CAN THE TIGER SIT DOWN WITH THE DRAGON? AN ASSESSMENT OF CHINESE AND INDIAN ANTITRUST LAWS

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I. INTRODUCTION

As globalization spurs increased competition in the international marketplace, countries around the world have hurried to implement competition policies to spur economic growth.\(^1\) Two of the world’s largest economies, India and China have recently developed and enacted new competition laws to encourage economic development, stimulate healthy market competition, and promote consumer welfare.\(^2\) How the law continues to develop in those countries has a great deal to do with their respective historical circumstances and present economic goals.\(^3\) For instance, China’s ultimate goal is to maintain political stability. The country “relies on economic growth to maintain its holy grail of political stability and sees antitrust law as a driver of economic growth.”\(^4\) India’s competition act “lists the economic development of the country as a goal of the law, which may result in permitting anticompetitive activities that ostensibly contribute to development goals.”\(^5\) These potentially divergent economic development goals could have enormous implications on international business.\(^6\)

This Note examines and compares the developing antitrust laws in China and India. Both nations are still developing into true market economies, and both see their respective competition laws as necessary parts of this evolution. Through comparative assessment, this Note aims to identify areas in these new antitrust laws that cause apprehension among the international community and to make specific suggestions as to what each country can take from the other to assuage that international concern.

The first section focuses on China’s legislative history regarding antitrust, and details some of the economic concerns driving the country’s adoption of new antitrust law. The second section does the same for India. The third provides a comparative overview of the two current legal regimes, including their relative standards and enforcement mechanisms. This Note concludes by elaborating on both what suggestions from the international community might be most helpful to both countries in furthering the domestic goals of

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4. Id. at 153.
5. Id. at 153–54 (internal quotations omitted).
6. Id. at 146–51.
their respective competition laws, and China and India’s potential to assume leadership roles in the movement towards global antitrust harmonization.

II. BACKGROUND

Antitrust, also known as “competition,” law has grown phenomenally in recent years.\(^7\) As of 2010, over 120 countries had enacted a competition law to regulate their domestic economy’s place in the melting pot that is the international corporate market.\(^8\) Antitrust law can be succinctly defined as “[t]he body of law designed to protect trade and commerce from restraints, monopolies, price-fixing, and price discrimination.”\(^9\) Recently, China and India have made their presence felt in international antitrust circles through their drafting and enactment of new competition laws.\(^10\) In China’s case, the 2008 adoption of the Anti-Monopoly Law of the People’s Republic of China (AML) marks the emerging economic power’s first implementation of a comprehensive antitrust law.\(^11\) India, on the other hand, first implemented a competition law in 1969.\(^12\) This law, the Monopolies and Restrictive Trade Practices Act 1969 (MRTP), was adopted to deal with monopolistic practices under a “command and control” economy.\(^13\) Since 1991, India has shifted its economic gears to fall more in line with free market economic principles.\(^14\)

Accompanying this change was the recognition that the MRTP was an ineffective means to regulate the Indian economy in a free market context.\(^15\)

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\(^7\) MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 2–3 (2010).
\(^8\) Id. at 3.
\(^9\) BLACK’S LAW DICTIONARY 111 (9th ed. 2009).
\(^10\) See generally Kaur, supra note 2, at 35 (“With many multinational companies either conducting or seeking to conduct business in the two countries, and their domestic industries experiencing unprecedented growth, it is paramount that the governments of India and China work to ensure healthy and competitive markets to allow consumers to reap the benefits of economic development. The Indian and Chinese governments are responding by developing competition laws that will encourage market competition and consumer welfare.”).
\(^12\) ABA SECTION OF ANTITRUST LAW, COMPETITION LAWS OUTSIDE THE UNITED STATES, at India 5, 5–6 (H. Stephen Harris ed., 2d ed. 2011).
\(^14\) Sharma, supra note 13.
\(^15\) See Kaur, supra note 2, at 35.
This realization in turn led to the 2003 adoption of a new competition law, the Competition Act of India (Competition Act) that replaces the MRTP.\textsuperscript{16} This section provides context as to the different obstacles and concerns faced by China and India in the implementation of their new competition laws.

\textbf{A. China’s Legislative History Regarding Antitrust Law}

The Chinese implementation of competition law has known three distinct eras.\textsuperscript{17} Initially, there was a complete absence of competition law.\textsuperscript{18} Before 1978, China maintained a planned economy, a system that did not allow for unauthorized competition.\textsuperscript{19} Between 1978 and 1992, China adopted a “planned commodity” economy; this provided for limited competition.\textsuperscript{20} In 1992 the People’s Republic of China adopted as its goal the creation of a “socialist market economy.”\textsuperscript{21} Since the 1990s, China has become more open to foreign investment, but such investment has been regulated to a point far beyond that allowed by international trade organizations such as the World Trade Organization (WTO).\textsuperscript{22} State regulation of foreign investment began to relax in 2001 to comply with China’s accession to the WTO.\textsuperscript{23}

The AML was adopted by the Twenty-Ninth Session of the Standing Committee of the Tenth National People’s Congress.\textsuperscript{24} It went into effect on August 1, 2008 and reflects over thirteen years of drafting and consultation with international experts.\textsuperscript{25} A number of laws were adopted prior to the drafting of the AML, most notably the 1993 Anti-Unfair Competition Law (AUCL) and the 1997 Price Law (Price Law), both of which govern some antitrust issues.\textsuperscript{26} It is anticipated that the AML will supersede these other

\begin{footnotesize}
\begin{enumerate}
  \item ABA SECTION OF ANTITRUST LAW, supra note 12, at India 5–6.
  \item Zhenguo Wu, Perspectives on the Chinese Anti–Monopoly Law, 75 ANTITRUST L.J. 73, 73–74 (2008).
  \item Id. at 73.
  \item Id. at 73–74.
  \item Id. at 74.
  \item Id.
  \item Kaur, supra note 2, at 36.
  \item Id.
  \item Id. at 73, 76–78.
  \item See ABA SECTION OF ANTITRUST LAW, supra note 12, at China 17–19 (explaining that the AUCL was the first Chinese law to address unfair and anticompetitive practices). Similar to the AML, the AUCL is concerned with “unfair competition,” a loosely defined term that refers to some antitrust issues also covered by the AML, such as predatory pricing. Whether the AUCL continues as a law relevant to antitrust policy remains to be seen, as the AUCL provisions that overlap with those of the AML are still effective. See id. at 19–21 (noting a similar overlap between the Price Law and the AML concerning predatory pricing issues, but noting that the Price Law has been invoked simultaneously with the AML, and that the Price
\end{enumerate}
\end{footnotesize}
laws over time. However, these laws still remain in effect despite the AML’s position as “China’s only comprehensive competition statute.” As the AML is meant to supplant the AUCL, the Price Law, and a host of other semi-related antitrust provisions, the AML is the focus of this Note.

