NOTE

The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review

> *Whether a cat is black or white makes no difference. As long as it catches mice, it is a good cat.*
>
> \- Deng Xiaoping

> *He who treads softly goes far.*
>
> \- Chinese proverb

I. INTRODUCTION

In a world where mergers affect every corner of the planet, any government seeking competitive markets has an interest in ensuring that these mergers are not harmful to competition. As China, the world's most populous country, has committed to a market economy,[1] it has now taken the momentous step of enacting its own Anti-Monopoly Law ("AML").[2] This effects a dramatic change in the antitrust regulation of multinational mergers. In international antitrust, even subtle legal differences between jurisdictions create significant potential for conflict.[3] For this reason, the advent of antitrust merger review by a country with such massive international economic weight and historic suspicion of capitalism and market forces generates grave concern in antitrust circles.

From an antitrust perspective, mergers are a legitimate concern for the government of every jurisdiction in which the merging firms previously competed.[4] As globalization accelerates, the

1. H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 CHI. J. INT'L L. 169, 172–82 (2006).

2. FAN LONG DUAN FA [Anti-Monopoly Law], 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 517–23 (P.R.C.), *available at* 2008 China Law LEXIS 1761 [hereinafter Anti-Monopoly Law] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008).

3. *See infra* Part II.A.2.

4. ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 431–33 (2d ed. 2008). Note that "antitrust" and "competition law" or "competition policy" are essentially synonymous insofar as the type of law that Americans call "antitrust" is the same as the type of law most of

geographic reach of firms expands and mergers become subject to regulation by an increasing number of jurisdictions.[5] As in any area of law, it is unsurprising that these jurisdictions will on occasion reach different conclusions in analyzing the same set of facts.[6] In the case of cross-border mergers, however, one jurisdiction's disapproval can derail a worldwide merger, even if other reviewing jurisdictions view the merger as unobjectionable, or even beneficial, to competition.[7] Where one jurisdiction perceives the other as blocking such mergers to further its own, non-competition-related social goals or to promote favored domestic firms at the expense of consumers in the first jurisdiction, this may create serious tensions between the two jurisdictions. As globalization continues and the interests of more jurisdictions are bound up in these mergers, the mergers face more complex multilateral antitrust review, and the inherent risks of international tension grow correspondingly.[8]

So far, these conflicts have been relatively rare. The United States and the European Union, the two primary centers of international merger review, maintain quite similar legal standards[9] and have agreed to collaborate in an effort to reach consistent conclusions as frequently as possible.[10] Nonetheless, there have been

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the rest of the world refers to as "competition law." As such, this Note will use the terms more or less interchangeably.

5. *See* J. WILLIAM ROWLEY & DONALD BAKER, INTERNATIONAL MERGERS: THE ANTITRUST PROCESS (2d ed. 1996) (describing the statutory and regulatory schemes of twenty-nine prominent jurisdictions); *see also* MAHER DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 14 (2003) ("Globalisation has made it almost inevitable to change antitrust law and policy.").

6. For instance, one jurisdiction may bar a merger on the grounds that it would mean fewer remaining firms in the relevant market, while another may allow it because it believes that the reduced number of firms would be more than offset, from the perspective of the consumer, by the newly created firm's ability to produce goods and services more efficiently and thus sell more (or better) products at a lower price. For a discussion of instances where such conflicts have arisen, see *infra* Part II.A.2.

7. This is so because many jurisdictions provide that transactions may not proceed until they have obtained approval, and even where a transaction will be permitted to proceed, a jurisdiction may impose fines that make the transaction prohibitively expensive. *See* Kyle Robertson, Note, *One Law to Control Them All: International Merger Analysis in the Wake of GE/Honeywell*, 31 B.C. INT'L & COMP. L. REV. 153, 162–63 (2008).

8. *See* DABBAH, *supra* note 5, at 14 ("[I]t is beyond doubt that such situations give rise to fundamental legal, economic and political problems with which the internationalisation of antitrust is concerned.").

9. *See* 15 U.S.C. § 18 (2006) (U.S. standard); Council Regulation 139/2004 of 20 January 2004, The Control of Concentrations Between Undertakings (The EC Merger Regulation), 2004 O.J. (L 24) 1 [hereinafter EC Merger Regulation] (E.U. standard). For a comparison of the approaches taken in each jurisdiction, see *infra* Part II.A.1.

10. Agreement on the Application of Their Competition Laws, U.S.-E.C., Sept. 23, 1991, 30 I.L.M. 1487, 1489 [hereinafter U.S.-E.C. Competition Application Agreement]. For a discussion of this collaborative effort, see *infra* notes 46–51 and accompanying text.

some notable disagreements between the two enforcement authorities, which have created highly publicized transatlantic tensions. In the wake of these clashes, commentators and regulators alike have paid increased attention to cooperation efforts between the United States, the European Union, and competition authorities around the world, seeking to avoid such conflicts in the future.[11]

Now, as international antitrust convergence stands largely at an impasse, a new complication has risen in the East. In 2008, the People's Republic of China effectuated its own competition law.[12] Under the Anti-Monopoly Law, the world's most significant developing country now has the legal authority to block a merger between foreign multinational corporations even if it is deemed permissible by the authorities of the European Union, the United States, and all other jurisdictions involved, so long as the firms have some connection to China.[13] Such overlapping authority has already created a history of significant conflict between the antitrust authorities of the two primary Western jurisdictions,[14] which have substantial experience with market competition, similar economic philosophies, and similar laws. This in itself is reason to be concerned as to *any* new merger review regime creating international conflict. What will happen with China on the scene, given its very different history and philosophy?

Considering China's Communist past, its present "socialist market economy," and its strong interest in social stability, one might reasonably expect that its goals in competition policy will vary from those of the United States and the European Union.[15] The difficult experience of these two Western regimes in multi-jurisdictional merger review suggests that China's significantly different goals could seriously threaten the ability of multinational corporations to merge successfully.

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11. *See, e.g.*, Charles W. Smitherman III, *The Future of Global Competition Governance: Lessons from the Transatlantic*, 19 AM. U. INT'L L. REV. 769, 772 (2004) (analyzing bilateral cooperation efforts between the United States and European Community on competition law).

12. Anti-Monopoly Law, *supra* note 2.

13. *See infra* notes 158–59 and accompanying text; *see also* Robertson, *supra* note 7, at 166 (warning that, in such situations, "[s]tates, such as China, may develop competition policies that allow for strategic blocking of foreign mergers").

14. *See infra* Part II.A.2.

15. *See infra* notes 106–10 and accompanying text. For example, allowing mergers that force inefficient rivals to close (with the result that workers lose their jobs) could be seen as inconsistent with China's "socialist" goals and, from a political standpoint, the resulting instability and unrest could be a threat to the Chinese government. From a development standpoint, the Chinese government may want to protect local firms that are in their infancy in hopes that they would grow into successful competitors.

Broadly accepted economic theory posits that when mergers create efficiencies outweighing the harm to competition, they will create a net benefit for consumers.[16] If the purpose of antitrust law is to protect the interests of consumers, as is generally the case in American and European law, such mergers should be permitted.[17] On the other hand, a legal regime based on domestic goals such as social stability and the protection of local industry may seek to block that same merger if, for example, it would place control of industry in hands that the authorities find politically objectionable.[18] The question becomes: What can be done to protect the international business community from strategic unilateral impediments to cross-border mergers and acquisitions?

Part II of this Note will describe the current global competition context and existing proposals for achieving international convergence and will then examine China's Anti-Monopoly Law and the risks this law poses to the international antitrust review of mergers. Part III will analyze proposals to minimize the risks created by Chinese merger review. Part IV will argue that phased implementation of merger review will create the best chance of a Chinese merger review regime that protects and benefits Chinese consumers without creating friction in the global economy.

To enable enforcers to gain experience in analyzing competition issues and to help convince the public and the government that competitive markets will benefit all stakeholders, AML implementation should begin with anti-cartel enforcement, elimination of local government restraints on trade, and review of domestic mergers. This Note also predicts that the rest of the international antitrust community will be increasingly wary of the risk of a single competition authority's blocking of significant mergers in a "hold-up" situation, and thus will be encouraged to move ahead with work on international convergence through collaborative fora such as the International Competition Network. Slightly delaying Chinese involvement in reviewing international mergers will thus ensure that Chinese reviewers have the experience and support they will need to integrate smoothly into the international antitrust arena. Similarly, their peers in that arena will be ready to welcome, guide, and perhaps even learn from the Chinese.

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16. GAVIL ET AL., *supra* note 4, at 568–70.

17. *Id.*

18. J. WILLIAM ROWLEY & DONALD BAKER, 1 INTERNATIONAL MERGERS: THE ANTITRUST PROCESS 3 (2d ed. 1996).

II. BACKGROUND

To understand the implications of Chinese merger review for global antitrust, it is instructive to examine the principles applied to mergers by the key Western jurisdictions, the potential problems posed by the interaction between those jurisdictions, and the proposed solutions to those concerns. In Part II.A, a description of the pre-AML international antitrust context sets the scene, while Parts II.B and II.C introduce China's Anti-Monopoly Law and outline the core concerns arising from Chinese regulators reviewing international mergers.

A. The International Antitrust Merger Review World before China

The increasing globalization and development of the past two decades have triggered corresponding growth in the scope and importance of global competition policy. First, the number and size of businesses conducting activities across borders has increased exponentially.[19] As these corporations grow beyond the borders of their nations, more jurisdictions have an interest in regulating the competition that results.[20] Second, as market economies develop around the world, governments see the need for laws that ensure that competition functions properly, delivering the promised benefits of the free market to consumers. This has led to the number of jurisdictions with competition laws ballooning from thirty-five to over one hundred between 1995 and 2003.[21]

Although a merger between large multinational corporations would be subject to regulation in many different jurisdictions, until recently the most significant reviewing bodies have generally been those of the United States and the European Union. Two reasons explain their primacy: (1) these are two of the largest markets in the world, where many corporations are based or conduct business; and (2) they have very well-developed competition law and theory, to which most other jurisdictions look for guidance.[22] Thus, this Part will compare the merger analyses conducted by European and American antitrust authorities before examining the interaction between the two jurisdictions and then introducing the international-level

19. CHARLES SMITHERMAN, TRANSATLANTIC MERGER CASES: UNITED STATES–EUROPEAN COMMUNITY MERGER REVIEW CO-OPERATION 7 (2007).

20. *Id.* at 14–15.

21. Michael W. Nicholson, *An Antitrust Law Index For Empirical Analysis of International Competition Policy*, 4 J. COMP. L. & ECON. 1009, 1009 (2008).

22. ROWLEY & BAKER, *supra* note 18, at 4.

proposals to minimize conflict and costs associated with the manifold review of cross-border mergers. This context will help to understand and address concerns about China's law, introduced in Parts II.B and II.C.

1. Comparing American and European Merger Analyses

In terms of both the substantive standards by which mergers are judged and the procedural mechanisms for regulating mergers, the United States and Europe have, on the whole, quite similar systems of antitrust merger review. In the United States, most mergers are reviewed under the standard provided in Section 7 of the Clayton Act.[23] The Clayton Act prohibits mergers that "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly."[24] Because the substantive standard of "substantially . . . lessen competition" is far from self-explanatory, the two authorities that split responsibility for competition regulation in the United States[25] have issued Horizontal Merger Guidelines to direct the analysis of mergers between firms that compete in the same market, the context in which there is greatest risk of harm to competition.[26] These Guidelines are discussed in detail and compared with the European equivalent below.

In Europe, the EC Merger Regulation, adopted by the European Commission in 1989 and amended significantly in 2004, provides the standard for competition law review of mergers.[27] Mergers that meet certain Community-wide turnover thresholds[28] are

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23. 15 U.S.C. § 18 (2006). They may also be challenged under the Sherman Act, as Section 1 agreements in restraint of trade, 15 U.S.C. § 1 (2006), as Section 2 monopolization or attempts to monopolize, 15 U.S.C. § 2 (2006), or under Section 5 of the Federal Trade Commission ("FTC") Act as an "unfair method of competition," 15 U.S.C § 45 (2006).

24. 15 U.S.C. § 18. One significant aspect of this language is the use of the word "may," which provides a basis for challenging mergers before consummation on the *probability* that they will have anticompetitive effects. GAVIL ET AL., *supra* note 4, at 432.

25. These two agencies are the FTC and the Antitrust Division of the Department of Justice ("DOJ").

26. U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES (1992), *available at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html [hereinafter DOJ/FTC Guidelines].

