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Book Review



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Abstract

HOW IS CHINA DISTINCT? What are the implications of Chinese exceptionalism? Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation (“Chinese Antitrust Exceptionalism”) explores these questions in the context of antitrust law and policy making. The book, authored by Angela Huyue Zhang, positions the relatively young Chinese antitrust regime in contrast to its more mature global counterparts, namely, the European Union (EU) and the United States (US). In this analysis, Chinese Antitrust Exceptionalism considers how China crafts and enforces antitrust policy, as well as how its counterparts enforce their policies against China. While it focuses on this one particular domain, the book serves to highlight the tension between an increasingly powerful Chinese state and the Western liberal democratic order.

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Book Review

***Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation* by Angela Huyue Zhang¹**DANA LEVIN²

HOW IS CHINA DISTINCT? What are the implications of Chinese exceptionalism? *Chinese Antitrust Exceptionalism: How the Rise of China Challenges Global Regulation* (“*Chinese Antitrust Exceptionalism*”) explores these questions in the context of antitrust law and policy making. The book, authored by Angela Huyue Zhang, positions the relatively young Chinese antitrust regime in contrast to its more mature global counterparts, namely, the European Union (EU) and the United States (US). In this analysis, *Chinese Antitrust Exceptionalism* considers how China crafts and enforces antitrust policy, as well as how its counterparts enforce their policies against China. While it focuses on this one particular domain, the book serves to highlight the tension between an increasingly powerful Chinese state and the Western liberal democratic order.

Angela Huyue Zhang is an Associate Professor and Director of the Centre for Chinese Law at the University of Hong Kong.³ Zhang is trained as a lawyer, having received her LLB from Peking University in Beijing and her LL.M, JD, and Doctor of Jurisprudence from the University of Chicago. She has practiced law in several jurisdictions, including Hong Kong, New York, Brussels, and London.

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1. (Oxford University Press, 2021) [Zhang, *Chinese Antitrust Exceptionalism*].
 2. JD/MBA Candidate (2022), Osgoode Hall Law School & the Schulich School of Business.
 3. “About Angela: Biography” (n.d.), online: <www.angelazhang.net/about-angela> [perma.cc/E5L6-5TH3].

Her research interests sit at the intersection of law and economics, as evidenced by her past works.⁴

I. SUMMARY OF ARGUMENT AND CONTENTS

Chinese Antitrust Exceptionalism is about how China interacts with and challenges Western legal and economic orthodoxy. “Chinese exceptionalism” broadly refers to a nationalistic framework that emphasizes the unique elements of China, Chinese political realities, and “what it...means to be Chinese.”⁵ It is commonly evoked in an attempt to explain or legitimize Chinese policy making, particularly how that policy making relates to the rest of the world.⁶ In *Chinese Antitrust Exceptionalism*, Zhang examines how this framework functions in the context of Chinese antitrust regulation. The purpose of the book is to demonstrate

how Chinese exceptionalism, as shown in both the way China regulates and the way China is regulated, poses challenges to the existing global antitrust regulatory order, one that is dominated by the pre-existing standards and norms set by the advanced regimes such as the United States and the European Union.⁷

Chinese Antitrust Exceptionalism largely follows the pattern set forth in the above description. The first part of the book covers how China carries out its antitrust policy-making and enforcement. The first chapter in that part examines the structure and history of Chinese antitrust law, and the second chapter examines the highly politicized processes by which agencies and bureaucrats carry out antitrust-related enforcement. Zhang goes to great lengths in these chapters to demonstrate how China deviates from the Western antitrust order. Notably, she emphasizes an enforcement process that is more beholden to bureaucratic whims than to the rule of law. For example, antitrust regulators will commonly use media tactics to shame enforcement targets into compliance.⁸ Enforcement targets that readily admit their wrongdoing and offer a proactive solution to regulators are known to escape shaming and other enforcement measures. Those