As the brief history above highlights, China has expended a huge number of resources in drafting what it hopes will be a comprehensive competition law that will transition smoothly into the existing international antitrust framework while forwarding China’s commitment to the growth of its “socialist market economy.”

B. India’s Legislative History Regarding Antitrust Law

India attained independence in 1947. Shortly thereafter, India adopted “command and control laws, rules, regulations, and executive orders.” India’s first competition law was the MRTP, enacted in 1969, which drew its authority from Articles 38 and 39 of the Indian Constitution. The relevant Article states: “The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.” The Indian command economy lasted until 1991, when the Indian government began a program of economic liberalization. This shift towards a market economy led to increased competition in the marketplace and the decision by the Indian government to replace the MRTP Act with the Competition Act, a decision summed up as follows:

In the pursuit of globalization, India has responded by opening up its economy, removing controls, and resorting to liberalization. The natural corollary to this is that the Indian market should be geared to face competition from within the country and outside. The Monopolies and Restrictive Trade Practices Act, 1969, has become obsolete in certain respects in

Law’s efficacy seems to stem from its ability to reap more specific local results with regards to price fixing).

27 Id. at China 13.
28 Id.
29 Id. at India 5.
31 INDIA CONST. art. 38, cl. 1.
32 Id.
33 Chakravarthy, supra note 30.
the light of international economic developments, relating more particularly to competition laws, and there is a need to shift our focus from curbing monopolies to promoting competition.\textsuperscript{34}

As such, the Indian government passed the Competition Act on January 13, 2003 and began to enact several provisions with the full force of law on March 31, 2003.\textsuperscript{35} These provisions are to be enforced using the adjudicatory powers of the aptly named Competition Commission of India (CCI), an entity created by the government on October 14, 2003.\textsuperscript{36} By the end of 2003, the provisions in force dealt mostly with the procedural establishment of the CCI; “provisions related to anticompetitive agreements and abuse of dominance” were not given legal effect until May 20, 2009.\textsuperscript{37} Even more recently, the Competition Act’s merger control regulations (“combination regulations” in the terms of the Competition Act) were enacted on June 1, 2011.\textsuperscript{38}

The large temporal gap between the initial adoption of the Competition Act’s procedural and substantive provisions was caused by a lawsuit alleging that the CCI’s adjudicatory powers constituted a violation of India’s separation of powers doctrine.\textsuperscript{39} The CCI as a functioning body was placed in limbo from 2003 until 2007, when the Competition (Amendment) Act was passed by Parliament.\textsuperscript{40} The Amendment Act created the Competition Appellate Tribunal, and requires the Tribunal to be chaired by either a retired Supreme Court Justice or a High Court Chief Justice.\textsuperscript{41} This Tribunal will serve as an adjudicatory oversight body for the CCI.\textsuperscript{42}

While India’s competition law has been slower to get off the ground than China’s AML, the fact that most of the Competition Act’s substantive provisions are now fully implemented and helmed by one adjudicative body

\textsuperscript{36} Sharma, \textit{supra} note 13.
\textsuperscript{37} ABA Section of Antitrust Law, \textit{supra} note 12, at India 6–7.
\textsuperscript{39} ABA Section of Antitrust Law, \textit{supra} note 12, at India 6.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
promotes faith that the Competition Act will prove to be a more effective mechanism to govern competition law than the MRTP.

C. Economic Goals of Antitrust Law Generally

Each country that has adopted a competition law (over 120 and counting) has done so to regulate a market economy and to prevent private industry from wielding its power in a manner that would undermine national economic growth. This type of regulation is generally held to foster the growth of healthy competition thereby creating markets responsive to consumer needs, which should in turn result in heightened consumer welfare and economic efficiency. While these tenets are generally held to be true, each country that adopts a competition law does so for more specific, secondary policy reasons as well, and it is these secondary reasons that are the focus of this section.

D. China’s Economic Goals Regarding Antitrust Law

The main impetus behind China’s drafting and subsequent adoption of the AML was the country’s accession to the WTO. Since the economic opening-up of 1979, China’s economy has been in a boom period, and maintaining this growth is the government’s main economic concern. China’s economic growth during this boom came at the expense of many of its state-owned enterprises (SOEs), a sector viewed as “key engines of economic development.” China’s concern that increased domestic

43 See Dhall, supra note 34, at 3 (explaining the general economic goals of competition law).
47 See id. at 173 (noting that reforms and legislative enactments led to China’s economic growth over the last several decades).
48 Id. at 174, 176.
competition from foreign firms would result in Chinese job loss due to the “inevitable demise of unproductive state-owned industries” highlights China’s main interest other than general economic growth—maintaining domestic tranquility.\textsuperscript{49} This interest, dubbed “Harmonious Society,” is especially salient under a monist political regime, as any marked decrease in the overall quality of life could result in political instability, something China is anxious to avoid.\textsuperscript{50} The AML’s drafting process shows the Chinese commitment to maintaining the “Harmonious Society” in the midst of its transition to a more open, global economy.\textsuperscript{51}

The overarching goal of the AML’s drafters was to write the law in a manner that would allow China’s “socialist market economy” to develop in compliance with international practices and to promote an economic system with self-regulating “natural selection” wherein the strongest firms survive and thrive.\textsuperscript{52} The drafters were guided by four principles. First, that the AML reflect China’s adoption of a new, market economy system.\textsuperscript{53} Second, that the AML should mirror the development of the Chinese economy and incrementally impose its anti-monopoly framework.\textsuperscript{54} Third, the AML should borrow liberally from more established foreign legislation and fit them onto the Chinese antitrust frame.\textsuperscript{55} Fourth, the drafters were to ensure that the AML complied with the reality and requirements of a global economy in order to aid in China’s integration into the global framework.\textsuperscript{56}

These guiding principles bode well for the flexibility of the AML, which is necessary for the law to adapt to the disparate demands that will be placed on its use by the international community. China’s vested interest in maintaining control over the development of the economy, in an area like antitrust where success depends on foreign investment, requires laudable juggling skills on the part of China’s government, especially because many

\textsuperscript{49} Id. at 176.


