mergers throughout the greater China region, and from time to time we work with or coordinate other important jurisdictions beyond the region. These transactions often are global deals with a China-specific component.

The second aspect is antitrust counseling and compliance work within the greater China region. The clients are companies – mostly multinational enterprises – with operations in China. Strict antitrust compliance is a necessity for them because they are mostly U.S. or European companies or do business in places with strict enforcement. We work with these clients to make certain that the Chinese operation is in compliance with international standards.

A third area that is China-specific concerns litigation, both enforcement and defense work. This is not a large part of our practice at present since most people are waiting for the passage of the proposed Anti-Monopoly Law.

Please email the interviewee at pjwang@jonesday.com with questions about this interview.

Editor: Would you give us a summary of the legal framework for a China antitrust practice?

Wang: The existing framework is two-fold. First there is a regulatory regime called the Foreign M&A Regulation. This is a broad regulation that covers all foreign-related deals involving China. Merger control provisions are a part of it. They are intended to be temporary, however, until the Anti-Monopoly Law comes into effect. Everything that is not concerned with merger controls is covered by a variety of laws and regulations. For example, there is an unfair competition statute which mostly deals with fair trade practices, including false advertising. This statute includes some competition provisions. There is also a very broad bidding law that deals with the competition law aspects of bidding, and a separate pricing law. And, of course, there are regulations that derive from all of these statutes.

Editor: Are there specialized courts?

Wang: There are no specialized courts at present. Most of the oversight activity is with administrative and enforcement agencies. What complicates matters is that each of these laws seems to have its own agency. The single most important and active agency is the Ministry of Commerce – formerly the Ministry of Foreign Trade and Economic Cooperation – and it has national jurisdiction over a variety of areas.

Editor: What is the substantive standard for antitrust review under the Chinese regime?

Wang: The current regime requires the agencies to consider whether a transaction will result in excessive concentration in a domestic market, obstruct fair competition in China or harm the interests of domestic consumers. That is the regulatory language currently in force.

The last version of the proposed Anti-Monopoly Law made public includes a standard of whether the concentration has or may have an eliminating or restrictive effect on competition. That seems to be a broader standard than what is currently in force.

Editor: I gather that the regime differentiates between domestic and foreign parties.

Wang: Yes. The Foreign M&A Regulation applies *only* if one of the parties has a foreign-related component. It does not apply to purely domestic transactions. The foreign commentators and governments have been very critical of this aspect of the regime, and, indeed, it is not in compliance with World Trade Organization requirements.

Editor: What is the status of the proposed Anti-Monopoly Law?

Wang: For the past five years people have been saying it is to be enacted "this year." The latest word is that it will be passed by the end of 2007, but cautious observers think that the time frame is 2007-2008. The legislation must go through three readings, and at present it is just about to go into the second reading.

Editor: Assuming the statute is enacted into law in substantially its present form, how extensive is its reach?

Wang: The statute is a comprehensive antitrust law. It is modeled more after the European model than the U.S. model. It has four major chapters, and these contain what would appear in just about all of the major competition laws around the world. There is a section on agreements between companies. There is a section about dominance and abuse of dominance. There is a section concerning mergers and acquisition. Finally, however, there is a section on abuse of administrative monopoly, which is a uniquely Chinese element.

Editor: Are there any pitfalls that U.S. general counsel should be aware of with respect to the Anti-Monopoly Law?

Wang: There is nothing in the law that, on its face, constitutes a problem for U.S. general counsel. Like most Chinese laws, however, it is drafted very broadly and some of the language is vague. This is intended to accord a substantial degree of administrative discretion, but the absence of clarity and predictability can be frustrating for the foreign practitioner and a source of uncertainty for companies. Some commentators have expressed their concern about the statute being used in a discriminatory fashion against foreign companies that have large market shares, say a controlling patent or IP position in a particular industry. On its face, the law appears to be neutral, but the concerns are there.

Editor: You were recently quoted in *Fortune* about a recent action brought by a Chinese enterprise, Sichuan Dexian Technology Co., against Sony Corp. and its local partner. What is at issue in this case?

Wang: This is a very interesting case of first impression in China. As we understand it, the suit was brought by a company manufacturing batteries against Sony. The claims include a charge that Sony has used technology – such as embedded codes – to prevent the use of competing batteries in its cameras and other electronics. While such a case would not be unusual in the U.S., this is a rare situation where the Chinese court has accepted the case under a very broad provision of the unfair competition law which mandates that business operators must follow principles of equality, fairness and bona fides.

It is difficult to say what impact the proposed Anti-Monopoly Law might have on this case. I think it is fair to conclude that the courts would not have permitted this case to proceed if they did not believe that there is support in place for a more stringent antitrust regime. Needless to say, the case is being followed by a great many people.

Editor: Jones Day takes great pride in offering its clients an integrated worldwide antitrust strategy in mergers and acquisitions. The concept sounds terrific, but how does it work in practice?

Wang: As the world's major economies have become integrated in the global arena, it is essential to have a team of antitrust lawyers who are dedicated to the practice and working in all of the major jurisdictions. We have this capability, and we are able to put together teams from across all of the firm's offices to handle complex matters that involve clients active in a variety of jurisdictions, including all of the major ones. This is an unusual capability. We do so much of this multijurisdictional work that it has become a regular and ongoing aspect of our practice.

Editor: What about the future? How do you see the practice developing over the next five years or so?

Wang: Antitrust is one of the most important growth areas for the Asia Pacific region. We have already seen Japan and Korea become two of the top four antitrust jurisdictions in the world in terms of their aggressiveness and enforcement. China is poised to be the next major participant as a consequence of having become such an important market and manufacturing center for the global economy. As people do an increasing number of deals here, merger control becomes very important for the global markets. That is why the proposed Anti-Monopoly Law is receiving such attention.