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4. See e.g. Angela Huyue Zhang, “The U.S.-China Trade Negotiation: A Contract Theory Perspective” (2020) 51 *Geo J Intl L* 809; John Zhuang Liu & Angela Huyue Zhang, “Ownership and Political Control: Evidence from Charter Amendments” (2019) 60 *Intl Rev L & Econ* 1; Angela Huyue Zhang, “The Role of Media in Antitrust: Evidence from China” (2018) 41 *Fordham Intl LJ* 473.
 5. Benjamin Ho, “Understanding Chinese Exceptionalism: China’s Rise, Its Goodness, and Greatness” (2014) 39 *Alternatives* 164 at 164.
 6. *Ibid.*
 7. Zhang, *Chinese Antitrust Exceptionalism*, *supra* note 1 at 5.
 8. *Ibid* at 72.

that fight back, even when they might have legitimate grounds to do so, are subject to increased public pressure. Antitrust proceedings rarely make it into the judicial system, because capitulation is typically the less costly option.⁹

The second part of the book turns to how Chinese firms are regulated by antitrust regimes overseas, namely, in the European Union and the United States.¹⁰ The first chapter focuses on how EU antitrust regulators scrutinize acquisitions by Chinese state-owned enterprises (SOEs). The second chapter focuses on how US regulators scrutinize SOEs and their export practices, in the context of the United States's heavy reliance on trade with China. In both chapters, a common theme is the challenge that Western regulators face when trying to assess the level of Chinese state control over any particular firm. The level of state control rarely maps perfectly onto the degree of state ownership, which creates difficulties in determining how to evaluate and appropriately constrain the actions of these enterprises.

The third and final part of *Chinese Antitrust Exceptionalism* deals with the role that antitrust enforcement plays in what Zhang calls “the bitter Sino-US technology war.”¹¹ This single chapter examines the way in which the two countries flex their extraterritorial power to impose economic punishments on each other. Examples include the US’ large fines on Chinese companies like ZTE and Chinese interference in multinational transactions, such as the proposed acquisition of Dutch-American firm NXP by Qualcomm, another American company.

Together, these chapters paint a picture of geopolitical and economic tension stemming from China’s rise to global power and its exceptional policy-making practices. For as much as the book is about antitrust specifically, it is equally about how China is navigating and asserting its position in a globalized world.

II. THE CHALLENGE OF WRITING ON CHINA

Chinese Antitrust Exceptionalism offers an impressive record of the intricate workings of Chinese bureaucracy, particularly in light of China’s famously opaque inner workings and culture of bureaucratic self-censorship. State secrecy is a cornerstone of Chinese government operations, owing to the influence of

9. *Ibid* at 71.

10. See Angela Huyue Zhang, “Part II: How China is Regulated” in Zhang, *Chinese Antitrust Exceptionalism*, *supra* note 1, 117.

11. *Ibid* at 15.

the Communist Party of China (CCP).¹² Zi Yang traces this to the rise of the CCP in the 1930s and 1940s, claiming that “maintaining secrecy was the key to the CCP’s success in taking over China.”¹³ In contemporary times, state secrecy is codified in the *Law on the Protection of State Secrets* (the “State Secrets Law”).¹⁴ Sigrid Ursula Jernudd describes the State Secrets Law as “extremely vague and opaque,” and claims its effect is to “[make] it a crime to be involved in the distribution of anything considered a ‘state secret.’”¹⁵ According to the Congressional-Executive Commission on China, Article 2 of the State Secrets Law defines a state secrets as “matters that relate to state security and national interests, are specified in accordance with legally defined procedures, and the knowledge of which is restricted to a defined scope of personnel within a defined period of time.”¹⁶ Per the same, Article 9 clarifies that this includes, “secret matters in major policy decisions on state affairs,” as well as “secret matters in national economic and social development,” and “other secret matters that are determined by the department administering and managing the protection of state secrets.”¹⁷ Jones Day has categorized the State Secrets Law as part of a “common theme of ambiguity and uncertainty in Chinese law.”¹⁸ Accordingly, Andrew Browne of the Wall Street Journal attributes a culture of fear and self-censorship amongst Chinese bureaucrats to the CCP’s focus on protecting state secrets. Browne explains, “There are no penalties for silence, but there’s plenty to lose by talking.”¹⁹ This is to say, the CCP does not encourage merely strict adherence to the letter of the law, but rather broad self-censorship out of an abundance of caution.