\textsuperscript{51} See Harris, supra note 46, at 177–83 (noting that internal support for liberalization and legal reform has been tempered by the prospect of consequential bankruptcies, job losses, and social unrest and providing an outline of the drafting process).

\textsuperscript{52} Wu, supra note 17, at 77–78; see also AML, supra note 45, art. 1 (“This Law is formulated with the goal of preventing and curtailing monopolistic practices, protecting fair market competition, increasing economic efficiency, safeguarding the interests of consumers as well as society as a whole, and promoting the healthy development of the socialist market economy.”).

\textsuperscript{53} Wu, supra note 17, at 78–79.

\textsuperscript{54} Id. at 79.

\textsuperscript{55} Id.

\textsuperscript{56} Id.
Western experts lack any real idea as to how the AML should react to China’s unique situation.57

E. India’s Economic Goals Regarding Antitrust Law

All countries, especially developing ones, face unique challenges in implementing a competition law and have specific reasons for doing so. As noted above, a widely accepted objective for any competition law is to enhance economic efficiency as a means to spur economic development.58 It is commonly held that such development will lower prices and enrich the overall welfare of the consumer, who will then be in a better position to inject capital back into the economic artery.59 This injection rewards innovation, thus encouraging further economic development.60 In India, these goals were to be carried out by the MRTP, and a brief synopsis of that law’s failings is necessary to understand India’s reasons for implementing the Competition Act.61

Like China, India opened its economy in the early 1990s.62 This opening led to trade liberalization and a commensurate increase in foreign corporations establishing a presence in India.63 This foreign business presence, in addition to India’s obligations to the WTO, led the Indian government to the realization that the MRTP as it stood in the 1990s needed to change if it were to adequately protect Indian industry.64 The Indian government appointed a committee to formulate a competition policy that would allow for legislation appropriate for India’s new place in the global economy.65 As noted previously, the committee decided that India required a new competition law.66 The MRTP lacked a provision allowing for the creation of a “watchdog for the introduction and maintenance of competition policy.”67 The Committee also found that “[c]ompetition law should deal with anti-competitive practices, particularly cartelization, price-fixing and other abuses of market power and should regulate mergers,” something the

57 Hamp–Lyons, supra note 1, at 1597–98.
59 Id.
60 Id.
62 ABA SECTION OF ANTITRUST LAW, supra note 12, at India 6.
64 Id.
65 Id.
66 Id. at 8.
67 Id. at 7.
MRTP did not do.\textsuperscript{68} As such, the MRTP was perceived as an impotent measure to combat unfair competition.\textsuperscript{69}

Taking these findings into account, the Indian government unveiled the Competition Act in 2003.\textsuperscript{70} The principle objectives as stated in the Competition Act are to:

\begin{quote}
\[P\]rove, \ldots keeping in view of the economic development \ldots of the Indian economy, \ldots for the establishment of a Competition Commission to prevent practices having adverse effect on competition, to promote and sustain competition [in Indian markets], to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters therewith or incidental thereto.\textsuperscript{71}
\end{quote}

Typically, developing countries enact competition laws with dual sets of objectives.\textsuperscript{72} The primary objectives of the Competition Act are of a macro-economic nature and deal with broad ideas like consumer welfare and economic development.\textsuperscript{73} “[T]he ultimate objective of the competition law \ldots is the protection of the interest of the consumer,” a primary objective more fully defined in the Competition Act.\textsuperscript{74} The secondary objectives typically included in competition laws describe the country’s more local, specialized needs.\textsuperscript{75} Unlike the AML, no secondary reasons for promulgating the Competition Act have been given.\textsuperscript{76}

Whether these primary objectives will be met through Indian antitrust regulation remains to be seen. India faces challenges unique from those being confronted in China, beginning with how India’s competition law will coexist with India’s democratic government. The Indian government does not have the power to enforce a state resolution like China’s “Harmonious Society,” and its democracy prevents it from making swift changes to react

\begin{thebibliography}{99}
\bibitem{68} Id.
\bibitem{69} Id. at 17.
\bibitem{70} Id. at 1.
\bibitem{71} Id. at 1.
\bibitem{73} Id. at 255.
\bibitem{74} Id.
\bibitem{75} Id. at 254.
\bibitem{76} Id. at 254–55.
\end{thebibliography}
and deal with unforeseen antitrust issues. This problem was one of the reasons behind the failure of the MRTP, but it has been addressed in the new competition law. All in all, it is apparent that the economic goal of the Competition Act is in its name: it strives to promote the national desire for Indian corporations to “level the playing field” with incoming international firms.

III. MERGER REVIEW IN CHINA AND INDIA

Mergers “are the combination of previously independent firms into one firm.” This type of corporate interbreeding can effectively occur in two ways: through a formal merger combining two separate corporations into a single entity, or by one corporation absorbing another corporation’s assets. This distinction is unimportant in the context of antitrust law and governance; the salient concern is that a merger changes what were once separate, competitive businesses into a common business entity with a single profit interest.

These types of business combinations are typically addressed, via merger laws, in three ways: notification procedures, merger thresholds, and public benefit assessments. This section explores merger review under the AML.
and the Competition Act, as well as the enforcement mechanisms present in each of the two laws.

A. Standards of Review and Extraterritorial Effects of Mergers

As globalization increases, there is an increasingly high risk that proposed mergers be subjected to review in an ever-larger number of jurisdictions. If a merger requires international comity to ensure success, one nation’s objection can derail the entire process. If a nation’s dismissal of an attempted merger is viewed by the international community as lacking a legitimate antitrust basis and is perceived as solely a means to favor its own domestic goals, serious tensions can arise between the affected countries.