27. EC Merger Regulation, *supra* note 9. The key source of all competition law is the Treaty of Rome. Treaty Establishing the European Community, Nov. 10, 1997, 1997 O.J. (C 340) 3. Articles 81 and 82 prohibit agreements that restrict competition, *Id.* art. 81, and the abuse of a dominant position, *Id.* art. 82, respectively. The Merger Regulation was enacted because these Articles did not, themselves, give authority to block anti-competitive mergers. EC Merger Regulation, *supra* note 9, pmbl. ¶ 7.

28. EC Merger Regulation, *supra* note 9, art. 1. Note that the EC Merger Regulation uses the term "concentration" to mean a change of control resulting from merger or acquisition. *Id.*

prohibited if they "would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position."[29] Like the American agencies, the European Commission has issued Merger Guidelines to direct this analysis.[30] As discussed below, the similarity goes beyond the basic phrasing of the standards. There is also strong agreement between the American and European competition regimes on the elements of merger analysis, though not yet enough to eliminate all potential for tension.

First, the Guidelines promulgated in both jurisdictions set forth similar substantive analytical steps and considerations to determine when a proposed merger would be anticompetitive. Of the five-step analysis provided for in the DOJ/FTC Guidelines, all five steps are also incorporated in a very similar form in the European Guidelines. These steps are (1) defining the relevant market and measuring concentration in that market before and after the merger; (2) assessing the potential adverse competitive effects of the merger on the relevant market; (3) analyzing the possibility of other suppliers entering the market to compete with the merged firm; (4) evaluating the efficiencies created by the merger; and (5) determining whether one of the firms would be likely to fail, and its assets to exit the market, unless the firms merge.[31] At first glance, the notable difference between the two sets of Guidelines is that the European analysis also considers "countervailing buyer power."[32] However, this difference has little significance, as buyer power is also incorporated in the American analysis as part of the assessment of potential anticompetitive effects.[33] Another significant common thread between the American and European analyses lies in what the authorities do *not* consider, either in their respective Guidelines or in the actual

art. 3. For consistency and clarity, this Note will generally use the term "merger" to denote all such transactions.

29. *Id.* art. 2, ¶ 3.

30. Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31) 3 [hereinafter EC Guidelines].

31. DOJ/FTC Guidelines, *supra* note 26, §§ 1–5; EC Guidelines, *supra* note 30, ¶¶ 14–63, 68–91.

32. EC Guidelines, *supra* note 30, ¶¶ 64–67.

33. *See, e.g.,* United States v. Baker Hughes, Inc., 908 F.2d 981, 986 (D.C. Cir. 1990) (holding that customer sophistication "was likely to promote competition even in a highly concentrated market"); FTC v. Elders Grain, Inc., 868 F.2d 901, 905 (7th Cir. 1989) (Posner, J.) ("A concentrated and knowledgeable buying side makes collusion by sellers more difficult."); *see also* DOJ/FTC Guidelines, *supra* note 26, § 2.1 (listing "the characteristics of buyers" among factors relevant to assessment of the risk of coordinated anticompetitive behavior in the post-merger market).

analysis of mergers: broader issues such as the effect of mergers on overall economic development or on competing suppliers are not part of either jurisdiction's antitrust merger analysis.[34]

Second, both regimes incorporate a notification system for transactions above a certain threshold. In order to ensure that American enforcement authorities have the procedural ability to review proposed mergers and, if necessary, to stop them before they are consummated, Congress passed the Hart-Scott-Rodino Antitrust Improvements Act in 1976.[35] The Act requires that firms report all acquisitions above certain thresholds based on the size of the transaction and the sizes of the parties.[36] Transactions without a strong connection to the United States are exempt from filing.[37] Similarly, the EC Merger Regulation requires parties to notify the Commission prior to consummation of a proposed merger[38] if the merger exceeds thresholds based on turnover worldwide and within the European Community.[39]

Finally, both regimes allow the respective enforcing agency to block undesirable mergers, though they have slightly differing mechanisms for doing so. In both systems, parties to a merger that exceeds the relevant thresholds are prohibited from implementing their transaction until the authorities have approved it or the waiting period has expired.[40] In the United States, however, the investigating agency[41] cannot directly block the acquisition; rather, the agency must sue in court for a preliminary injunction.[42] Thus, even if the agency believes that, under the DOJ/FTC Guidelines, a proposed merger

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34. For more on this point, see *infra* Parts II.B and II.C.

35. 15 U.S.C. § 18a (2006).

36. *Id.* § 18a(a)(2). These thresholds are commonly referred to as "notification thresholds," and the filings in the United States are commonly referred to as "HSR filings." These thresholds are indexed for inflation: as of 2009, for instance, all transactions valued above $260.7 million must be reported regardless of the size of the parties. Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 74 Fed. Reg. 1687 (Jan. 13, 2009) (also covering smaller acquisitions where the firms have significant assets and sales).

37. 16 C.F.R. § 802.50(a) (as adjusted by Revised Jurisdictional Thresholds for Section 7A of the Clayton Act, 74 Fed. Reg. 1687) (exempting, for example, acquisitions of stock in a foreign company that generates less than $65.2 million in annual sales within the United States).

38. EC Merger Regulation, *supra* note 9, art. 4.

39. *Id.* (referring to Article 1 definition of "Community dimension"). The relevant term, "aggregate turnover", is defined as revenue net of value added tax. *Id.* art. 5, ¶ 1.

40. *Id.* art. 7, ¶ 1; 15 U.S.C. § 18a(a). This means the transaction may not proceed until (a) thirty days pass, (b) the deal is approved, or (c) a second request is issued and either (i) another thirty days pass or (ii) the deal is approved. *Id.* § 18a(b)(1), (e).

41. The investigating agency may be either the FTC or the DOJ; the agencies agree on which will investigate, or whether to grant early termination of the investigation, shortly after being notified of the proposed transaction. 15 U.S.C. § 18a(b)(2).

42. *Id.* § 18a(f).

would lessen competition, the merger may proceed unless the agency successfully convinces a court that it would actually do so. The European Commission, on the other hand, has the unilateral power to block a merger that it concludes would "significantly impede effective competition."[43] Decisions of the Commission may then be appealed to the European Court of Justice.[44] Also unlike the American procedure, third-party complainants may appeal a decision by the Commission *not* to challenge a merger.[45] The fact that the Commission does not need judicial approval to block a merger, but is subject to judicial review for failing to block a merger, means that the Commission is at least marginally more likely to challenge mergers than the American agencies.

While the European legal standards and procedures for merger review are fairly analogous to those of the United States, the two jurisdictions have not reached identical conclusions in all mergers. The occasional divergences and tensions discussed below hint at the risks confronting the antitrust community and international business as China, with its somewhat dissimilar standards, joins the more established jurisdictions in reviewing cross-border mergers.

2. Transatlantic Antitrust Interaction and Global Concerns

The relatively similar horizontal merger guidelines published by the United States and European Union reflect a common intellectual vision that is the result of an extensive convergence process.[46] This convergence effort began in 1991 with an agreement to exchange information on enforcement activities and to cooperate and coordinate their activities in order to minimize conflict in antitrust enforcement.[47] The 1991 Agreement indicated transatlantic acknowledgement of the potential for conflict in the increasingly prevalent transactions that implicate both jurisdictions.[48] The Best

43. EC Merger Regulation, *supra* note 9, art. 8, ¶ 3.

44. *Id.* art. 16.

45. *See* Case T-464/04, Indep. Music Publishers & Labels Ass'n v. Comm'n, 2006 E.C.R. II-02289 (Court of First Instance criticizing a Commission decision declining to challenge a merger and ordering the Commission to undertake further review of the transaction). On the other hand, the only option for third parties in the United States who are injured by agency inaction in such a case would be to bring their own suit challenging the merger. *See* 15 U.S.C. § 26 (2006) (providing for injunctive relief for private parties, under the Clayton Act); 15 U.S.C. § 15 (2006) (same, under the Sherman Act).

46. *See supra* notes 31–34 and accompanying text.

47. U.S.-E.C. Competition Application Agreement, *supra* note 10.

48. *Id.* pmbl. (stating that "the world's economies are becoming increasingly interrelated," that "the sound and effective enforcement of the Parties' competition laws would be enhanced by cooperation," and that "from time to time differences may arise . . . concerning the application of

Practices on Cooperation in Merger Investigations recently adopted by the American antitrust agencies and the European Commission also play a significant role in bilateral convergence.[49] Though non-binding, the Best Practices recognize the risks of divergent approaches to mergers[50] and set forth practices that the agencies seek to apply when reviewing the same merger.[51]

Despite these efforts, there remain some significant differences between the merger analyses of the United States and the European Union that have occasionally led to notable conflict. For example, as mentioned above, the nature of review in the two jurisdictions means that U.S. agencies likely are more disposed to decline to challenge mergers because they can accept defendants' efficiency arguments that may be difficult to quantify, whereas the Commission would only accept such arguments if it thought they would withstand appellate review.[52] Relatively subtle procedural differences like this may contribute to the occasional divergence in conclusions that the two bodies reach.

The Boeing / McDonnell Douglas and the General Electric / Honeywell mergers, a pair of transactions that were each addressed by both the American and European authorities, highlight both the differences between the two regimes and the risks of such divergences. In 1997, Boeing sought to acquire McDonnell Douglas. Neither firm was engaged in production within the European Community, though both sold aircraft to European customers.[53] The FTC had already decided to permit the merger.[54] Nonetheless, the European

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their competition laws."). The United States and the European Union subsequently entered into another agreement that provided guidelines for requests for positive comity. Agreement on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., June 4, 1998, 37 I.L.M. 1070.

49. *See* Press Release, U.S.-E.U. Merger Working Group, Best Practices on Cooperation in Merger Investigations (Oct. 30, 2002), *available at* http://www.usdoj.gov/atr/public/international/docs/200405.pdf.

50. *Id.* ¶ 1 (acknowledging that divergent approaches "undermine public confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives").

51. *Id.* ¶ 4 (providing for practices such as scheduled communication between agencies at key points in their investigations).

52. *See supra* notes 41–45 and accompanying text.

53. *See* Vago Muradian, *Europe Rejects Boeing-MDC Merger, White House Mulls Response*, DEFENSE DAILY, July 17, 1997 (quoting an analyst as observing that "[e]ssentially, a foreign government is attempting to dictate to two American companies whether [they] can form a more efficient business combination").

54. *See* Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger, Roscoe B. Starek III and Christine A. Varney in the Matter of The Boeing Company/McDonnell Corporation (June 25, 2007), *available at* http://www.ftc.gov/opa/1997/07/boeingsta.shtm

Commission opposed the deal as originally proposed, creating a very public dispute between ministers and heads of government.[55] The Commission ultimately obtained a settlement that required Boeing to modify its exclusive contracts with three major airlines, and the tension dissipated as the firms merged under the terms of the settlement.[56]

The next significant transatlantic conflict arose in 2001 when General Electric sought to acquire Honeywell. This time, the DOJ cleared the merger while the European Commission prohibited it altogether.[57] The conflicting decisions of the DOJ and Commission were followed by further heated statements, this time from the DOJ's Assistant Attorney General for Antitrust, who accused the Commission of blocking the merger because the resulting American firm would be *too* efficient.[58] The divergent conclusions apparently resulted from the European Union's concern that the merged firm would be able to obtain a dominant position in the market for some aircraft components by bundling Honeywell and General Electric products.[59] Although the different results arose from apparently legitimate differences over economic antitrust theory,[60] the

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(reasoning that McDonnell Douglas was no longer a meaningful competitive force and that a merger would not lessen competition).

55. *See* Resolution Expressing the Sense of the House of Representatives Regarding the Interference of the European Commission in the Merger of the Boeing Company and McDonnell Douglas, H.R. Res. 191, 105th Cong. (1997) (stating that the Commission was "determined to disapprove the merger to gain an unfair competitive advantage for Airbus Industries" and that blocking the merger "would constitute an unwarranted and unprecedented interference in a United States business transaction . . . ."); Michael Harrison, *Clinton Warns of Boeing Trade War*, INDEPENDENT (London), July 18, 1997, at 22 (quoting President Clinton who stated: "There's an orderly process for our handling this and I think we'd better let the orderly process play itself out before we talk ourselves into a trade war."); Steven Pearlstein & Anne Swardson, *U.S. Gets Tough to Ensure Boeing, McDonnell Merger; Retaliation Plan in Works as Europe Threatens*, WASH. POST, July 17, 1997, at C1 (discussing negotiations between Clinton administration representatives and the European Union's commissioner for competition); *see also* Kathleen Luz, Note, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the Need for a Globalized Antitrust System*, 32 GEO. WASH. J. INT'L L. & ECON. 155, 158, 170–71 (1999) (analyzing the heated debate between the Clinton administration and European officials concerning the merger).

