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## I. INTRODUCTION

Competition laws across Asia have gone beyond infancy and nascent stages and have become laws to be reckoned with. The sheer numbers of Asian countries with competition laws, and the seeming diversity as regards enforcement patterns and application of principles, naturally leads one to question whether the implementation of the laws are truly motivated by competitive forces or whether some other hidden agendas drive the same.

China's recent probes into Microsoft Corp. and foreign car companies such as Audi and Chrysler, for example, have prompted observers to question if China is using its competition laws to support domestic firms at the expense of foreign companies. According to a recent Reuters article, legal experts point out that the Chinese authorities appear to have wielded the law against more foreign multinationals than local companies; firms targeted include Mead Johnson Nutrition Co. and Danone SA which have been slapped with heavy fines, as well as U.S. chipmaker Qualcomm Inc., which faces the prospect of a U.S. $1 billion fine.

The same article noted that this had prompted the U.S. Chamber of Commerce to send a private letter to the U.S Secretaries of State and Treasury to highlight concerns that China's enforcement of the anti-monopoly law was being used to pursue "China's industrial policy goals" and promote Chinese producer welfare and advance industries policies that nurture domestic enterprises, instead of the internationally accepted norm of using competition law to protect consumer welfare and competition.

Similar concerns have also been raised regarding the Indonesian competition authority, which had in the mid-2000s issued a string of infringement decisions against the likes of Chevron, Carrefour, Mitsubishi, Pfizer, and Temasek, the Singapore sovereign wealth fund.

Amidst such concerns, this article looks at the track record of competition authorities in Asia—namely China, India, and the more active jurisdictions within Southeast Asia, some of which had implemented competition law at the behest of international organizations or pursuant to their obligations under free trade agreements with Western nations—to assess whether economic nationalism or protectionism may be at play. Has competition law in Asia been enforced in line with their stated objectives of protecting the competitive process and encouraging market entry and efficiency for the benefit of consumers, or has it been used as a tool to unfairly target foreign companies and protect domestic companies against foreign competition?

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## II. QUICK SURVEY OF SOME ASIAN COUNTRIES

A quick survey of the landscape in several countries shows that the competition authorities in Asia have pursued both local and foreign-owned firms. Even state-owned enterprises or government-linked companies have not been spared. Indeed, there is no clear evidence that foreign firms have been unfairly and more heavily targeted. In fact, with many of the relatively young competition authorities in Asia focusing on cartel activities in their initial years of operation—as these tend to be low-hanging fruits—their targets have predominantly been the local firms or local trade associations that engage in such cartel behavior.

Some may argue that it is perhaps with merger control that competition authorities can wield their power to achieve nationalistic aims. Yet, as the country-specific discussions below show, save for the one or two instances, there is no consistent discerning pattern that surfaces to dictate a position one way or the other.

### *A. China*

Cartel cases pursued by the Chinese authorities have involved a mixture of foreign firms and local firms; state-owned companies are also not exempted. In February 2013, the NDRC's local offices in Guizhou province and Sichuan province imposed substantial sanctions on Maotai and Wuliangye, two state-owned liquor companies, of 247 million renminbi (about U.S. $40 million) and 202 million renminbi (about U.S. $33 million) respectively, for their resale price maintenance practices. The NDRC's decision in August 2013 to fine six milk powder manufacturers a total of 670 million renminbi (about U.S. $109 million) for imposing an RPM restriction on distributors involved a mixture of Chinese and international firms.

However, China's recent merger decisions, such as its four conditional clearance decisions published in 2013, suggest that the Chinese Ministry of Commerce ("MOFCOM") does impose requirements on foreign firms to supply key products to the Chinese market on favorable terms as a condition for merger clearance. Industry observers have noted that certain aspects of MOFCOM's merger decisions appear driven by industrial policy considerations and indicate that transactions involving key industries such as food and agriculture and minerals, as well as industrial inputs, will be regulated with an eye towards broader strategic interests.

An example is MOFCOM's assessment of the *Marubeni/Gavilon* merger in which MOFCOM chose to define the relevant market as the market for imports of soybeans into China (which effectively excludes domestic supplies of soybeans from its analysis) and eventually imposed extensive hold-separate remedies on the parties. In another merger, *MediaTek/Mstar* involving Taiwanese chipmakers, one of the remedies imposed was that MediaTek and Morningstar must comply with certain price control arrangements, including ensuring that prices in China of LCD TV control chips must not be higher than the prices of similar products sold by MediaTek and Morningstar outside China—again suggesting wider national interest considerations at play.

Yet, in response to the allegations that China's anti-monopoly law has been used as an excuse for protectionism, the Chinese authorities have emphasized that China's anti-monopoly law applies to both domestic and foreign firms, with the aim of protecting consumers. The National Development and Reform Commission ("NDRC"), one of the country's competition authorities, pointed out that it has targeted local telecommunications companies, including

China Unicom and China Telecom Corp. and local financial institutions for anti-competition practices. "Those who have been penalised include state-owned enterprises, private companies, and foreign-owned enterprises, and industry associations," the NDRC's Director-General told Reuters, adding that the law was "to protect market order and fair competition."