As the number of countries with full-fledged competition laws grows, so too does the number of competition laws that have extraterritorial effect. The potential commercial dangers caused by this proliferation of extraterritorial regulation are evident in the proposed merger of General Electric (GE) and Honeywell International, two U.S. companies incorporated in and operated from the U.S. The U.S. cleared the transaction, but the European Union blocked the merger due to its perceived potential for monopolistic practice. The result of the European Commission’s decision was that the merger was blocked in both the European Union (EU) and in the U.S., despite neither party to the proposed merger being European. This highlights the unfortunate reality that individual nations, in applying their respective competition laws, have no duty to show deference to other nations in their assessment of a merger’s validity, even where both corporations hail from a foreign nation.

that could grow from a merger against the potential anti–competitive effects stemming from the merger. See id. at 89 (explaining how public benefit can outweigh anti–competitive effects in certain situations).

84 Hamp–Lyons, supra note 1, at 1578–79.
85 Id. at 1579.
86 See id. at 1599–1602 (detailing international concerns over potentially protectionist application of the AML).
87 See Ana Piilola, Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation, 39 Stan. J. Int’l L. 207, 207 (explaining how, despite antitrust laws being predominantly national laws, their extraterritorial application has been the traditional means by which nations deal with antitrust issues).
90 Id. at 155.
The U.S. and EU antitrust laws are the two most developed bodies of antitrust law in the world and are generally held to be very similar in their treatment of antitrust issues. If these two long-developing bodies of law can reach such opposite views on a merger, it is no wonder that the global business community monitors the infancy of Chinese and Indian antitrust law with apprehension. As two of the largest emerging markets on the planet, a great number of potential mergers will fall under the extraterritorial jurisdiction of their respective competition laws. The way these two eastern giants review mergers and enforce their decisions will likely play a huge role on the international economic stage as competition laws develop.

1. Mergers/Combinations—Standards of Review Under the AML

While the provisions of the AML as a whole are enforced by an administrative hydra comprised of the Anti-Monopoly Commission (AMC), the Anti-Monopoly Enforcement Authorities (AMEA), and the Ministry of Commerce (MOFCOM), merger review is commenced solely under the auspices of MOFCOM. The standards of review for mergers under the AML are laid out in the fourth chapter of the AML, “Concentration of Business Operators.” “Concentration of Business Operators” for purposes of the AML is defined in Article 20, and refers to three types of concentrations: “mergers[,] acquisitions of control of another business operator through acquisition of equity or assets[,] and acquisitions of control of, or of the capacity to exercise decisive influence over, another business operator by contract or other means.” Operator concentration can either promote or hinder competition in a globalized economy.
Article 27 of the AML identifies several factors MOFCOM should consider when engaged in merger review. The required documents to file with MOFCOM are similar to those required by the European Union, but documents written in a language other than Chinese must be accompanied by a Chinese translation. Much of the specific guidance for merger review under the AML is still in draft form and, as such, is of only limited utility for foreign corporations seeking to expand into China. This problem is compounded by the fact that little analysis of how MOFCOM applies these regulations currently exists, making it difficult to anticipate exactly how MOFCOM’s analysis of a proposed merger will come out. The most informative analysis currently available can be found in MOFCOM’s public merger decisions. However, MOFCOM’s explanations contain significant omissions and potential for errors in interpretation.

Despite the brevity of MOFCOM decisions, certain insights into the review process can be gleaned from the decisions issued thus far. For example, where the merger involves the “combination of well-known brands,” there is a heightened risk of scrutiny. Heightened care should also be taken where a company involved in a merger has a dominant or leading position in the market, especially where the proposed merger could threaten smaller domestic companies.

MOFCOM’s standard for review of proposed mergers, while murky, appears to offer an improvement over China’s law on the subject prior to the adoption of the AML. Previous to the adoption of the AML, China implemented a merger review process that applied only to “foreign

98 ABA SECTION OF ANTITRUST LAW, supra note 12, at China 50; see also AML, supra note 45, art. 27 (“The following factors should be considered when investigating Operator consolidations: (1) The relevant market share of Operators party to the consolidation as well as their ability to control the market; (2) The degree of consolidation in relevant markets; (3) The effect of the consolidation on market entry and technological advance; (4) The effect of the consolidation on consumers and other Operators; (5) The effect of the consolidation on national economic development; and (6) Other factors that the State Council anti-monopoly law enforcement authorities regard as worth consideration.”).

99 McDavid & Wei, supra note 94, at 991–92.

100 Id. at 995.

101 ABA SECTION OF ANTITRUST LAW, supra note 12, at China 50, 52. An example of MOFCOM’s public statements regarding proposed mergers can be found at Andrew Batson, China’s Statement Blocking Coca-Cola Huiyuan Deal, CHINA REAL TIME REPORT (Mar. 18, 2009, 6:58 AM), http://blogs.wsj.com/chinarealtimetime/2009/03/18/china%E2%80%99s-statement-blocking-coca-cola-huiyuan-deal/.

102 ABA SECTION OF ANTITRUST LAW, supra note 12, at China 52.

103 Id.

104 Id.

companies seeking to acquire domestic Chinese companies.\footnote{106} According to Article 2 of the AML, merger review now encompasses proposed domestic mergers, although in effect little has changed, as all published merger reviews have involved foreign companies.\footnote{107} However, the fact that the law identifies domestic mergers as within MOFCOM’s power should encourage international investors, especially in light of MOFCOM’s track record of granting approval. The agency has reviewed seven proposed mergers, and allowed six of them to move forward.\footnote{108} As each of these mergers involved a foreign corporation, this approval rate should give investors a reason to feel cautiously optimistic about their chances for success with a merger proposal in China.