56. Case IV/M.877, Boeing-McDonnell Douglas, 1997 O.J. (L 336) 16.

57. The Commission's decision was affirmed by the European Union's Court of First Instance. Case T-210/01, Gen. Elec. Co. v. Comm'n, 2005 E.C.R. II-05575.

58. Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney Gen. Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (July 3, 2001), *available at* http://www.usdoj.gov/opa/pr/2001/July/303at.htm.

59. *See* Thomas L. Ruffner, *The Failed GE/Honeywell Merger: The Return of Portfolio-Effects Theory?*, 52 DEPAUL L. REV. 1285, 1285–87 (2003) (describing differences in United States and European enforcement policies in relation to GE/Honeywell merger).

60. Specifically, the dispute centered on whether "portfolio effects" of the conglomerate merger would adversely affect the market. *See* Pinar Karacan, *Differences in Merger Analysis*

accusations of parochialism indicate the high potential for tension in cases where jurisdictions may have conflicting national economic interests.[61] Situations such as these, where it appears that one country has blocked a merger with pro-competitive benefits for consumers around the world solely because the merger would make it more difficult for a favored domestic firm to compete, illustrate the parochialism that commentators often cite as a core concern in international merger review.

As increasingly more jurisdictions are involved in the review of transnational mergers, the risk of interference with competitively beneficial mergers becomes ever greater. If the potential for parochialism is a risk when there are two jurisdictions involved, it will certainly be a weightier concern when fifteen sets of regulators take part. The threat of such parochialism interfering with mergers that create real economic benefits for consumers around the world is a significant impetus for reform to the international antitrust system. The first goal of this reform would be to prevent national agencies from acting on parochial concerns and blocking mergers that create net benefits for the entire globe.[62]

In addition to this risk of non-consummation, the costs of effecting mergers are becoming increasingly burdensome even in cases where no jurisdiction is troubled. For instance, a 2003 study commissioned by the International Bar Association found that the typical international merger generates an average of €3.3 million ($4.24 million) in merger review costs.[63] These procedural costs to

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Between the United States and the European Union, Highlighted in the Context of the Boeing/McDonnell Douglas and GE/Honeywell Mergers, 17 TRANSNAT'L LAW. 209, 235–39 (2004); Ruffner, *supra* note 59, at 1325.

61. *See* Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON. L. 457, 467 (2002) (observing that "the conflict of interest erodes the grounds for trust"). For example, in the Boeing case, the United States arguably had an interest in an American company becoming more competitive, both because the government would receive more tax revenue and the domestic economy would benefit, in addition to having been lobbied by Boeing in favor of allowing the merger. On the other hand, the European Union had an interest in protecting Airbus's competitive position as a rival to Boeing, especially given the significant support the company receives from European governments.

62. *See* Andrew T. Guzman, *The Case for International Antitrust, in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 99, 101 (Richard A. Epstein & Michael S. Greve eds., 2004) (arguing that domestic antitrust regimes exhibit parochial bias, which includes favoritism towards domestic corporations); *see also* Eleanor M. Fox, *Toward World Antitrust and Market Access,* 91 AM. J. INT'L L. 1, 2 n.4 (1997) [hereinafter Fox, *Toward World Antitrust*] ("*Parochialism* connotes discrimination against and barriers to foreign goods or services.").

63. Press Release, Int'l Bar Ass'n, IBA/ABA Survey Identifies Costs to Bus. of Competition Referrals on Cross-Border M&A Deals (June 23, 2003), *available at* http://www.ibanet.org/Article/Detail.aspx?ArticleUid=7a18abb4-4da0-4f31-b606-86c21b211a49.

parties and regulators alike have fueled the desire for an international antitrust regime that both reviews mergers more efficiently and reduces the uncertainty facing parties across jurisdictions. The next Part will examine the various proposals for international antitrust that achieve the goals of preventing parochial blocking and reducing the costs of antitrust review.

3. Avenues to International Convergence

The occasional conflict and consternation between the world's leading antitrust authorities, combined with the ever-growing number of antitrust systems around the world, have spawned a variety of proposals on how to accomplish convergence and minimize procedural burdens on business. Some of these proposals, such as creating a supranational antitrust agency, are likely too high-minded and ambitious to have much hope for success in the real world in the foreseeable future. However, more modest proposals involving fairly informal discussion and cooperation have already shown some success and have great potential to minimize the costs and risks facing cross-border mergers. This Part discusses the primary proposed solutions to the problems facing international antitrust and assesses the probable efficacy of each such proposal.[64]

a. Supranational Antitrust Enforcement

The most drastic proposed overhaul of the international merger review system calls for a supranational antitrust enforcement agency to be charged with the task of reviewing cross-border mergers.[65] The underlying premise for such a proposal is fairly simple: in order for an antitrust enforcement agency to assess and regulate business conduct effectively, it ought to operate at the same level as the businesses involved.[66] In the case of cross-border mergers, the transaction necessarily affects a geographic market that is broader than any one nation. Proponents argue that relocating merger review to this same level would (1) eliminate the burdens of reporting to multiple agencies

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64. The proposals are discussed, roughly, in descending order of the degree to which nations would have to cede control over their domestic competition policy.

65. *See* Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons From Our Federalism*, 68 ANTITRUST L.J. 219, 222 (2000) (discussing the possibility of supranational review); Karel Van Miert, The WTO and Competition Policy: The Need to Consider Negotiations, Address Before Ambassadors to the WTO (Apr. 21, 1998), http://ec.europa.eu/competition/speeches/text/sp1998_038_en.html (advocating the establishment of "a multilateral framework of competition rules").

66. Ginsburg & Angstreich, *supra* note 65, at 222.

and facing conflicting remedies from each,[67] (2) create an agency that can consider competitive impact across the entire geographic market,[68] and (3) take advantage of any possible economies of scale in merger review.[69]

However, it is not clear that supranational enforcement is either possible or even desirable in practice. Arguably the largest obstacle to supranational merger review is that countries would be hesitant to relinquish control over mergers. Because national antitrust authorities and governments derive significant benefits from merger regulation, they are likely to resist such a reform.[70] Another problem is that a rigidly unified international competition law would halt the evolution of competition law, as it would remove pressure created by "competition of competition laws."[71] Further, because a merger would be anti-competitive in one country, thereby inevitably leading that country to pressure the supranational agency to block the merger, such an agency might not in fact make the "globally optimal"[72] decisions aspired to under this plan.[73]

Even if countries agreed to surrender authority over international mergers to a supranational enforcement agency—an occurrence that appears highly unlikely—implementation would be difficult, and political pressures in practice would prevent realization of the most significant theoretical gains. The real-world ills of parochialism and transaction costs require a more pragmatic cure.

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67. These problems would necessarily not apply where there is only one global regulator.

68. Ginsburg & Angstreich, *supra* note 65, at 222.

69. *Id.* at 223.

70. *See* INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT 130 (2000), *available at* http://www.usdoj.gov/atr/icpac/finalreport.htm [hereinafter ICPAC Report] (recognizing the potential conflict of interest from using filing fees to fund a substantial part of agency operation, beyond the specific merger); Ginsburg & Angstreich, *supra* note 65, at 226 (citing the significant share of agency revenues received from merger notification fees, particularly by the American agencies, and agencies requiring divestitures be directed to domestic buyers).

71. Karl M. Meessen, *Competition of Competition Laws,* 10 NW. J. INT'L L. & BUS. 17, 21 (1989). So long as there are nations implementing a range of competition laws, they will be able to learn, empirically, which of those laws actually augment competition and improve economies, and which ones do not. *Id.* at 18.

72. *See* Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1512 (1998) [hereinafter Guzman, *Is International Antitrust Possible?*] (stating that when analyzing international mergers, "[t]he optimal policy is the one that allows all activities for which the global change in profits plus the global change in consumer surplus is positive").

73. *See* Ginsburg & Angstreich, *supra* note 65, at 226 ("[I]f a merger that is procompetitive overall is thought likely to have anticompetitive effects in a certain country, that country could not be expected to yield jurisdiction over the merger.").

b. Use of Binding International Codes or Treaties

Another ambitious proposal is the development of an international competition code, which could involve either an international enforcement agency or enforcement by the individual states in accordance with the code. A notable example of such a proposal was drafted by the International Antitrust Code Working Group, which created a draft International Antitrust Code (commonly known as the Munich Code).[74]

The Munich Code was a highly articulated antitrust treaty that called for an International Antitrust Authority to be created by the signatory countries within the institutional framework of the General Agreement on Tariffs and Trade ("GATT").[75] Under this plan, the international code would effectively replace the antitrust laws of each signatory state.[76] This approach would have the advantage of uniformity and clarity: businesses would have one worldwide set of clear rules with which to comply.[77] The problems posed by conflicting national antitrust rules would be remedied as nations adopted the uniform international code.

In reality, however, even those nations that agree on the broad principles of competition law would be unlikely to reach an agreement on the details involved in such a code.[78] Furthermore, states would almost certainly hesitate to surrender their sovereignty over an area of law with such potential for domestic economic significance.[79] And even if such a system were developed, there would still be a substantial danger of high-profile disputes and international tension in cases where one country sees potential for competitive harm in its own markets, but others do not.[80] In sum, although an international

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74. Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement, *reprinted in* 25 ANTITRUST & TRADE REG. REP. S-1 (Aug. 19, 1993) (BNA) [hereinafter Munich Code].

75. *See id.* art. 19.

76. *See id.* art. 2, § 1(a). Member states would be required to either directly transform the Munich Code into domestic law, or to change domestic laws to bring them into conformity with the Code. *Id.* art. 2, cmt. 1. The International Antitrust Authority would have the power to sue national authorities that fail to meet their obligation under the Code, *id.* art. 19, § 2(e), with an International Antitrust Panel to resolve disputes over implementation. *Id.* art. 20, § 2.

77. Eleanor M. Fox, *Competition Law and the Agenda for the WTO: Forging the Links of Competition and Trade,* 4 PAC. RIM L. & POL'Y J. 1, 11 (1995).

78. Fox, *Toward World Antitrust*, *supra* note 62, at 16.

79. *Id.* at 18.

80. *See* Ginsburg & Angstreich, *supra* note 65, at 226 ("[I]f a merger that is procompetitive overall is thought likely to have anticompetitive effects in a certain country, that country could not be expected to yield jurisdiction over the merger."); *see also* Guzman, *Is International Antitrust Possible?*, *supra* note 72, at 1512–15 (describing "a two-country model in which one

antitrust code would theoretically be an effective tool, it is unlikely that such a code could be successfully implemented.[81]

c. Use of Bilateral Arrangements

The easiest of the existing proposals to implement, and one that has been used fairly extensively in practice, is the negotiation of bilateral agreements on antitrust enforcement.[82] These formal agreements between a pair of jurisdictions include measures such as notification and information exchanges, communication, and cooperation amongst national enforcement officials.[83] As bilateral agreements are relatively easy to develop and can improve competition law enforcement, particularly where the agencies interact regularly, some scholars argue they are the most effective solution.[84] Indeed, such agreements have achieved considerable success in facilitating convergence and increasing efficiency in the review of cross-border mergers.[85]

Nonetheless, as even the most prominent supporters of bilateral agreements recognize,[86] they do not eliminate the potential for significant disagreements between nations.[87] A merger that would be pro-competitive in one jurisdiction but is perceived as having anti-competitive effects in the other will likely be blocked, even where the net outcome of the merger, on a global scale, would be pro-competitive.[88] Furthermore, the sheer number of jurisdictions with some form of merger review and control mechanisms limits the helpfulness of bilateral agreements. Today, more than one hundred

country is home to exporters of imperfectly produced goods but not to importers of those goods and the other country is home to importers and not exporters").

81. Diane P. Wood, *The Impossible Dream: Real International Antitrust*, 1992 U. CHI. LEGAL F. 277, 278 n.4 (1992).

82. *E.g.*, U.S.-E.C. Competition Application Agreement, *supra* note 10 (bilateral agreement between the United States and the European Communities).

83. *Id.* arts. II–IV.

84. *See* Smitherman, *supra* note 11, at 857 ("Bilateral cooperation coupled with the creation and strengthening of regulatory networks represents the most effective means available for competition law regulation and enforcement in the present globalization era.").