### *B. India*

The Competition Commission of India ("CCI") has expressed that India's competition law is competitively neutral and is enforced in the same spirit on private and government enterprises alike. Indeed, it appears that the CCI does not hesitate in taking public entities to task for anticompetitive conduct. The recent penalty in December 2013 of about 17.73 billion rupees (U.S. $289 million) imposed on Coal India, a state-owned monolith, for abuse of dominance, sends a clear message that public entities cannot escape their responsibility under India's competition law. Other recent penalties imposed include: (i) 63 billion rupees (U.S. $1 billion) in June 2013 on 11 cement manufacturers of the Cement Manufacturer's Association for amounting to a cartel, (ii) a combined penalty of 3.17 billion rupees (U.S. $52 million) on United Phosphorus Limited, Excel Crop Care Limited, and Sandhya Organic Chemicals Private Limited for collusive bidding in tenders and for collectively refraining from a particular bid, as well as (iii) a penalty of 520 million rupees (U.S. $8.5 million) on the Board for Control of Cricket in India for abusing its dominant position by denying market access to potential competitors. Many of these involve local companies.

The CCI has, in a short span of four years, imposed several headline penalties in abuse of dominance investigations. This includes imposing a penalty of 6.3 billion rupees (U.S. $103 million) on DLF Limited, the largest locally established real estate company in India, for abuse of dominance in relation to the ostensibly unilateral terms and conditions of the apartment purchase contracts that it has entered into.

### *C. Indonesia*

The Indonesian competition authority, the KPPU, has historically taken an active stance against cartels. Bid-rigging cases have formed the bulk of the KPPU's decided cases, making up 77 out of the 84 decisions issued by the KPPU over the last four years. Many of these have involved local companies. One of the highest fines in recent times of U.S. $2 million was imposed on Konsorsium PNRI for collusive tendering in the scheme to implement electronic national identity cards. The KPPU has also been investigating cartels in numerous food markets, from garlic to soybean, again involving mostly local companies and importers. In its decision on the garlic cartel, KPPU adopted an infringement against 19 local garlic importers and imposed fines on each of them of IDR 11 million (about U.S. $920) to IDR 921 million (about U.S. $76,700).

In the area of merger control, the KPPU has assessed 138 mandatory post-merger notifications since the implementation of the merger regulations in 2010, of which 19 were foreign mergers. The KPPU has approved all the mergers unconditionally, except for one. While this was a foreign-to-foreign merger involving Nestle and Wyeth in relation to infant formula milk, the condition imposed by KPPU was a behavioral one of requiring the merged entity to submit its monthly selling price and sales volume of the products in the two markets of concerns. Given that the condition was not unduly onerous and did not require any restructuring or divestment of the merged entity, it does not appear that the KPPU's intent was to impede the foreign firms involved.

Although there have been concerns that the KPPU had in its earlier decisions unfairly targeted foreign firms such as Chevron, Carrefour, and Pfizer, as mentioned above, it is evident that local firms themselves have also been hauled in by the KPPU on dubious grounds. This included the KPPU's allegation that Indonesia's national airline, Garuda, and other airlines had formed a cartel to fix fuel surcharges—although this might in reality have been due to common fuel input costs rather than cartel activity.

### D. Malaysia

In its relatively short history of enforcement since the Malaysian Competition Act came into effect on January 1, 2012, all the published cases by the Malaysian Competition Commission ("MyCC") have predominantly involved local enterprises. Indeed, its first big case involved an infringement decision against Malaysia Airlines and AirAsia, both of which are Malaysian enterprises, for entering into what the authority assessed to be a market-sharing agreement and for which it proposed a financial penalty of 10 million ringgit (about U.S. $3 million) each. Notably, Malaysian Airlines is the national airlines carrier and a government-linked company, and the infringement decision was intended to send a clear signal that the objective of competition law in Malaysia is to promote the process of competition rather than any specific players in the market.

The MyCC has since issued interim measures against the Pan-Malaysian Lorry Owners Association (for which the MyCC eventually accepted an undertaking in lieu of any financial penalties), issued proposed infringement measures to 26 ice manufacturers for price-fixing, and began investigations into alleged cartel behavior following announcement of price hikes in stationery supplies, all of which targeted mostly domestic players.

The most recent price-fixing case was the facilitation by the Sibu Confectionery and Bakery Association to collectively raise the prices of confectionery and bakery products, for which the MyCC issued a total proposed fine of close to half a million ringgit (about U.S. $150,000) to 24 of the association members. In its only abuse of dominance case thus far, the MyCC proposed a 4.5 million ringgit (about U.S. $1.4 million) financial penalty on Megasteel Steel Sdn Bhd, the only domestic manufacturer of hot rolled coil in Malaysia, for engaging in an alleged margin squeeze.