2. Mergers/Combinations—Standards of Review Under the Competition Act

The Competition Act’s provisions regarding merger control came into effect on June 1, 2011.\footnote{109} The Competition Act forbids any person or enterprise from entering into a merger that “causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.”\footnote{110} A “combination” for purposes of the Competition Act can mean any merger or acquisition that would result in “control, shares, voting rights or assets” whose value eclipses certain thresholds laid out in the Competition Act.\footnote{111} “Combination” also refers to an acquisition “of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or provision of a similar or identical or substitutable service, if” the newly acquired business has assets within or outside India worth over the

\footnotesize{\begin{itemize}
\item \footnote{106} Id. at 708.
\item \footnote{107} Id. at 708–09.
\item \footnote{108} Id.
\item \footnote{109} Rana, supra note 38.
\item \footnote{110} The Competition Act, supra note 45, § 6(1).
\item \footnote{111} Id. § 5(a). “Control,” for purposes of the Competition Act, is defined as “controlling the affairs or management by (i) one or more enterprises, either jointly or singly, over another enterprise or group [or] (ii) one or more groups, either jointly or singly, over another group or enterprise.” Id. § 5, explanation (a). A “group” is found when two or more enterprises are, directly or indirectly, in a position to (i) exercise 26 percent or more of the voting rights in the other enterprise; or (ii) appoint more than 50 percent of the members of the board of directors of the other enterprise, or (iii) control the management or affairs of the other enterprise.
\item \footnote{Id. § 5, explanation (b).} Id. § 5, explanation (b).}
\end{itemize}}
amount set by the Act.\textsuperscript{112} Finally, “combination” can also, according to the Competition Act, refer to a merger or amalgamation between businesses where the combining parties cross the location and asset value thresholds laid out in the Act.\textsuperscript{113} The value of the threshold assets is measured according to the previous year’s audited totals, and takes into account such intangibles as goodwill, trademark, copyright and a host of other factors.\textsuperscript{114}

While the portions of the Competition Act dealing with combinations were implemented well after the Act’s other substantive provisions, the CCI spent that time accepting criticism of its Draft Combination Regulations from interested parties around the world.\textsuperscript{115} Many of these criticisms were taken to heart by the CCI and were addressed with the May 11, 2011 publication of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations).\textsuperscript{116} While the CCI’s apparent willingness to accept criticism should be looked upon favorably by many in the international community, commentators have made clear that the changes have not answered all questions nor smoothed all perceived wrinkles from the combination regulations.\textsuperscript{117}

The Competition Act lays out a list of factors similar to those utilized in the AML that the CCI is required to consider in “determining whether a combination would have the effect of or is likely to have an appreciable adverse effect on competition in the relevant market . . . .”\textsuperscript{118} The CCI acted quickly in showing its willingness to exercise its powers of review, passing its first clearance of a proposed combination on July 26, 2011, just over one month after the Competition Act’s combination provisions were brought into force.\textsuperscript{119}

\begin{thebibliography}{99}
\bibitem{footnote112} Id. § 5(b).
\bibitem{footnote113} Id. § 5(c).
\bibitem{footnote114} Id. § 5, explanation (c).
\bibitem{footnote116} Rana, \textit{supra} note 38; the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, No. 3 of 2011, \textsc{India Code} (2011), vol. 98.
\bibitem{footnote117} See discussion infra Part IV.C.
\bibitem{footnote118} See the Competition Act, \textit{supra} note 45, § 20(4) (laying out the fourteen factors the CCI should consider in ruling on whether a proposed combination is or is not acceptable).
\end{thebibliography}
B. Enforcement Under the AML

MOFCOM is tasked with enforcement of the AML’s provisions concerning mergers and acquisitions. MOFCOM has the power to either clear a proposed combination or to further investigate its potential effects on competition. This initial decision must be made within thirty days of the agency receiving notice of the proposed transaction. MOFCOM can directly block a proposed merger where this initial inquiry convinces the agency that “[o]perator consolidation has the effect of restricting or eliminating competition . . .” If a proposed merger or acquisition passes MOFCOM’s initial scrutiny, the transaction could still be subject to further restrictions per Article 29 of the AML, which allows MOFCOM “to place restrictive conditions on the consolidation which will diminish its negative effects on market competition.” MOFCOM is charged with making its reasoning public when it denies a proposed combination or when it forces restrictive conditions as a prerequisite for a combination to move forward. However, MOFCOM’s explanations for its decisions relating to mergers thus far have been scant.

C. Enforcement Under the Competition Act

In India, the CCI enforces the Competition Act under Chapter IV of the Act. In rendering its judgment on whether a combination will have a deleterious effect on competition, the CCI follows “principles of natural justice,” and is not bound by India’s Code of Civil Procedure. This phrase “refers to allowing each person for whom there is an investigation to have an

120 McDavid & Wei, supra note 94, at 991–92.
121 Id.
122 AML, supra note 45, art. 25.
123 Id. art. 28. It is worthwhile to note that Article 28 allows the “Operator” to rebut such a finding through a showing that the transaction’s potential to foster competition or to promote the “public interest” clearly outweighs its potential negative effects on competition. Id. The AML does not elucidate exactly how such potential can be shown, nor does it define “public interest.” Id.
124 Id. art. 29.
125 Id. art. 30.
126 See Batson, supra note 101 (demonstrating that while MOFCOM does make statements public, thus living up to its duties under AML Article 30, these statements do not provide insight into the agency’s decision making process beyond MOFCOM’s assessment that a transaction will have negative effects on competition).
127 See ABA SECTION OF ANTITRUST LAW, supra note 12, at India 28–29 (outlining the enforcement duties and obligations of the CCI).
128 Id. at India 30.
opportunity of being heard; this concept is presented in the legal maxim *audi alteram partem*, which means ‘no man shall be condemned unheard.’129

Once the relevant merger documentation has been submitted to the CCI, the Competition Act gives the CCI the power to allow the transaction to progress or to disallow the transaction.130 The CCI makes this inquiry based on its own knowledge and information, which explains why premerger notification is mandatory under the Competition Act.131 Section 20 of the Competition Act lays out the methodology for the CCI’s investigation of a supposed violation of the Act’s regulations on combinations.132 The CCI may also, if it believes that the proposed combination will have an adverse effect on competition, order appropriate modification of the agreement where it believes such modification will remedy the anti-competitive effects of the combination.133

**IV. INTERNATIONAL CONCERNS**

There are a host of international concerns regarding China’s and India’s implementation of their merger laws.134 This section provides an overview of some of the more current concerns expressed by the international community beginning with the possible extraterritorial effects of the two laws. This section then briefly highlights more specific concerns regarding each of the two countries.

**A. Extraterritoriality**

Competition laws have proliferated throughout the developing world in recent years; China and India are two of the larger players on the world stage to have implemented them. Merger control regimes have grown exponentially, to the point where “[m]erger control is out of control.”135 The AML’s extraterritorial effects are laid out in Article 2, which states that

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129 *Id.*

130 *The Competition Act, supra* note 45, § 31(1)–(2).