85. *Report from the Commission to the Council and the European Parliament on the Application of the Agreement between the European Communities and the Government of the United States of America regarding the Application of their Competition Laws*, at 9, COM (2000) 618 final (Oct. 4, 2000).

86. Smitherman, *supra* note 11, at 814.

87. *See supra* Part II.A.2.

88. *See* DABBAH, *supra* note 5, at 229 (noting how international organizations, such as WTO, have advocated "shifting the focus of domestic antitrust authorities from national to global welfare and efficiencies); *see also* Guzman, *Is International Antitrust Possible?*, *supra* note 72, at 1512–15.

countries have competition laws.[89] Negotiation of a series of bilateral agreements between each competition regime would be extremely difficult and lengthy, but variance among the many resulting agreements would still impose significant costs on business. In sum, bilateral agreements present a good starting point towards competition enforcement that maximizes efficiency and minimizes costs, but they fall significantly short of achieving a globally optimal outcome that minimizes transaction costs and divergent determinations.

d. Multilateral Arrangements and Networks

Possibly the most promising, and currently the most successful, approach to international convergence on antitrust enforcement involves "soft law" convergence through multilateral networks.[90] This approach is based on the "recognition that countries may be prepared to cooperate in meaningful ways but are not necessarily prepared to be legally bound under international law."[91] The primary forum for this convergence today is the International Competition Network ("ICN").[92]

The ICN does not attempt "top-down" harmonization; it is based instead upon experimentation by member agencies, enabling other agencies to adopt practices that appear effective.[93] Significantly, developing-world agencies play a substantial role in the ICN, helping set the agenda and participating in norm-creation.[94] In an effort to

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89. Nicholson, *supra* note 21, at 1009.

90. D. Daniel Sokol, *Monopolists Without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 BERKELEY BUS. L.J. 37, 97 (2007). By "soft law," Sokol means that this mechanism involves convergence through non-binding consensus and recommended practices.

91. ICPAC Report, *supra* note 70, at 284.

92. International Competition Network, http://www.internationalcompetitionnetwork.org/ (last visited Sept. 11, 2009). The ICN was launched in 2001 by top officials from fourteen jurisdictions, including the United States and European Union, following the recommendations of the International Competition Policy Advisory Committee, created by the DOJ to address global antitrust problems, especially multi-jurisdictional merger review. ICPAC Report, *supra* note 70, at 281.

93. INT'L COMPETITION NETWORK, A STATEMENT OF MISSION & ACHIEVEMENTS UP UNTIL MAY 2005 2 (2005). Contrary to the international response to many such non-binding recommendations in other fields, many agencies have already begun to adopt the best and recommended practices published by the ICN. As of 2005, fifty-four percent of member agencies had made changes to their merger review regimes to comply with the recommended practices. Sokol, *supra* note 90, at 113. Another indicia of success lies in the ICN's rapid growth: its meetings now involve delegates from over ninety national antitrust agencies. Dina Kallay, Counsel for I.P. and Int'l Antitrust, U.S. Fed. Trade Comm'n, Remarks at Melbourne Law School's "Unleashing the Tiger? Competition Law in China and Hong Kong" Conference (Oct. 4, 2008), *available at* http://www.ftc.gov/oia/speeches/081004kallaymelbourne.pdf.

94. Sokol, *supra* note 90, at 106.

encourage a Chinese merger regime that is in line with these international norms, many of ICN's recommended practices were presented to the Chinese government as it drafted the AML, as discussed below.[95] Multilateral soft law convergence has proven, thus far, to be the most effective international mechanism in addressing the problems of multi-jurisdictional review. A significant strength of the ICN has been the inclusion of developing agencies, giving them a voice in norm creation and thereby augmenting the perceived legitimacy of the recommendations and making developing countries more amenable to including them in their own practices.[96] Indeed, if Chinese antitrust officials were to participate in the norm creation process, it could significantly strengthen the ICN's future international convergence efforts. In addition to the inherent value of adding China's input into the process, the prospect of diminishing the likelihood of parochialism in Chinese merger review will give agencies from the United States and European Union a strong incentive to increase their own convergence efforts.

The proposals outlined in this Part all share the fact that their ability to create an efficient system for the analysis of international mergers in the future depends crucially on China. No international convergence can remedy the concerns created by the addition of China to the multi-jurisdictional merger review arena unless China is included in the discussion. This will require that the international community proceed with efforts wherein China would be able to contribute to the process rather than be force-fed foreign ideas. It will also depend on how China applies the AML and participates in the international antitrust community. To get a sense of what to expect from China, this Note next will examine the background and substance of the AML.

B. Enter the Dragon?: An Introduction to China's Anti-Monopoly Law

China's interest in economic liberalization and competitive markets has its roots in the rule of Deng Xiaoping. A few years after his rise to power, serious discussion began in China about enacting a competition law.[97] The primary impetus for the enactment of a comprehensive competition law, however, was China's need to re-tool its economic policies in connection with its 2002 accession to the

95. *See infra* Part III.A.
96. Sokol, *supra* note 90, at 114.
97. Harris, *supra* note 1, at 172–74. Deng gained power in 1978, and discussions of enacting a competition law started in the mid-1980s. *Id.* at 174.

WTO.[98] In 2003, China promulgated several draft rules, including rules on mergers involving foreign multinationals, and enacted Provisional Merger and Acquisitions Rules.[99] Within the year, however, Chinese officials had acknowledged that they would "simply not enforce an antitrust review when approving M&A transactions."[100] Thus, prior to 2008, China was not generally involved in the review of transnational mergers.

In April 2005, China circulated a draft AML to Chinese and foreign antitrust experts for comment, a process which helped Chinese drafters incorporate foreign experience into several subsequent drafts and ultimately to the final law.[101] In August 2007, China passed the AML, which went into effect on August 1, 2008.[102] The AML prohibits, in the mergers and acquisitions context, "consolidation which has or may have the effect of eliminating or restricting market competition."[103] Consistent with the Western approach of permitting transactions when efficiencies outweigh anticompetitive effects, the AML permits mergers when "the positive effect on competition is greater than the negative effect."[104] The factors to be considered in merger analysis include: (1) market share and ability to control the market, (2) market concentration, (3) the effect on market entry and technological advance, (4) the effect on consumers and competitors, (5)

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98. *Id.* at 176–77.

99. *See* Client Alert, Latham & Watkins, *Acquisitions of Non-Listed Domestic Enterprises in the People's Republic of China*, (Feb. 2004), *available at* http://www.lw.com/Resources.aspx?page=ClientAlertdetail&pageNum=75&publication=980&searchtype=ClientAlert%2C+Newsletters.

100. Harris, *supra* note 1, at 178 n.45 (citing Shu-Ching Jean Chen, *China Quietly Scraps M&A Review*, DAILY DEAL, July 15, 2003).

101. *Compare* Anti-Monopoly Law of the People's Republic of China Draft for Comment, (Apr. 8, 2005), *available at* http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/DevCompLaw_PRC.aspx, *with* Anti-Monopoly Law, *supra* note 2. *See also* Anti-Monopoly Law of the People's Republic of China Draft for Comment, (July 27, 2005), *available at* http://www.ibanet.org/LPD/Antitrust_Trade_Law_Section/Antitrust/DevCompLaw_PRC.aspx. For discussion of ongoing interaction concerning the AML, *see infra* note 139.

102. Anti-Monopoly Law, *supra* note 2.

103. *Id.* art. 3. The only immediately apparent difference between this and the American and European language is that it lacks the word "substantially" or "significantly." *See* 15 U.S.C. § 18 (barring mergers that "may . . . substantially . . . lessen competition"); EC Merger Regulation, *supra* note 9, art. 2, § 2 (barring mergers that "would significantly impede effective competition"). Indeed, the ABA recommended the incorporation of such a term during the drafting process; however, the term was not included in the final version. Joint Submission of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law and International Law on the Proposed Anti-Monopoly Law of the People's Republic of China (2005), at 24, *available at* http://www.abanet.org/intlaw/committees/business_regulation/antitrust/chinacommentsantimonopoly.pdf [hereinafter ABA Comments].

104. Anti-Monopoly Law, *supra* note 2, art. 28. This probably means that the impact of the slight difference in language, *supra* note 103, is minimal.

the effect on national economic development, and (6) any other factors deemed "worth consideration."[105]

Although these factors are not entirely dissimilar from those seen in the American and European merger guidelines, there are some notable differences. Whereas the American and European analysis is quite narrowly focused on the competitive impact within the relevant market, the AML provides for a broader inquiry. The inclusion of factors like effect on national economic development, technological advance, and other competitors is evidence that the Chinese intend their law to have a significantly different focus than those of either the Americans or the Europeans. Incorporation of these considerations may provide an avenue for furthering the more "parochial" goals of increasing domestic production and avoiding plant closings, as opposed to focusing on protecting consumer welfare.

This uniqueness is to be expected: the AML is different because China is different. China is constitutionally committed to being a "socialist market economy."[106] Central planning has long been part of Chinese culture, viewed as the primary route to economic goals.[107] For China, law is a tool for achieving social goals.[108] In an area of law that largely relates to the "private economy," but that also has significant public implications, it is natural for China to incorporate considerations beyond impact on market competition.[109] China's history, goals, and current issues are all very different from those of the United States and the European Union. China is a developing economy, and its government simultaneously needs to encourage private sector competition, address public sector interference, and manage the economy's development. Even experienced Western experts do not know what form of competition law is ideal in such a

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105. Anti-Monopoly Law, *supra* note 2, art. 27. For comparison, see *supra* notes 31–34 and accompanying text, which discuss the factors considered in American and European analysis.

106. XIAN FA [Constitution], pmbl. ¶ 7, (P.R.C.), *available at* 2004 China Law LEXIS 6033 ("[T]he peoples of China will continue to . . . develop the socialist market economy."); *id.* art. 15 ("The state implements a socialist market economy.").

107. Ignacio De León, *Chinese Anti-Monopoly Law: Institutional Analysis of Competition Policy in Transition and Developing Countries: The Lessons from Latin America*, 3 WASH. U. GLOBAL STUD. L. REV. 405, 421–22 (2004).

108. Ignazio Castelluci, *Rule of Law with Chinese Characteristics*, 13 ANN. SURV. INT'L & COMP. L. 35, 46 (2007) (observing that "[p]olitical considerations . . . play a major role in case-by-case judicial or administrative interpretation and enforcement" in China).

109. *Id.* at 85, 88 (identifying competition law as an area in which "stricter legality principles will probably have wider application," due to its relation to improving market functionality, but also one where policy considerations will continue to have an impact).

situation.[110] The substantive concerns arising from this breadth of issues to be addressed are discussed below in Part II.C.

The procedure for review outlined in the AML bears strong similarities to those of the United States and the European Union. When a proposed merger is above certain thresholds, the parties must report their proposed transaction to the Ministry of Commerce.[111] After reporting, there is a thirty-day waiting period, during which the authorities can either decide to investigate further or clear the transaction.[112] As in the European Union, the authorities have the power to prohibit a merger directly, without judicial approval, when the merger would restrict or eliminate competition.[113] Like both the United States and European Union, Chinese authorities can approve mergers subject to restrictive conditions, as the European Union did with Boeing,[114] and China has in fact already done so in a pair of mergers.[115]

To summarize, the AML imposes a substantive standard for the approval of mergers that is at least superficially similar to those of the United States and European Union: mergers must not "ha[ve] the effect of eliminating or restricting market competition."[116] The procedural requirements are also quite similar: parties to mergers above certain thresholds of business volume must report their intended transaction to the authorities and then wait for a given period of time, or until given approval, before consummating the transaction. The greatest potential for conflict is, predictably, in the details. The factors considered in determining whether a merger would eliminate or restrict competition include some that are not

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110. *See* Ginsburg & Angstreich, *supra* note 65, at 224 ("We do not know, and we doubt that anyone knows at this early stage, how to deal with the peculiar issues that are likely to arise with mergers in a country that is still in transition from socialism to capitalism . . . ."); *see also* Diane P. Wood, *International Harmonization of Antitrust: The Tortoise or the Hare*, 3 CHI. J. INT'L L. 391, 405–06 (2002) (discussing the need for different competition laws in transition economies).

111. Anti-Monopoly Law, *supra* note 2, art. 21; *see also* Circular of the Legislative Affairs Office of the State Council Requesting the Public Soliciation of Comments on Provisions of the State Council on the Declaration of the Concentration of Business Operators (Draft for Comment) art. 3 (Aug. 1, 2008), *available at* 2008 China Law LEXIS 1919 (proposing thresholds, similar to the Hart-Scott-Rodino Act and EC Merger Regulation, above which mergers must be reported).