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12. Zi Yang, “Opening Up While Closing Up: Balancing China’s State Secrecy Needs and Military-Civil Fusion” (2021) 16 *Asia Policy* 45 at 46.
 13. *Ibid* at 52-54.
 14. *Zhonghua Renmin Gongheguo Baoshou Guojia Mimi Fa* (中华人民共和国保守国家秘密法) [*Law of the People’s Republic of China on Guarding State Secrets*] (promulgated 1 October 2010, effective 1 October 2010) 2010 Standing Comm Nat’l People’s Cong Gaz (China).
 15. “China, State Secrets, and the Case of Xue Feng: the Implication for International Trade” (2011) 12 *Chicago J Intl L* 309 at 311.
 16. National People’s Congress Standing Committee, “State Secrets Protection Law of the People’s Republic of China” (2021), online: *Congressional-Executive Commission on China* <www.cecc.gov/resources/legal-provisions/law-on-the-protection-of-state-secrets-cecc-partial-translation-and> [perma.cc/B6GH-8FZG].
 17. *Ibid*.
 18. “Insights: Traps for the Unwary in Disputes Involving China” (August 2012), online: <www.jonesday.com/en/insights/2012/08/traps-for-the-unwary-in-disputes-involving-china> [perma.cc/Z2SB-D4S5].
 19. “China’s Central Bank Can’t Shed a Culture of Secrecy,” *Wall Street Journal* (1 March 2016), online: <www.wsj.com/articles/chinas-central-bank-cant-shed-a-culture-of-secrecy-1456818894> [perma.cc/LEW8-K6WE].

Given this culture of bureaucratic secrecy and self-censorship, Zhang demonstrates an impressive ability to extract and record intricate and seemingly non-public details on the inner workings of the Chinese antitrust system. In her opening chapter, she lays out the stakes of this regime, stating that “the line between national security and antitrust policy, once belonging to separate spheres, has become increasingly blurred,” and she later clarifies that some policy-makers view antitrust policy as a “tool to protect national interests.”²⁰ While this might suggest that Zhang would struggle to get sensitive information, her work suggests otherwise. For example, Zhang discusses an infant formula price-fixing case in which the National Development and Reform Commission (NDRC), one of the main Chinese antitrust regulators, used an aggressive media strategy to target, and publicly shame, only some of the firms involved in the case. To the question of why only some of the firms were targeted, Zhang references a conversation she had with an NDRC official who revealed to her that “these differential disclosures had to do with the firms’ levels of cooperation rather than the severity of their conduct.”²¹ Zhang continues:

[I]f a firm vigorously defended itself and did not confess to its behaviour quickly, the NDRC would subject the firm to more negative media hype and inflict a higher penalty. [The official] said that among the infant formula producers, Biostime was the most difficult to deal with during its investigation as the firm had aggressively defended its [resale price maintenance] practices....Biostime’s lack of cooperation meant that it became a scapegoat.²²

This sort of admission lays bare the highly politicized, rule-of-law agnostic nature of antitrust enforcement in China. The fact that Zhang was able to get a bureaucrat to confirm it is a testament to her access and to the exceptional level of insight found in *Chinese Antitrust Exceptionalism*. At its best, the book is a remarkable exposé of the inner workings of one of the world’s most powerful and most obfuscated bureaucracies.

III. OPPORTUNITY FOR DOMESTIC COMPARATIVE ANALYSIS

One thing that could strengthen Zhang’s argument would be further analysis of how the Chinese antitrust regime compares to other sites of Chinese policy-making. While the book focuses on antitrust specifically, Zhang has asserted that the book is about more than just this one area. “[T]he conflicts that

20. Zhang, *Chinese Antitrust Exceptionalism*, *supra* note 1 at 15, 21.

21. *Ibid* at 103.