131 RAMAPPA, *supra* note 63, at 258; *see also* The Competition Act, *supra* note 45, § 6(2) (requiring notice of impending mergers of amalgamations).

132 *See* RAMAPPA, *supra* note 63, at 258 (explaining the procedure the CCI implements in assessing a combination).

133 The Competition Act, *supra* note 45, § 31(3).

134 *See* Kaur, *supra* note 2, at 35–36 (identifying some concerns with the AML and the Competition Act).

“[t]his Law is applicable to monopolistic practices as part of economic activities occurring within the People’s Republic of China.”\textsuperscript{136} This law also applies to monopolistic practices outside of China that have the effect or eliminating of restricting Chinese market competition.”\textsuperscript{137} Section 32 of the Competition Act explicitly expands the CCI’s mandate to transactions outside of India’s borders if the transaction at issue “has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.”\textsuperscript{138}

One problem the international community has with the extraterritorial effects of these laws is their potential to be wielded as a type of unilateral bludgeon, meaning that MOFCOM or the CCI could potentially block transnational mergers that have little to do with their respective nations.\textsuperscript{139} This type of nationalistic behavior is not uncommon among developed countries, and it follows that developing nations seeking to promote their own domestic agendas through antitrust law would not balk at similar behavior if doing so would promote their economic policy.\textsuperscript{140} However, extraterritorial abuse of their respective antitrust laws would likely be a self-defeating move for China or India. Each country created a competition law as a means to encourage and control the growth of its domestic economy.\textsuperscript{141} Abuse of the extraterritorial reach of the AML or Competition Act would stymie these attempts, because such behavior could decrease foreign investment in Chinese or Indian industry due to the likely perception that the Chinese and Indian antitrust authorities are overly protectionist.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{136} AML, supra note 45, art. 2.
\item \textsuperscript{137} Id.
\item \textsuperscript{138} The Competition Act, supra note 45, § 32.
\item \textsuperscript{139} See MAHER M. DABBAH, THE INTERNATIONALISATION OF ANTITRUST POLICY 3, 5 (2003) (explaining how a country’s apparent willingness to apply its’ antitrust laws extraterritorially creates friction between foreign governments and can be damaging to firms engaged in international business).
\item \textsuperscript{140} See Eleanor M. Fox, Antitrust and Regulatory Federalism: Races Up, Down, and Sideways, 75 N.Y.U. L. REV. 1781, 1803–05 (2000) (cataloging incidences where developed countries, like the United States, Japan, and the European Union, have antagonistically employed their antitrust laws in the past).
\item \textsuperscript{141} See discussion supra Part II.C (explaining how the respective texts of the AML and the Competition Act each support the idea that they were adopted to promote economic growth).
\item \textsuperscript{142} See Li Yanping, China Dismisses Retaliation Fears Over Coke Decision (Update 1), BLOOMBERG (Mar. 20, 2009, 4:30 PM), http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aMFZ5ZcMXYM0 (addressing protectionist concerns in China regarding the blocked Coca-Cola/Huiyuan Juice Company deal).
\end{itemize}
B. International Concerns Regarding the AML

While the AML is generally quite similar to the U.S. and EU antitrust laws, there are some specific differences in the AML that create pointed apprehension among members of the international community with a business interest in the Chinese market. One notable difference is the AML’s purpose of promoting the socialist market economy. This goal allows for a broad interpretation of the potential breadth of the law and its application, because the AML does not define the method used to achieve this goal.

Other prevalent concerns with the application of the AML’s merger provisions are that its provisions incorporate “additional, non-competition related factors into the analysis . . .” of whether a merger will be allowed. The most troubling of these is the term “national security,” the exact definition of which is not provided in the text of the AML. It has been posited that the best way to understand the application of such undefined terms is to investigate the case law, which might be true in a country like the U.S. that has provided detailed judicial review of mergers, but has proven mostly unhelpful in shedding light on MOFCOM’s assessment process in China.

C. International Concerns Regarding the Competition Act

While concerns over the AML revolve around the fact that it continues to leave many variables unknown, the international consensus on the Competition Act is that its implementation has taken many international concerns regarding its drafting into account. The issues lie less with what the Competition Act leaves unsaid and more with what it lays out explicitly. One example of this is concern over the potential 210 day statutory time frame allowed for review and approval of any combination. This potential lag in time is especially irksome due to the potential extraterritorial effects of

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144 AML, supra note 45, art. 1.
145 Farmer, supra note 143, at 42–46.
146 Id. at 36.
147 Id. at 46.
148 Id. at 46–48.
149 Carpenter et al., supra note 115, at 1.
150 See id. at 2–3 (explaining that the 210 day statutory time frame allowed for the CCI to pass final orders remains unchanged, and that this timeframe could negatively impact foreign mergers that have little practical effect in India).
a CCI review. Concerns also exist regarding potential sectoral overlap between the CCI and other regulators and how this will affect companies’ ability to comply with the requirements of multiple regulators. The most troublesome perceived shortcoming of the Competition Act has little to do with the law itself, but instead deals with the perceived inability of the CCI to maintain the necessary confidentiality to avoid harming companies’ stock price and to avoid what has been, in India, a historically cut-throat environment for corporate rivalry.

These international concerns beg the question, how far should either China or India go in attempting to placate the nations expressing these concerns? To what degree should China or India subordinate its own stated goals regarding merger regulation and antitrust law? If it is in fact worth the trouble each country would go through to assuage these concerns, what models exist that China and India can follow? The next section focuses on these issues and attempts to answer whether, regardless of international pressure, the international community should expect China and India to at some point “look out for number one,” and that such self-service should be expected from developing economies.

V. HARMONIZATION: WORTH THE TROUBLE OR JUST TOO MUCH DISSONANCE?

Arguably, neither China nor India should make a meaningful change to their laws. China’s economy, as well as India’s, continues to grow at an exceptionally high rate even amidst the current global economic recession. Both the AML and the Competition Act were implemented for similar reasons, namely to regulate foreign entities in their domestic operations within China and India and to entice foreign business investment, and it can

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151 See Zerick Dastur, India: Sectoral Interplay and the Antitrust Regime, MONDAQ (July 6, 2011), http://mondaq.com/x/136230/Antitrust+Competition/Sectoral+Interplay+And+The+Antitrust+Regime (detailing how merger regulation under the CCI could potentially butt heads with other specialized sectoral regulators, specifically in the banking industry).


be claimed that both systems are currently mechanisms to achieve these goals.  