112. Anti-Monopoly Law, *supra* note 2, art. 25.

113. *Id.* art. 28.

114. *Id.* art. 29. Such approval is essentially a settlement between the regulators and the merging parties.

115. Li Jing, *MOFCOM Approves InBev, AB Merger*, CHINA DAILY, Nov. 19, 2008, at 13; Aaron Back & J.R. Wu, *China Flexes Global Merger Clout, Imposes Conditions on Lucite Deal*, WALL ST. J., Apr. 28, 2009, at B6.

116. Anti-Monopoly Law, *supra* note 2, art. 28.

contemplated under the Western approaches. It is this ability under the AML to contemplate both social goals and arguably more parochial concerns that may unsettle foreign observers worried about the potential for aberrant conclusions.

C. The Only Thing(s) We Have to Fear . . . : The Core Concerns

Chief among the concerns of international businesses and commentators regarding the AML is the possibility that China will, in important cases, implement the AML in a parochial way to block mergers that have a net positive effect on competition in order to advance its own strategic goals.[117] This is particularly troubling because when there is disagreement over the competitive effects of a merger, the jurisdiction taking the most restrictive view will control.[118] Thus, the AML enables China to block worldwide mergers based on China's own special interests.[119] This is especially ominous given that the AML appears to explicitly incorporate considerations that the United States and European Union do not consider to be legitimate antitrust concerns.[120] Such considerations create a risk that the Chinese authorities might block economically beneficial transnational mergers purely due to China's domestic social goals.

It is worth noting that some of the social goals China seeks to pursue may be perfectly legitimate in light of its need to continue developing its national economy. Although the consensus outside of China is that goals such as the development of national industries should be pursued through other laws, Westerners have very little experience applying competition law in a situation like China's. Experience in the laboratory of China may demonstrate that incorporation of these considerations makes a very effective model for developing-economy competition law.

Nonetheless, dangers abound if China experiments with these considerations on cross-border mergers wherein China's "policy considerations" may conflict with the interests of its international peers. If China is perceived as externalizing the costs of social,

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117. *See* STEPHEN WOOLCOCK, DEP'T OF INT'L RELATIONS, INTERNATIONAL COMPETITION POLICY AND THE WORLD TRADE ORGANIZATION, PAPER FOR THE LONDON SCHOOL OF ECONOMICS COMMONWEALTH BUSINESS COUNCIL TRADE FORUM IN SOUTH AFRICA 9, http://www.lse.ac.uk/collections/internationalTradePolicyUnit/pdf/internationalCompetitionPolicyAndTheWorldTradeOrganization.pdf (last visited Nov. 9, 2008).

118. *See* Robertson, *supra* note 7, at 162–63.

119. *Id.*

120. *See, e.g.*, ABA Comments, *supra* note 103, at 2 (protection of the "national economy" and "public interest" are not "appropriate considerations in a competition law").

nationalistic, or political goals onto the rest of the international economy, the ramifications could be serious. Firms may be discouraged from investing in China, which would harm its economic development, and political tensions with trading partners could also harm China's economic interests.[121] If a disagreement over the economic theory of "portfolio effects" could bring two similar, friendly jurisdictions to heated rhetoric and accusations of "parochialism,"[122] what would happen if China blocked a benign cross-border merger in order to promote the development of domestic firms in the industry?

Indeed, the first year of AML enforcement demonstrates these very risks. The first public decision issued under the AML addressed the November 2008 takeover of American brewer Anheuser-Busch by Belgian rival InBev.[123] Though neither company was Chinese, the merger was subject to AML review because both had significant ownership stakes in Chinese breweries which competed with one another.[124] The Chinese Ministry of Commerce approved the merger, but imposed conditions on the merged firm that restricted its ability to acquire or expand its stake in major Chinese breweries.

Though the Anheuser-Busch / InBev decision evoked only a murmur of commentary from abroad,[125] a more troubling decision came in March 2009 when the Ministry blocked Coca-Cola's proposed acquisition of Huiyuan, a Chinese juice company.[126] Seeking to expand its presence in China, Coca-Cola, which was number one in the juice market in China in 2008, undertook to acquire Huiyuan, a successful Chinese company that claimed the second largest market share. The market concentration was relatively low, however, with the two firms

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121. As a net exporter, China would face substantial risk that trading partners who perceived protectionism in the implementation of the AML would implement retaliatory measures against Chinese exports. *See id.* at 7 (inclusion of "objectives distinct from that of preserving the competitive process . . . is likely to chill investment in, and trade with, China").

122. *See supra* notes 57–60 and accompanying discussion.

123. Li, *supra* note 115, at 13.

124. Anheuser-Busch had a 27 percent stake in Tsingtao Beer, and InBev had a 28.5 percent stake in Zhujiang Beer. Associated Press, *China Approves US-Belgian Beer Merger*, USA TODAY, Nov. 18, 2008, http://www.usatoday.com/money/economy/2008-11-18-3455189696_x.htm?loc=interstitialskip.

125. *See, e.g.*, W. Stephen Smith et al., Morrison & Foerster Legal Update, *InBev-Anheuser-Busch: China's First Public Merger Decision Under the AML* (Dec. 2008), *available at* http://www.mofo.com/news/updates/files/14970.html (suggesting that requirement of prior approval for subsequent transactions is redundant, as significant acquisitions would be covered by the AML, so the Ministry of Commerce would learn with experience that such conditions are unnecessary); Xinzhu Zhang et al., *The InBev and Anheuser-Busch Merger in China: A View from Economists*, ONLINE MAG. GLOBAL COMPETITION POL'Y, Dec. 11, 2008, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1322526 (discussing the future of merger control in China).

126. Valerie Bauerlein & Gordon Fairclough, *Beijing Thwarts Coke's Takeover Bid*, WALL ST. J., Mar. 19, 2009, at B1.

having a combined market share around only eighteen to twenty percent, depending on the definition of the relevant market.[127] Despite market concentration levels that would have resulted in summary approval under American and European analyses,[128] the Ministry blocked the merger. The Ministry's explanatory public statement reasoned that Coca-Cola would be able to use its dominant position in the soda market to restrain competition in juice, thereby possibly harming small competitors.[129]

Observers were unconvinced. The consensus was that the merger would not harm competition and therefore should have been permitted.[130] The concerns pertaining to tying and bundling could easily be addressed through narrowly tailored remedies and AML enforcement. The perception abroad was that this decision was primarily nationalistic, a response to public sentiment opposed to a foreign corporation acquiring a strong Chinese brand.[131] Although the Ministry unsurprisingly denied that nationalism played a role,[132] the decision served to amplify existing fears that the AML would be misused against foreign investors.[133] Whether or not the decision was actually motivated by nationalist concerns, it has undoubtedly added weight and immediacy to fears of parochialism.

Opaque, unpredictable decisions that seem more consistent with nationalism than with effective competition policy create considerable costs. Foreign investors will be hesitant to invest in China, thereby diminishing the value of successful Chinese brands and companies and slowing China's economic development.[134]

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127. Patrick Chovanec, *Beijing's Antitrust Blunder*, WALL ST. J. ASIA, Mar. 23, 2009, at 15 (citing "2008 market share data from Euromonitor").

128. *See* DOJ/FTCMerger Guidelines, *supra* note 26, § 1.5 (creating safe harbor for mergers with HHI of less than 1000); Chovanec, *supra* note 127, at 15 ("[T]he transaction produces HHI scores that would have resulted in a summary dismissal of antitrust concerns in either the U.S. or EU.").

129. Statement of the Ministry of Commerce, *China's Statement Blocking Coca-Cola Huiyuan Deal*, WALL ST. J., CHINA JOURNAL, Mar. 18, 2009, http://blogs.wsj.com/chinajournal/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/.

130. Chovanec, *supra* note 127, at 15.

131. Sundeep Tucker & Jamil Anderlini, *Coke's Rejection is to Chinese Public's Taste*, FIN. TIMES (Online), Mar. 18, 2009, *available at* http://www.ft.com/cms/s/0/9df57384-13d1-11de-9e32-0000779fd2ac.html.

132. *Veto of Coke Bid is Not Protectionism*; *China Says Welcomes Inbound M&A By Foreign Firms*, CHINA DAILY, Mar. 23, 2009, *available at* http://www.chinadaily.com.cn/bizchina/2009-03/23/content_7606202.htm.

133. Sundeep Tucker and Jamil Anderlini, *China's Block on Coke Bid Raises Alarm Over M&A*, FINANCIAL TIMES (London), Mar. 19, 2009, at 23.

134. *See* Chovanec, *supra* note 127. This is so because the antitrust doubts reduce the willingness of investors to purchase successful brands and companies from Chinese owners, in turn reducing the likely return on an investment in the company's shares.

Simultaneously, Chinese companies seeking to invest abroad may find themselves the targets of retaliatory protectionism.[135] For example, within hours of the announcement of the Coca-Cola decision, Australian politicians were already using this perceived protectionism as justification for their own favored protectionist policies.[136] If China blocks a future proposed merger for seemingly nationalist reasons, the parties to the transaction will not be the only losers.

In addition to these issues pertaining to China's substantive analysis, there is a final procedural concern about Chinese merger review that relates to the addition of another major regulatory hurdle for transnational mergers. Such deals require submissions to an ever-increasing number of antitrust authorities, and China's new presence as another major player in this already-crowded field may increase transactional costs to the point that otherwise efficient mergers are deterred.[137] Although such concerns can be addressed to some extent by cooperation among the authorities, as is done between the United States and the European Union under their Best Practices, this cannot fully eliminate the burdens of discerning and complying with the requirements of so many jurisdictions. The expected expense of dealing with China's merger review will be even higher—and more discouraging—so long as the fears and uncertainty augmented by the Coca-Cola decision remain. Early experience has shown that the threats outlined above, both substantive and procedural, are real. The next Part will analyze methods of minimizing the risks posed by Chinese antitrust merger review.

III. GETTING TO HARMONIOUS ANTITRUST: PROPOSALS ANALYZED

With the advent of the AML, the international antitrust community is focused on how to minimize the systemic risks posed by Chinese antitrust enforcement. Beyond the more general international convergence efforts outlined above in Part II.A.3, this will depend on measures that are internal to China. This Part analyzes the existing proposals and their likely efficacy for helping Chinese merger review achieve China's goals while integrating smoothly into the world of

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135. *Canning Coke: China Can't Keep Buying Abroad and Reject Suitors At Home*, FIN. TIMES (London), Mar. 20, 2009, at 10.

136. *See* Peter Smith, *China's Move Stirs Australian Concerns*, FINANCIAL TIMES (Online), Mar. 18, 2009, http://www.ft.com/cms/s/0/71d0e09c-13d4-11de-9e32-0000779fd2ac.html (reporting that Australian politicians were using the Chinese merger decision to support their efforts to block investments by Chinese companies in major Australian companies).

137. Donald Baker, *Antitrust Merger Review in an Era of Escalating Cross-Border Transactions and Effects*, 18 WIS. INT'L L.J. 577, 587 (2000).

international antitrust. Part III.A analyzes suggestions, primarily from Western commentators, for specific changes in the AML and related regulations in order to make the law more consistent with emerging international norms. Many of these same experts commented on earlier drafts and continue to advocate these changes. Because the law is already in effect, however, Part III.B examines proposals to address these concerns through delayed implementation of the existing laws. The exposed weaknesses in both approaches point the way to the solution proposed in Part IV of this Note.

A. "Play Our Game": Changing or Reinterpreting the Rules

Throughout the AML drafting process, China solicited comments from experts both within China and abroad.[138] This means that most of the proposals for how to draft and implement the AML were presented to the relevant Chinese officials and considered by them during the drafting process. The process of soliciting input to the law and its implementation continues today in the form of various regular bilateral discussions and other programs, most notably between China and the United States and between China and the European Union.[139] Although China is unlikely to amend the AML to incorporate already-rejected suggestions, these recommendations may still be useful because Chinese officials continuously seek to learn from foreign experience and could incorporate these lessons through regulations or future interpretations and applications of the law.

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138. *See supra* note 101 and accompanying text.