### E. Singapore

The Competition Commission of Singapore ("CCS") has, in its close to ten years of existence, pursued a mixture of local and foreign companies. In the cartels area, the CCS's targets have mostly been local companies, with the CCS issuing infringement decisions against coach operators for price-fixing of coach tickets for travel between Singapore and Malaysia, electrical and building works companies for bid-rigging, modeling agencies for price-fixing, ferry operators for unlawful sharing of price information, and the Singapore Medical Association for its fee guidelines.

However, in mid-2014, the CCS issued its first international cartel infringement decision and financial penalties totaling S$9.3 million (about U.S. $7.4 million) against four Japanese ball and roller bearings manufacturers and their Singapore subsidiaries. This is the first time that the CCS has exercised the extraterritorial reach of its powers and signals the CCS's growing intent to act against international cartels as it also issued a proposed infringement decision against another international cartel involving freight forwarding companies earlier this year.

The CCS's only abuse of dominance infringement decision thus far involved a local ticketing agent, SISTIC. While the CCS had commenced an abuse of dominance investigation against Coca-Cola Singapore, the CCS ceased its investigation without an infringement decision being taken after Coca-Cola voluntarily amended its supply agreements and provided undertakings.

Under its voluntary merger regime, the CCS has assessed close to 40 merger notifications, most of which involve foreign firms, given Singapore's open economy. The CCS has cleared virtually all of these notified mergers without requiring any commitments from the parties, although it is now publicly consulting on remedies offered by the merger parties in an ongoing merger assessment involving online recruitment advertising. Given that the merger notifications to CCS predominantly involve foreign firms, this suggests that the CCS has not unfairly targeted or imposed unusually strict requirements on mergers involving foreign firms.

## III. EVIDENCE POINTS AGAINST PROTECTIONISM

The review thus far suggests a seemingly balanced approach that the competition authorities have been taking with the implementation of competition laws across the region.

### *Reasons Giving Rise To Possible Misconceptions*

Why then is there a genuine concern and misperception that foreign companies are being unfairly targeted by competition authorities in Asia? Why have there been so many competition cases involving foreign firms, with seemingly disproportionate penalties imposed on them?

There may be objective reasons as to why foreign firms have frequently found themselves the subject of antitrust investigations and infringement decisions in Asia:

1. Many foreign firms, by virtue of having been successful enough to expand beyond their home countries, tend to be large and influential in their respective markets. They may be able to leverage their global networks and global customer base to be more efficient and garner a higher market share. Together, these factors make foreign firms—although this could vary, depending on the industry and the nature of their goods—more likely to be dominant in the relevant market or at least possess enough market power (even if short of dominance) and for their actions to have a significant impact on competition.
2. Because of their larger size and revenues, and because the financial penalties for competition infringements are commonly calculated as a percentage of the firm's relevant turnover or even global turnovers, an infringement decision against a foreign firm tends to attract a much higher financial penalty.
3. Infringement decisions involving foreign firms are more likely to be widely publicized and grab headlines, since such firms tend to be globally well-known household names, as opposed to decisions involving lesser-known local firms for which publicity is generally limited to the affected jurisdictions and industry.

4. Foreign firms are more likely to be involved in anticompetitive or merger activities on a larger or even global scale. As such, where there has been a negative decision against the firm in one country, it may have a knock-on effect on other jurisdictions as other competition authorities are more likely to pursue them and find the firm in breach of their respective competition laws. With more and more global cartel cases coming to light, foreign firms may find themselves more likely to be prosecuted and targeted in multiple jurisdictions.

In addition, misconceptions about foreign firms being unfairly targeted may stem from the lack of information and transparency surrounding the decisions of many competition authorities in Asia, where competition law is relatively new and the authorities are less experienced and sophisticated than their western counterparts. As such, it is not always possible to analyze the authorities' decisions and assess whether any discriminatory treatment was rendered in respect of foreign firms as compared to local firms. The decisions of the Chinese competition authorities, in particular, are often criticized for not being accompanied by sufficient information regarding their assessment, although this is seen to be improving.

However, as competition authorities in this region grow in maturity and experience, and as evidenced by the increasingly detailed and sophisticated decisions published by the competition authorities in Asia, misunderstandings regarding the wrongful targeting of foreign firms where the competition assessments were based on genuine objective justifications should lessen over time.

## IV. CONCLUSION

It is very likely that given that competition law in Asia is now fairly pervasive, and with ASEAN Economic Community 2015 looming, the likely increased implementation and enforcement of competition laws across Asia will continue to fuel the perception of protectionism.

Yet, contrary to allegations that competition law in Asia has been used as a veil for protectionism against foreign firms, there is no clear evidence that foreign firms have been unfairly and more heavily targeted by competition authorities in Asia. As postulated above, there could be objective justifications as to why foreign firms are more likely to find themselves the subject of antitrust investigations and infringement decisions. In addition, any misperceptions about foreign firms being unfairly targeted—if they truly stem from a lack of understanding about the basis of the authority's decision—should lessen over time as competition authorities in Asia grow in experience and transparency.