However, this assertion fails to account for a couple important factors. First, both the AML and the Competition Act’s merger regulation provisions are new laws representative of each country’s first attempt at comprehensive regulation of a market economy. India’s merger guidelines are still being tweaked to fit into the international merger control puzzle more comfortably. The AML’s opacity and lack of predictable enforcement thus far has shed very little light on how its requirements are analyzed by MOFCOM, which might be negatively impacting China’s attempts at inducing foreign investment through mergers. As shown by its opinion explaining why Coca-Cola’s proposed merger with Huiyuan Fruit Juice was denied, MOFCOM has not been overly forthcoming in its explanations other than its vague references to undefined notions of a merger’s “adverse effects on competition,” and that merger review goals are to “protect fair market competition[ ] and to safeguard the interests of consumers as well as the public interest.” India has shown itself to be open to input from foreign countries in its efforts to refine the Competition Act, as evidenced by the willingness of the CCI to incorporate suggestions from the international community into the new Combination Regulations. This demonstrates that, at least in the early stage of adoption, the CCI will likely be amenable to changing parts of the law to better accommodate international concerns.

Of course, that China and India’s merger provisions have yet to cause harmful friction among the international community or the business investors the two countries wish to regulate and attract does not mean the laws should remain static. There are other questions to be answered regarding whether China and India should harmonize their laws to further fit international laws, and if such an attempt is worth either country’s efforts.  

**A. Harmonization: Who Will Benefit?**

As the number of countries adopting national competition laws continues to increase, two prominent ideas regarding the process of harmonizing these laws have emerged. The first is that harmonization between different

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154 See discussion supra Part II.C (explaining the reasons behind the adoption of the AML and The Competition Act).
155 ABA SECTION OF ANTITRUST LAW, supra note 12, at China 7, India 6–7.
156 Batson, supra note 101.
157 See generally Desai et al., supra note 152 (explaining the suggested changes from the international community that were implemented in the CCI Regulations).
jurisdictions’ laws would benefit many of the “relevant stakeholders” concerned with international competition law.\textsuperscript{159} The second is that, regardless of the net positive effects such harmonization would create, it is an unlikely achievement at any point in the near future.\textsuperscript{160} While it is settled that some countries would gain were global competition laws to be harmonized, it is unclear which countries would make up that group. As developing economies, China and India might be better served, at least for the present, by tending their own burgeoning expertise in the application of their respective competition laws at the expense of the international antitrust community. However, this assertion carries little weight in a vacuum, and therefore additional questions must be answered.

The first question in assessing international competition law harmonization is, who needs harmonization?\textsuperscript{161} In the merger context, the business community has made it known that they would endorse further harmonization.\textsuperscript{162} They believe that harmonization, will cut down on transaction costs and will prevent the much-feared “hold-up” situation, wherein the country with the most stringent merger review policy will be in a position to block a merger that may have only a passing relationship with its national interests.\textsuperscript{163} Also, further harmonization is thought to reduce transaction costs by cutting down on the number of competition authorities that a company must notify before proceeding with a planned merger.\textsuperscript{164} This concern speaks to many nations’ concerns regarding the extraterritorial effects of China and India’s competition laws. China’s history of seeking council from countries with more experience regulating competition laws prior to adopting the AML, as well as India’s willingness to implement suggestions from the international community in its enactment of the Competition Act’s merger provisions, make a plausible case that the two countries would be amenable to addressing this concern through further harmonization.\textsuperscript{165}

Another question that needs to be addressed is, “would there be other unintended consequences from a push to harmonize competition laws, resulting from the fact that each country and region presently has a

\textsuperscript{159} Crane, supra note 3, at 143.
\textsuperscript{160} Id.
\textsuperscript{161} Wood, supra note 158, at 398.
\textsuperscript{162} Id. at 399.
\textsuperscript{163} Id. at 399–400.
\textsuperscript{164} See id. at 399 (detailing the inefficiencies and burdens created by the current network of disparate competition laws, including filing costs, staggered filing requirements, and myriad notification procedures).
\textsuperscript{165} See discussion supra Part III.A (detailing China and India’s respective merger review policies).
competition law that fits within its own legal system and reflects its own
history and enforcement priorities? One anticipated consequence is that a
true international framework would undermine country-specific goals in
adopting an antitrust law as a necessary consequence of international
harmonization. If a true international antitrust model is put in place under
the authority of an international body, nations like India and China that have
already adopted a competition law would be short-changed, as it is likely that
the U.S. and EU antitrust laws would act as the model for any such
international framework. Consequences such as these would likely
engender a great deal of resistance from China and India, who, as detailed
above, enacted competition laws as a means to protect their own domestic
markets from more established American and European corporations, as well
to encourage international investment in their economies. These
nationalistic concerns, along with the fact that many countries still lack a
competition law, make it appear that harmonization under a large
international framework is unlikely to happen in the near future. While
full-scale international harmonization may not be a viable option presently,
there are still methods of harmonization that could benefit China and India
and the respective applications of their competition laws.

B. International Harmonization Mechanisms

Many models have been advanced as possible mechanisms for the
international harmonization of antitrust law, which can be filed under three
general classifications: hard harmonization, intermediate harmonization, and
soft harmonization. Essentially, hard harmonization is legally binding
international policy. As discussed above, this type of harmonization is
unlikely given the current pride of place given to the advancement of
domestic goals over assuaging international concerns among developing

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166 Wood, supra note 158, at 398.
167 See id. at 405–06 (noting that developing countries often see themselves differently
situated from the U.S. and EU).
168 Crane, supra note 3, at 152–54.
169 See DABBAH, supra note 7, at 6–7 (highlighting some of the relevant issues in the
adoption of a truly international competition law).
170 Wood, supra note 158, at 404. These formulations are non–exclusive. Other experts in
the field of international antitrust define similar parameters using different verbiage. For
example, Crane adopts a “three–prong” approach to defining potential harmonization tools,
while Dabbah considers similar options under a unilateral, bilateral, and multilateral
formulation. See generally Crane, supra note 3 (discussing potential harmonization tools);
DABBAH, supra note 7 (outlining the different methods by which further harmonization might
occur).
171 Wood, supra note 158, at 404.
countries, China and India included. Some experts hold that hard harmonization can be achieved through the WTO, but the general consensus is that “[f]or many reasons . . . it seems clear that the world is not ready yet for hard harmonization of competition laws.”