139. Officials and scholars from the United States and China have discussed the AML through such programs as the U.S.-China Legal Exchange, held in the United States in December 2006, *see* U.S. Commercial Service Website, 2006 China Legal Exchange, http://www.buyusa.gov/asianow/chinalegalexchange.html (last visited Sept. 11, 2009), and a series of seminars in China and visits to the United States by Chinese officials sponsored by the United States Trade and Development Agency, *see* Press Release, U.S. Trade and Dev. Agency, USTDA Initiative Promotes U.S.-China Cooperation Towards Effective Anti-Monopoly Law Implementation, Mar. 7, 2008, *available at* http://www.ustda.gov/news/press releases/2008/EastAsia/China/ChinaAML_030708.asp. Officials and scholars from the European Union and China have discussed the AML through programs such as the E.U.-China Conference on Competition Policy, E.U.-China Trade Project Website, http://www.euchinawto.org/index.php?option=com_content&task=view&id=85&Itemid=54 (last visited Sept. 11, 2009), and through study visits and internships for Chinese officials to the European Union. Directorate General of Competition, *see* E.U.-China Trade Project Website – Study Visit: Merger Control, http://www.euchinawto.org/index.php?option=com_content&task=view&id=176&Itemid=54 (last visited Sept. 11, 2009); E.U.-China Trade Project Website – Internship at EC Directorate General for Competition, http://www.euchinawto.org/index.php? option=com_content&task=view&id=214&Itemid=54 (last visited Sept. 11, 2009); *see also* Terms of Reference of the EU-China Competition Policy Dialogue (May 6, 2004), *available at* http://ec.europa.eu/competition/international/bilateral/cn2b_en.pdf.

The most common advice of international observers is that both the substantive and procedural requirements of the AML should comply with the "Recommended Practices" of the International Competition Network ("ICN"),[140] which reflect the consensus of over one hundred national competition authorities.[141] The core of these recommendations can be easily summarized: bring the AML into compliance with the international consensus towards which the competition community is converging.

The suggested substantive changes to the AML center on the factors considered in merger evaluation rather than the standard itself. The basic phrasing of the standard that the AML applies to mergers looks much like that used in the United States and elsewhere.[142] Nevertheless, there are some significant differences in the factors to be considered in evaluating a merger, which have provoked some unease.[143] The core concern cited regarding the AML factors is that they look beyond the competitive effect of the merger, particularly by focusing on competitors and "national economic development."[144]

The AML's broad list of considerations, as compared to international standards, causes concern because it may create unpredictability for parties as well as the opportunity for Chinese authorities to block mergers that are not harmful to competition. By contrast, the consensus among the international competition enforcement community, as represented by the ICN, is that antitrust merger review "should focus exclusively on identifying and preventing or remedying anticompetitive mergers. A merger review law should not be used to pursue other goals."[145] Similarly, Western

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140. *See* ABA Comments, *supra* note 103, at 21–26 (recommending changes to at least five Articles in order to be consistent with ICN's Recommended Practices in the relevant areas).

141. Kallay, *supra* note 93; *see also* discussion *supra* Part II.A.3.

142. *See* Anti-Monopoly Law, *supra* note 2, art. 28 (barring any merger that "has the effect of restricting or eliminating competition").

143. *Id.* art. 27. These factors are discussed *supra* note 105 and accompanying text.

144. William Blumenthal, Presentation to the International Symposium on the Draft Anti-Monopoly Law of the People's Republic of China (May 23–24, 2005), *available at* http://www.ftc.gov/speeches/blumenthal/ 20050523SCLAOFinal.pdf [hereinafter Blumenthal, Presentation]; ABA Comments, *supra* note 103, at 2; Antitrust Committee of the International Bar Association, Working Group on the Development of Competition Law in the People's Republic of China, *Comments on the Draft Anti-Monopoly Law of the People's Republic of China (PRC) (Draft of 27 July, 2005)*, 46 (Aug. 23, 2005), *available at* http://www.ibanet.org/LPD/ Antitrust_Trade_Law_Section/Antitrust/DevCompLaw_PRC.aspx [hereinafter IBA Working Group Comments].

145. International Competition Network, *Recommended Practices for Merger Analysis*, § 1(A), cmt. 1 (2008), *available at* http://www.internationalcompetitionnetwork.org/ media/library/Cartels/Merger_WG_1.pdf.

commentators argue that the AML should not consider a merger's effect on competitors; improved efficiency often harms rivals of the improved firm, so their complaints do not show that the merger has the effect of "restricting or eliminating competition."[146] China's significant divergence from the norm by incorporating these considerations has the potential to lead to determinations on the merits of transnational mergers that conflict with the conclusions of other authorities. For this reason, commentators have consistently advocated a more narrowly focused merger evaluation.[147]

From the Chinese perspective, however, it might not be in China's best interest to strictly adhere to American and European precepts of narrow focus in merger review. China is a developing country, which may require it to take a slightly different perspective in close cases than the United States and European Union would take.[148] Western antitrust experts do not have all the answers in this context and perhaps should not prevent China from seeking the answers itself. To consider a merger's effect on development and competitors is not necessarily to harm consumers. Using a limiting principle that prohibits harming consumers through antitrust enforcement,[149] Chinese authorities might best aid their developing economy by blocking mergers where there is neither a clear benefit nor a clear harm to consumers, but there is definite harm to development through shutting local firms out of the market.[150] Such decisions could, in some cases, conflict with American or European decisions to permit mergers without modification where it is unclear that consumers either suffer or benefit. In such cases, however, the United States and European Union might have a weaker interest, in terms of competition policy, in permitting the merger. Though their own regimes would allow such a merger, the Western authorities are unlikely to rattle their sabers if the merger's benefits to consumers are unclear, particularly if they consider the potential positive impact on international development. If this minor shift enables developing countries to aid their development through antitrust enforcement

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146. Blumenthal, Presentation, *supra* note 144, at 7.

147. *Id.*; Pamela Jones Harbour, Remarks before the New York State Bar Association International Law and Practice Section in Shanghai (Oct. 20, 2006).

148. Eleanor M. Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 SW. J. L. & TRADE AM. 211, 228–29 (2007) [hereinafter Fox, *The Other Path*].

149. Such a limiting principle may, in fact, be embodied in AML Article 28, providing that the authorities "shall not prohibit" a merger where "the positive effect on competition is greater than the negative effect." Anti-Monopoly Law, *supra* note 2.

150. Fox, *The Other Path*, *supra* note 148, at 229 n.66.

without harming consumers, it could be a valuable decision both for antitrust theory and for economic development around the world.

One of the most significant procedural complaints about the AML concerns the thresholds above which parties must notify enforcement authorities of a proposed merger. The draft provisions based notification on whether one party has assets, sales, or market share in China that exceed certain thresholds.[151] During the drafting process, commentators recognized that these provisions would require notification to the Chinese authorities of transactions above the thresholds, even if the firm being acquired had no presence or sales in China.[152] The ABA, citing the ICN Recommended Practices, suggested that the AML be redrafted to incorporate significant changes, including modifying the thresholds to focus on assets and sales of the *acquired* company in an acquisition.[153] Furthermore, the ABA suggested giving the Chinese State Council the authority to promulgate the notification thresholds in the form of regulations and thereby avoid the legislative amendment process when making changes to such thresholds.[154]

The version of the AML that was enacted incorporated some, but not all, of these recommendations: the statute itself does not set forth any thresholds, instead providing that notification thresholds shall be promulgated by the State Council.[155] Shortly after the AML became effective, the State Council promulgated the Regulation on Notification Thresholds for Concentrations of Undertakings.[156] This regulation shifted the focus to revenue *within China* of at least two parties—a step in the right direction.[157] As one group of commentators has pointed out, though, the regulation does not focus on the Chinese turnover of the *acquired* firm. Thus, the regulation leaves open the possibility that an acquisition of a firm with no presence in China—for example, as part of a three-party transaction, or where the acquired

151. ABA Comments, *supra* note 103, at 22–23.

152. *Id.* The ABA also pointed out that market share should not be used for notification thresholds, because it can only be calculated after other significant analytical steps; market share was subsequently removed, resolving this concern. *Id.*

153. *Id.*

154. *Id.* at 23.

155. Anti-Monopoly Law, *supra* note 2, art. 21.

156. Available in Chinese at http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm. See Peter Wang, Yizhe Yang & H. Stephen Harris, Jr., *China: New Merger Notification Thresholds Under The AML Published*, *available at* http://www.mondaq.com/article.asp?articleid=64738 (Aug. 29, 2008), for an English summary. Note that, as discussed *supra* note 28, the term "concentrations" refers to mergers and acquisitions, for which this Note generally uses the term "mergers."

157. Wang, Yang & Harris, *supra* note 156.

firm is a subsidiary of a firm with a significant presence in China—would have to be reported to the Chinese authorities.[158] To those concerned about additional procedural burdens on merging parties and the possibility of China strategically interfering with mergers that have no real nexus to China, these notification thresholds are worrisome. Commentators throughout the drafting process advocated setting notification thresholds which ensure that only mergers with a sufficient nexus to China are captured.[159] Undoubtedly such observers will continue to push for changes to the notification thresholds, especially since they are contained in regulations that are relatively easy to alter.

On the other hand, if these mergers actually have no nexus to China, by definition they have no impact on the Chinese market. Therefore, is there truly any cause for concern? Put another way, if China has no interest in these mergers, why would its government devote valuable administrative resources to reviewing and blocking such a merger, especially considering the certain international outcry it would provoke? If China has no interest in these cases and will neither seek nor review information from parties that do not report mergers purely external to China, parties likely would soon learn not to report such transactions. Thus, there is no need to devote resources to amending the thresholds.

It is imaginable that there may be some limited danger, from the international perspective, in not amending the thresholds because they may leave some room for the Chinese authorities to deliberately block a merger that affects only a foreign market when a Chinese firm in the same market would be disadvantaged. In reality, however, the diplomatic and trade-relations costs to such an enforcement decision would probably be prohibitive. Therefore, the failure of the thresholds

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158. *Id.* ("Because the Regulation does not . . . require that the target have operations or any particular level of sales in China, the Regulation may catch transactions with little, if any, connection to China."). Where there are three or more entities, "a filing would be required even if two of the acquiring undertakings each have China-wide turnovers in excess of [the threshold] but the acquired business has no sales or presence in China." *Id.* As to two-party deals with no competitive impact in China, "[China's Ministry of Commerce] has historically interpreted, and presumably will continue to interpret, a 'party' to mean the entire group of affiliated companies." *Id.* Therefore, an acquired subsidiary with no business in China may exceed the Chinese revenue threshold due to its parent company's dealings in China.

159. Pamela Jones Harbour, Remarks before the New York State Bar Association International Law and Practice Section in Shanghai (Oct. 20, 2006); *see also* Wang Xiaoye, Presentation to the EU-China Conference on Competition Policy (Apr. 22, 2005) *available at* http://www.euchinawto.org/index.php?option=com_content&task=view&id=85&Itemid=54 (giving the example of Coca-Cola acquiring a small bottler in Russia as a transaction that would be subject to Chinese regulation under the draft provisions, despite having little effect on competition in China).

to require a "sufficient nexus" to China probably does not pose a significant threat to international mergers external to China.

The final procedural concern that commentators have expressed about merger review under the AML is about the definition of "control." Although the AML makes "control" of another corporation the trigger for its reporting requirement, it fails to define the term. This is a key ambiguity because if one corporation acquires shares in another, but not enough to give it control, the transaction is not a merger at all and antitrust merger review is irrelevant.[160] Absent a clear definition, parties may not be certain whether, for example, acquiring a forty-five percent stake in a corporation would trigger notification responsibilities. The lack of a clear standard here adds more procedural confusion to an already convoluted process.[161] Although a draft of the Regulation on Notification of Concentrations that included factors for determining whether "control" has been acquired was circulated in March 2008, the Regulation promulgated in August 2008 did not have any provisions to help define the term.[162] This means that an acquiring business cannot be certain whether its transaction will give it "control," prompting its obligation to notify the Chinese authorities.[163] Although this does not pose any direct substantive threat to international mergers, the lack of clarity certainly adds to the procedural burdens of international merger review. The course commentators accordingly recommend is to explicitly define "control" in a new provision in the Regulation.[164] An oft-cited model is that used under the American Hart-Scott-Rodino Act and its implementing regulations, which define "control" as ownership of at least fifty percent of a firm's voting shares.[165]

The central problem with all of these suggestions, however, is that the enacted law has already come out the other side of China's process of thoroughly consulting with international antitrust scholars and practitioners during the drafting process. For the more procedural aspects of the law, perhaps it may be possible to make changes that reduce threats to international mergers without impinging on China's sovereign interests, thereby making continuing discussions on possible

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160. *See* Anti-Monopoly Law, *supra* note 2, art. 20 (whether a transaction is an "Operator consolidation" under the AML, and thus subject to the Article 21 reporting requirements, turns on whether "[o]ne Operator gain[s] controlling rights in another Operator").