22. *Ibid*.

we observe between China and the global antitrust order offers a lens through which we can closely observe the systematic issues that are dividing China and the Western liberal democracies,” Zhang says in a presentation discussing the book.²³ Accordingly, an analysis of how the antitrust regime reflects other areas of globally-relevant Chinese regulation could help establish how widespread and systematic these issues are.

For example, there is a body of literature that argues that China’s central bank, the People’s Bank of China (PBC), has a relatively low level of independence.²⁴ Meanwhile, the literature suggests that central banks elsewhere have increasingly sought greater distance from political control.²⁵ This begins to paint a picture of how the PBC, much like China’s antitrust regime, exhibits a degree of exceptionalism in the face of Western liberal order. This picture is supported by reports of global economic concern stemming from unclear PBC decision-making, as well as skepticism about the truthfulness of economic data that the PBC has a role in collecting and publishing.²⁶ Whereas central bank independence, transparent decision making, and reliable data are seen as important elements of a well-functioning global economy, critics accuse the PBC of eschewing these objectives in order to serve political goals. A discussion of the parallels between the Chinese antitrust regime and PBC policy making (or similar) could further support Zhang’s overarching observation about the tension between China and the West. More specifically, it could help illuminate how the antitrust regime follows common patterns in the broader Chinese bureaucracy,

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23. Angela, “Q&A with Author Angela Huyue Zhang on Her New Book ‘Chinese Antitrust Exceptionalism’” (1 March 2021) at 00h:01m:06s, online (video): <www.youtube.com/watch?v=vH3tFxWIP0Q> [perma.cc/CRV2-P4JV].
24. Liansheng Zheng & Hongying Wang, “Authority and Autonomy without Independence: The Gradual Institutional Change of the Chinese Central Bank” (2021) 30 *J Contemporary China* 349 at 350, citing Nicholas R Lardy, *China’s Unfinished Economic Revolution* (Brookings Institution Press, 1998); Connie Wee-Wee Chung & Jose L Tongzon, “A Paradigm Shift for China’s Central Banking System” (2004) 27 *J Post Keynesian Economics* 87; Leong H Liew & Harry X Wu, *The Making of China’s Exchange Rate Policy* (Edward Elgar, 2007); Victor C Shih, *Factions and Finance in China: Elite Conflict and Inflation* (Cambridge University Press, 2008); Henry Sanderson & Michael Forsythe, *China’s Superbank: Debt, Oil and Influence—How China Development Bank is Rewriting the Rules of Finance* (John Wiley & Sons, 2013).
25. Zheng & Wang, *supra* note 24.
26. Browne, *supra* note 19; Mark Magnier, “China’s Better-Than-Expected GDP Prompts Skepticism From Economists,” *Wall Street Journal* (19 October 2015), online: <www.wsj.com/articles/chinas-better-than-expected-gdp-prompts-skepticism-from-economists-1445269199> [perma.cc/RMX9-498E].

which in turn could help to demonstrate the tension between that Chinese statecraft and its global counterparts.

That being said, this is not a glaring omission. *Chinese Antitrust Exceptionalism* is otherwise thoroughly researched and argued, and it is highly convincing. It covers its subject matter in tremendous depth, which is a credit to Zhang's expertise and the decade-plus of work that went into this book. While I suggest that Zhang could have included the sort of comparative analysis I mention above, I must also acknowledge that without it her work still delivers on its promise.

IV. CONCLUSION

On balance, *Chinese Antitrust Exceptionalism* is an impressive and compelling examination of how one of the world's biggest actors is shaping the global order. Zhang's research is deep, and her resulting analysis makes a substantial contribution to the literature on how one of the world's biggest and most secretive bureaucracies is functioning. The book thoroughly demonstrates Chinese exceptionalism in the context of the global antitrust system and serves this up as a representative case of broader political-economy tensions accompanying China's rise to power. I would recommend this book to anyone interested in the intersection of law and economics, international relations, and globalization studies.