161. Blumenthal, Presentation, *supra* note 144, at 8–9; IBA Working Group Comments, *supra* note 144, at 35–36.

162. Wang, Yang & Harris, *supra* note 156.

163. *Id.*

164. Blumenthal, Presentation, *supra* note 144, at 8–9 (citing 16 C.F.R. § 801.1(b) (2009)).

165. 16 C.F.R. § 801.1(b).

changes to procedural regulations viable. However, it is unlikely that future advocacy will result in any changes in the law itself. China will consider foreign advice, but the starting point for Chinese merger review has already been set.

The reality is that China has made its decision and intends to consider the effect that mergers will have on development. Any efforts in this area should focus on aiding Chinese regulators in ensuring that they do not make decisions that harm consumers in the name of "national economic development."[166] To the extent that the Western antitrust community is actually concerned about China applying the AML to mergers in a way that either (a) blocks mergers that would increase consumer welfare in Western countries or (b) imposes procedural costs that would deter such beneficial mergers, these concerns may be addressed in ways that are less intrusive on China's sovereign policy decisions than amending the law and regulations. In particular, the approach of gradually phasing in implementation, discussed in the next Part, could help reduce the risk of the Chinese authorities making decisions that are harmful to the international economy. If these risks can be avoided without any foreign pressure on China to "conform" to Western principles, it will benefit all sides.

B. "A Journey of a Thousand Miles Begins with a Single Step"[167]

While the proposals outlined above have focused on direct communication with and advocacy to the Chinese government in an effort to modify the AML to become more compliant with international norms, other commentators have suggested that the most effective way for Chinese antitrust to develop consistency with these norms is through gradual experience.[168] By "phasing in" AML enforcement, China would be able to gain confidence in competitive markets and in antitrust law while developing institutional capability for effective enforcement before moving on to more complex issues such as mergers.[169]

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166. One way this goal can be achieved is through focus on the limiting principle, as discussed *supra* notes 149–50 and accompanying text, and possibly embodied in AML Article 28.

167. LAO TZU, TAO TE CHING, ch. 64 (Stephen Mitchell trans., Harper Collins Publishers 1988).

168. R. Hewitt Pate, *What I Heard in The Great Hall of the People – Realistic Expectations of Chinese Antitrust*, 75 ANTITRUST L.J. 195, 201 (2008).

169. *Id.* at 209.

This more gradual approach recommends that China "start with the basics" in the enforcement of the AML.[170] In this view, "the basics" means focusing on cartels and government restrictions on competition.[171] By starting with the detection and elimination of cartels, the enforcing authorities will gain experience on issues where the rules and the economic benefits from enforcement are clear.[172] This will help both in terms of administering the rules in a "consistent and just" manner, thereby augmenting the legitimacy of antitrust, and also in terms of introducing the Chinese public to competition law in a manner that is understandable to them.[173] Because "[f]ixed prices take money directly from the pockets of consumers," addressing such behavior will create the most immediate benefits to the Chinese public and thus create crucial early public support for the AML.[174]

Commentators also recommend an early focus on enforcing the AML's restrictions on protectionism by local government[175] because this area promises similar clarity and potential for immediate economic benefit.[176] In transition economies such as China's, government-imposed barriers to entry are among the most significant restraints on competition, so eliminating these restraints can create some of the most substantial and immediate economic benefits from AML enforcement.[177] Focusing on government restraints will also help gain private sector support for antitrust enforcement and reduce corruption. [178] At the same time, tackling cases where evidence will be

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170. *Id.*; William E. Kovacic, *Getting Started: Creating New Competition Policy Institutions in Transition Economies*, 23 BROOK. J. INT'L L. 403, 444–46 (1997) [hereinafter Kovacic, *Getting Started*].

171. Kovacic, *Getting Started*, *supra* note 170, at 445.

172. Pate, *supra* note 168, at 196; Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 401, 408 (1995).

173. Pate, *supra* note 168, at 209.

174. *Id.* at 209; *accord* Kovacic, *Getting Started*, *supra* note 170, at 449–50 (encouraging the agency to "resist political demands that it take action that would reduce competition and restrict consumer choice").

175. These provisions are contained in Chapter 5 of the AML. Anti-Monopoly Law, *supra* note 2, arts. 32–37.

176. Pate, *supra* note 168, at 209; *see also* William E. Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisitions in Emerging Markets*, 66 U. CIN. L. REV. 1075, 1110 (1998) (recommending focus on government impediments to competition as a top initial priority in the competition policy of transition economies); Salil K. Mehra & Yeng Manbei, *Against Antitrust Functionalism: Reconsidering China's Anti-Monopoly Law*, 49 VA. J. INT'L L. 379, 411–12 (2009) (discussing enforcement of the AML).

177. Kovacic, *Getting Started*, *supra* note 170, at 441.

178. *Id.* at 442.

relatively easy to find will make it easier for the authorities to gain experience in enforcing the AML.[179]

Some commentators have argued that government control over the judiciary is such that it will interfere with effective enforcement of the anti-protectionist provisions of the AML.[180] However, because these provisions effectively function as a domestic free trade agreement, local governments should recognize the win-win nature of the provisions and thus cooperate in lowering their barriers to trade.[181] If local and regional officials become familiar with the reasons for enforcing these provisions, they will understand how they stand to gain from uniform nationwide enforcement.[182] Thus, their influence over the judiciary will not bar effective administration of the AML. Experience with the benefits created by this regulation may, in fact, encourage local and regional officials to trust in competition and competition law, thereby resulting in far-reaching effects that will ultimately aid effective enforcement of the more complex aspects of the law, such as merger review.[183]

This approach is based on a realization that China comes to antitrust with a very different history than that of jurisdictions such as the United States and the European Union, which themselves took many decades to develop merger review to its present stage. It will take time for China to develop the capacity for effective enforcement in the more complex areas of competition law.[184] Furthermore, China has no experience with judicial review of governmental action, which in the Western nations is fundamental to the relationship between the regulators and the regulated.[185] Both impartial review of agency decisions and the ability to take action that is unpopular with other government entities are essential to accurate decisionmaking. Officials need to develop familiarity with the intricacies of antitrust review, a process which will be aided through experience, involvement

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179. *Id.* To wit, the relevant facts behind a governmental decision, such as the denial of a permit or license, are usually quickly discernible.

180. Veron Mei-Ying Hung, *China's WTO Commitment on Independent Judicial Review: Impact on Legal and Political Reform*, 52 AM. J. COMP. L. 77, 95–96 (2004); Pate, *supra* note 168, at 209.

181. *See* Mehra & Yeng, *supra* note 176, at 424–26 (citing Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 VAND. L. REV. 1401, 1405 (1994)).

182. Mehra & Yeng, *supra* note 176, at 427–28.

183. *Id.* at 411.

184. Pate, *supra* note 168, at 195–96; *see also* D. Daniel Sokol, *The Future of International Antitrust and Improving Antitrust Agency Capacity*, 103 NW. U. L. REV. COLLOQUY 242, 242-43 (2008) ("There is a learning curve for young antitrust agencies.").

185. Pate, *supra* note 168, at 208.

with international institutions, and technical assistance from agencies such as the DOJ, FTC, and European Commission.[186] The judges and officials who review any disputes arising from agency determinations will become more effective in these duties both through specific training on the competition policy issues involved and through experience gained from specializing in AML appeals.[187] Because phased implementation deploys regulatory resources in the areas where they will be most effective first and helps officials lay the groundwork for effective merger enforcement later, this approach will assist the Chinese authorities in developing the institutional knowledge that they will need for broader enforcement later.

In addition, China has different needs and goals than do the established antitrust pillars of the United States and European Union. China's approach to antitrust will inevitably be different from the Western approach.[188] For instance, the Chinese government places a great deal of emphasis on stability in its society, and the development of a "harmonious society" is an oft-repeated core goal of its governance.[189] To the extent that competition results in upheaval in markets and corresponding job losses, the government tends to be wary in its approach toward competition.[190] A key benefit of this approach is that experience with the economic benefits of AML enforcement will help assuage skepticism of the ability of competitive markets to achieve China's important social, economic, and developmental goals.

This gradual approach to convergence of Chinese antitrust to international norms is certainly promising. It is based on a solid understanding of the challenges facing young competition authorities in transition economies and the likely hesitance that the Chinese government will feel in putting their confidence in competition in order to achieve important social and economic goals. Gaining familiarity with antitrust enforcement by beginning with its simplest concepts minimizes both the administrative cost of enforcement and the risk of error in interpretation or application. The approach also has the advantage of providing significant direct benefits to consumers, which will give an early boost to public confidence in competition.

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186. *See generally* Sokol, *supra* note 184, at 242.

187. Kovacic, *Getting Started*, *supra* note 170, at 420–21.

188. Pate, *supra* note 168, at 211; *see* discussion *supra* Part III.A.

189. *See* John Delury, *"Harmonious" in China*, 148 POL'Y REV. 35, 35 (2008) (discussing China's discourse of "harmony" and its origins in Confucian thought).

190. Harris, *supra* note 1, at 177.

In sum, this proposed approach to Chinese merger analysis is that, while the authorities gain experience by working against cartels and local administrative monopolies, more complex issues such as merger analysis are put on a backburner. Meanwhile, the international competition community would continue to engage Chinese officials in discussions about their perception of the goals of antitrust law[191] and to support institutional reforms such as judicial independence, believing such reforms present the best opportunity to avoid merger decisions that are contrary to competition theory.[192]

The significant flaw in this approach, however, is that it assumes more patience than Chinese authorities are likely to exercise with respect to mergers. This approach appears to depend on the questionable assumption that the Chinese authorities would be willing to refrain from merger regulation until both (a) the international antitrust community has had time to convince them to conform to international norms, and (b) they have developed a judiciary that is more independent and an antitrust establishment that agrees with Western principles of merger analysis.

But this proposal, unfortunately, is likely a moot point. Given that the law is already in effect and that merging parties are already required to notify the authorities of their combinations, it was never likely that China would wait to get significantly involved in merger review. Instead, the authorities are more disposed to begin enforcement activity with respect to mergers early. Indeed, the first year of experience, with decisions such as the Coca-Cola veto,[193] demonstrates that China will not wait. What is needed, then, is a solution that will incorporate gradual implementation of AML enforcement, build upon the likelihood of early merger enforcement, and create the conditions for effective Chinese merger review that will benefit the Chinese economy and will not harm the global economy.

IV. *DO* TRY THIS AT HOME, FIRST: A WORKABLE SOLUTION

In order to minimize both procedural and substantive risks to the world market, most Western commentators believe that Chinese merger review should be brought in line with prevailing international norms.[194] However, engagement and advocacy for an AML that mirrors the workings and goals of international antitrust have fallen

191. Pate, *supra* note 168, at 210.

192. *Id.*

193. *See supra* notes 126–33 and accompanying text.

194. *See* discussion *supra* Part III.B.

somewhat short of producing a law clear of potential conflicts with Western antitrust regimes. China will seek to address its somewhat unique concerns as a developing economy by considering, as part of its antitrust analysis, the effect of mergers on national development. Whatever one thinks about the merits of this approach relative to the West's narrow consumer–focused approach, Chinese merger review presents the following question: What can be done to avoid experimentation with this novel approach harming competition in the world economy and consumers everywhere?

China's particular social goals and institutional realities mean that Chinese antitrust is most likely to succeed if it begins by phasing in implementation of enforcement.[195] The flaw in trying to begin enforcement by focusing only on cartels and "administrative monopoly," however, lies in the reality that China will not wait until after it has completed complex institutional reforms and gained extensive experience in antitrust enforcement to implement merger enforcement. Engagement and support for judicial independence will certainly help develop effective enforcement in the long run,[196] but such longitudinal efforts leave a significant time gap during which China will be enforcing the AML's merger provisions, as it is already doing. The key is finding a way to apply similar concepts of phased implementation and institutional learning directly to immediate merger enforcement.

Given this reality, the best way to develop merger review that benefits China's citizens and minimizes international friction is to begin merger enforcement early, focusing on the domestic: China should allow purely domestic mergers with pro-competitive benefits and block domestic mergers that would clearly harm competition. By starting merger enforcement early while substantially holding off on international mergers,[197] the Chinese public will receive the greatest benefit and will be able to see the most explicit examples of these benefits. At the same time, the government can minimize the perceived threats, both substantive and procedural, to international markets. China can then refine its analysis through experience on domestic mergers, learning empirically whether the consideration of

195. Kovacic, *Getting Started*, *supra* note 170, at 444–46; Pate, *supra* note 168, at 196.

196. Pate, *supra* note 168, at 210.

197. The fact that China has already begun antitrust enforcement on international mergers, *see supra* notes 123–33 and accompanying discussion, does not make this argument moot because the Ministry of Commerce can fairly easily shift more resources to domestic merger review, retaining just enough international merger review resources to protect against the most egregiously anticompetitive cross-border mergers.

development and rival firms successfully achieves their goal of furthering development without harming competition or consumers.

A. Phased Implementation Can Solve the Substantive Concerns with the Anti-Monopoly Law

From the perspective of most Western commentators, the substantive overbreadth of China's goals in implementing the AML has its origins in a lack of trust in competition to create prosperity and a concern about the instability that competition creates.[198] The centrality of stability as a social goal of the Chinese government means that the government is unlikely to be dissuaded from considering factors such as a merger's impact on national economic development and rivals, as rivals' bankruptcies and plant closings will create unemployment and prevent local industry from taking root.[199] For their part, Western commentators fear that these considerations will tend to discourage mergers that increase efficiency in cases where inefficient plants or rivals would close.[200] The authorities will likely feel compelled to block such mergers or shape consent decrees to protect labor and local industry.[201] Indeed, this compulsion likely will be the greatest when enforcers are confronted with cross-border mergers, wherein the consolidation will result in some plants in China closing and some of the profits being enjoyed by overseas shareholders, who may also acquire a treasured Chinese brand. Such transactions would understandably give any government agent pause, particularly where the government places such emphasis on avoiding instability.

The early stages of Chinese merger enforcement, therefore, must proceed in a way that builds confidence in competition so mergers that ultimately benefit consumers will not be blocked, even in the case of cross-border mergers. The best way for China to overcome its natural hesitation in such situations is to begin by gaining experience with domestic mergers, where all benefit to be gained from the merger will stay within the Chinese economy: Chinese consumers will benefit from lower prices and improved goods and services, and

198. Blumenthal, Presentation, *supra* note 144, at 7.

199. Fox, *The Other Path*, *supra* note 148, at 230.

200. Pate, *supra* note 168, at 201–02.

201. To the extent that they do so, they may reduce China's prosperity as consumers do not get the best products at the lowest prices available through increased efficiency, and cause friction in the global economy as firms with ties to China will be discouraged from efficient combinations. *See* GAVIL ET AL., *supra* note 4, at 568–70 (discussing the role of efficiencies in the determination of whether a merger is anticompetitive).

Chinese firms will benefit from increased profits. Because the political cost of allowing such a transaction to proceed will be much lower than one involving a foreign corporation, it will be easier for the authorities to take what may be perceived as a risk in approving the merger. Though in the short term some jobs may be lost as plants close or as inefficient rivals lose market share, the net benefits will be quite broadly shared.[202]

Indeed, starting with domestic mergers would likely help the Chinese agencies learn how they can most effectively consider the factors of development and the effect on competitors within the scope of merger analysis. In a domestic merger, there would be no risk of political pressure tempting officials to overreach by blocking a merger that benefits consumers in order to protect Chinese companies. Where a domestic merger neither harms nor benefits consumers but would be likely to impede economic development, the officials could experiment with either blocking the merger or extracting remedies designed to remove the impediments to development.[203] By doing this in the domestic context, China would be able to discover whether this approach is, in fact, economically beneficial, as all effects would be felt within its own borders. If such an approach worked domestically, the Chinese authorities could then apply their learning in cross-border mergers with less risk of imposing costs on sister jurisdictions around the world. If the decision resulted in significant costs, the regulators would be able to fine-tune their approach on the next such merger without having to worry about international repercussions from their experimentation.

Skeptics may contend that experimenting with merger analysis that incorporates the consideration of economic development in the domestic context would not be effective because some development concerns would not apply the same way domestically as they do in cross-border mergers. For instance, where there are no foreign firms involved, there is no risk of domestic firms being pushed out of markets by large foreign firms who will not contribute to domestic development, such as by providing skilled jobs in the country. In the

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202. Ideally, most of the early mergers reviewed and approved would be ones where the efficiencies are significant enough that the average consumer benefits in a visible way, thereby increasing the public and governmental comfort level with such decisions.

203. As long as this experimentation is limited to where the parties cannot show the merger would increase efficiency, this will not be as harmful to consumers as some commentators fear. *See* Fox, *The Other Path*, *supra* note 148, at 229 (observing that "handicap[ping] the efficiencies of the dominant firm and thereby harm[ing] . . . consumers . . . was not the problem in the forefront of our minds" as developing country policymakers; abuse of dominance and other anticompetitive practices are more significant concerns in this context).

context of China, however, there is a way around this critique. China is a very large country, with very diverse economic conditions from one region to another.[204] Therefore, a merger between Shanghai-based companies that may affect economic development in Xinjiang may provide a good test case for these purposes.

By implementing Chinese merger review in this manner, the Chinese authorities would gain competence in antitrust enforcement and develop principles for a form of merger review that aids economic development, without risking international tension. As an added bonus from the perspective of international business, the authorities may be able to explicate their approach to merger analysis by drafting a set of Merger Guidelines, similar in format to those of the United States and European Union, based on their experience in domestic mergers.[205] This transparency would significantly reduce the perceived substantive threat posed to transnational mergers.

B. Phased Implementation Can Solve the Procedural Concerns with the Anti-Monopoly Law

Just as an initial focus on domestic mergers would alleviate many of the substantive concerns on the application of the AML, such an approach would also help bring about the procedural changes sought by the international antitrust community. For instance, this approach would encourage Chinese authorities to clarify what it means to obtain "controlling rights" in a firm.[206] Under the present vagueness of the AML, in order to determine whether a given transaction needs to be reported because it involves acquisition of "controlling rights," both foreign and domestic companies must either ask the authorities for guidance or make the decision based on their own judgment. If they ask the authorities for guidance, the apparent room for subjectivity will mean that the authorities will have to undertake a fairly substantial review in each instance just to decide whether the parties even have to file "notification" information. If the companies decide for themselves, it is possible that the authorities will learn of the transaction independently, conclude that control has been acquired, seek the notification information, and then possibly block the merger or even punish the firms for failure to comply with their

204. *See* CIA WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ch.html#Econ (last visited Sept. 11, 2009) ("Economic development has been more rapid in coastal provinces than in the interior.").

205. Kovacic, *Getting Started*, *supra* note 170, at 436–37.

206. *See supra* notes 160–65 and accompanying discussion.

notification obligations.[207] Alternatively, companies will take the safe route and report any acquisition of a significant stake in a firm, even if it falls well short of fifty percent, thereby leading to costly and needless work on the part of the regulating authorities. Any of these circumstances will impose significant administrative costs simply as a result of companies' uncertainty.

As the Chinese authorities gain experience across domestic cases, this would create a clear incentive to develop and clarify the standard for "controlling rights." The administrative costs, combined with the complaints that the Chinese government would invariably receive from domestic companies, would likely convince the authorities to promulgate an objective standard. Any clear standard that is published would then help alleviate the procedural confusion facing international businesses as China turns its attention to cross-border transactions. The antitrust community can therefore expect the phased-in implementation of merger review to help alleviate this procedural threat to international mergers.

On the other hand, critics may contend that a phased-in approach focusing on domestic mergers will not address the procedural concerns over application of AML notification thresholds to mergers in which the acquired firm has no significant connection to China.[208] Such concerns will not become relevant until the authorities begin to devote their attention to cross-border mergers, and thus the earliest experiences under this plan would not lead to any changes in this area. Once the authorities begin to shift their focus to the international arena, however, there is some chance that China will make the changes sought by international commentators. If this does happen, it will be for reasons similar to those for the clarification of "control." The overinclusiveness of the thresholds would mean that the enforcers would be devoting resources to receiving and reviewing information on transactions with no nexus to China—in other words, transactions in which they have no real interest.[209]

Moreover, many of these transactions would likely involve Chinese firms acquiring overseas firms that have no operations in

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207. *See* Anti-Monopoly Law, *supra* note 2, art. 21 ("When Operator consolidation reaches certain standards for declaration as designated by the State Council, relevant Operators shall report the consolidation to the State Council anti-monopoly law enforcement authorities prior to implementation. If a declaration is not made, the consolidation may not be carried out.").

208. *See supra* notes 158–59 and accompanying discussion.

209. *See* INTERNATIONAL COMPETITION NETWORK, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES 1 (2002), *available at* http://www.internationalcompetitionnetwork.org/media/archive0611/mnprecpractices.pdf (advocating that "jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned").

China. This means that a substantial portion of the cost of the over-inclusiveness would be imposed directly on the Chinese economy in the form of unnecessary transaction costs for Chinese companies operating overseas. By this time, the experience with the definition of "control" may well have made the authorities more responsive to concerns about the costs of administration and compliance. Therefore, although the phased implementation approach may not directly hasten this change, it may help create the necessary conditions for change.

Once China has gained experience in domestic merger analysis, it will be better prepared to review transnational mergers in a way that benefits the Chinese economy, both in terms of consumer welfare and economic development, while still minimizing friction in the global economy. After such experience, there will be substantially less chance of China reaching different conclusions from those of Western agencies on high-profile mergers, as the experience and confidence in competition will likely bring Chinese analysis closer to international norms both on matters of procedure and of substance. China will no longer be tempted to "experiment" with applying untested development considerations to cross-border mergers. This will reduce the risk of international tension arising out of decisions like the blocking of Coca-Cola's Huiyuan acquisition, a risk that would be weightier in cases where the American company is an important economic player and has a stronger desire to consummate the merger.[210] In such cases, there is serious potential for tension like that between the United States and European Union in the Boeing / McDonnell Douglas and General Electric / Honeywell mergers.[211]

C. Phased Implementation Can Help Further International Antitrust Convergence

As a consequence of this approach, any of the proposed international antitrust convergence efforts outlined above in Part II.A.3 would have a much greater chance of success, and China would be much more receptive to such international efforts. Particularly with regard to bilateral and multilateral arrangements, China could be expected to become a valuable participant in international convergence, sharing its experiences and applying the learning of

210. *See* Bauerlein & Fairclough, *supra* note 126 (observing that the acquisition may not have been a good deal for Coke, as Huiyuan's sales and market share had been slipping at the time of the failed acquisition).

211. *See supra* notes 53–61 and accompanying discussion.

others to its own enforcement mechanisms. China's increased trust in competition to create prosperity and its comfort with a more dynamic economy would enable it to listen more receptively to the advice of foreign practitioners without reflexively doubting that the Western approach could work in the Chinese context. At the same time, the lessons learned in the laboratory of domestic Chinese antitrust could be exported through these arrangements to help other developing countries create and apply competition law in a way that is suited to their unique needs.

Having devoted substantial effort to bringing China into the fold of convergence on international antitrust, major players like the United States and European Union would also be further convinced of the value of convergence and would devote more energy to these efforts, thus minimizing the risk of future merger-related conflict. Having become more aware of the systemic risks that could arise from antitrust review in countries like China, these players would recognize the need to make a concerted effort to achieve true convergence, not just lecture developing countries on how antitrust is done in the West. If experience shows that economic development can legitimately be part of antitrust merger analysis in developing countries without adversely affecting consumers worldwide, Western governments will be less perturbed when mergers involving Western firms are blocked due to development concerns. Ultimately, a gradual start for China beginning with review of domestic transactions would benefit every party with a stake in international antitrust merger review.

V. CONCLUSION

In order to help ensure a smooth introduction to the world antitrust arena, China should begin by gaining experience with antitrust merger review at home. As the Chinese government gains experience, it will develop trust in the fundamental concepts of competition policy and develop its merger analysis to achieve China's special goals without unnecessarily burdening international business. When this happens, China will be ready to apply its AML to cross-border mergers in a manner that allays the concerns of Western commentators and augments Chinese prosperity. In turn, this application will contribute to an international competition community where consumer interests are protected effectively and efficiently, foreign investors feel secure in investing in China's developing economy, and the risks of retaliatory protectionism are minimal. From that point, it is reasonable to expect that China will become an active participant in international convergence and norm creation efforts through fora like the ICN, while this experience will further convince the rest of the antitrust community to push toward international antitrust convergence. What had appeared initially to be a threat to efficient international business combinations may ultimately lead to an improved system of multi-jurisdictional merger review.

Christopher Hamp-Lyons[*]

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