Intermediate harmonization, which may also be referred to as the choice of law option, is comprised of agreements among nations, like the North American Free Trade Agreement (NAFTA), to abide by specific bilateral or multilateral resolutions between nations and to commit to some idea of “best practices.” One of the main concerns with implementing this sort of harmonization practice in the global context is that such agreements will be either overbroad or so hyper specific that they are rendered meaningless and ineffective. However, leading antitrust experts believe that a major step towards the benefits of international antitrust harmonization is represented by the guidelines propagated by the International Competition Network (ICN). India is currently a member of the ICN, and many commentators have urged China to subscribe to the organization’s “Recommended Practices” guidelines. These pleas have thus far fallen on deaf ears, as China remains unaffiliated with the ICN.

Finally, soft harmonization, or “information sharing,” is comprised of nonbinding, collaborative learning between countries that have adopted, or are looking to adopt, an antitrust law. This method has been utilized by the Organization for Economic Co-Operation and Development (OECD), which propagates goal-oriented texts on international competition law, none of which are binding. This type of harmonization is already occurring in China and India, as evidenced by the AML’s fourteen year gestation period and India’s continued willingness to listen and implement suggestions from the international community. In the long term, continuing openness to

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172 Id. at 405; see also Andrew Guzman, The Case for International Antitrust, 22 BERKELEY J. INT’L L. 335 (2004) (arguing the WTO is the best organization for forwarding “deep cooperation” among nations on an international level).
173 Wood, supra note 158, at 404; Guzman, supra note 172, at 371.
174 See Wood, supra note 158, at 405–06 (explaining specifically the issues with intermediate harmonization with regards to developing economies like China and India).
175 Hamp–Lyons, supra note 1, at 1604.
177 International Competition Network Members, supra note 176.
178 Guzman, supra note 172, at 369–70; Wood, supra note 158, at 406.
179 Guzman, supra note 172, at 370; Wood, supra note 158, at 404.
180 See discussion supra Part V (discussing the CCI’s willingness to consult with and adopt suggestions from the international community); see also Wu, supra note 17, at 78 (detailing how the international community was consulted throughout the drafting of the AML).
similar learning experiences could create a platform for more formal harmonization between China, India, and the rest of the world. But for the present, this soft harmonization approach is likely the best option for all parties involved in the evolution of the AML and the Competition Act.\footnote{Guzman, \textit{supra} note 172, at 370; Wood, \textit{supra} note 158, at 406–07.} Any attempt at a more extreme, binding type of international law will likely be met with resistance from not only China and India, but other developing economies as well. This would harm not only China and India’s interest in continued international investment in their domestic industries, but also harm more developed nations, like the U.S., in their attempts to expand domestic business into emerging foreign markets. Because hard harmonization by its nature is binding international law, it is unlikely that there will be any real international push for the codification of such agreements. As a result, “soft harmonization” will likely continue as the primary catalyst for global harmonization in antitrust law.\footnote{See Wood, \textit{supra} note 158, at 405–07 (defining and analyzing “hard,” “intermediate,” and “soft” methods of harmonization, and endorsing “soft” harmonization as the most effective route to international antitrust harmonization).}

The consensus among the international community and international business leaders is that some level of global harmonization in antitrust laws is desirable.\footnote{Id. at 399.} Therefore, the question for China and India is which of the disparate harmonization approaches makes the most sense within the context of their domestic goals and the application of their respective competition laws. The three methods of harmonization discussed above each have their defenders and detractors. The next section applies these perceived positives and negatives and offers suggestions for how India and China can further adapt their laws to fit into the global antitrust puzzle, while maintaining the integrity of their domestic purposes and furthering their state-specific goals.

\section*{VI. ENDORSEMENT}

Like many developing countries that have adopted competition laws, China and India have done so to regulate their recently implemented market economies, as well as to promote their own domestic goals.\footnote{See discussion \textit{supra} Part II.C–E (explaining the goals and motives behind Chinese and Indian antitrust laws).} China aims to maintain domestic tranquility and to promote the development and growth of the “socialist market economy.”\footnote{AML, \textit{supra} note 45, art. 1.} India wishes to regulate the continued growth of its economy while maintaining a “level playing field” for their domestic firms with regards to the recent influx of foreign corporations
seeking to establish a presence on India’s economic landscape. These goals will likely be undermined should China and India attempt to engage in any sort of global, hard harmonization. Instead, it would be more beneficial if the Chinese and Indian competition authorities remained open to international input, via channels of soft harmonization, while further attempting to follow some intermediate harmonization models.

It should be encouraging to the international community that the Chinese and Indian competition authorities have thus far been open to feedback from the international community and have proven willing, to an extent, to adapt their laws to meet some of the more pointed criticisms leveled at the AML and the Competition Act. If this level of receptiveness continues, many of the concerns regarding the AML and the Competition Act may be remedied organically as MOFCOM and the CCI become more adept at administering their respective laws. To further promote foreign investment in their countries and to assuage some of the fears engendered by their laws’ potential for extraterritorial application, China and India should both attempt to be more transparent in applying their competition laws. “Transparency is an important antidote to many pathologies . . . . It promotes clarity in policy formation, increases the understanding of legal commands by affected parties, and disciplines the exercise of discretion by public officials by subjecting their actions to external review and criticism.”

China and India both benefit from further transparency in the application of their merger regulation provisions. Thus far, as shown in the reasons offered by MOFCOM for the block of the Coca-Cola/Huiyuan merger, China’s competition authority has not been vague and uninstructive with their interpretations of the AML’s merger provisions.

More concrete explanations of how the AML’s merger provisions are applied would alleviate concerns over the potential for abuse by the Chinese competition authorities. Due to the centralized nature of the Chinese government, some observers might take further explanation of the merger provisions with a grain of salt because the application of the AML will likely shift as China’s domestic goals change. This, however, is true of competition law in general. Therefore, greater transparency should still be a goal for China’s competition authorities, as the increased insights into the decision-making process would, as Kovacic states, make MOFCOM and its

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186 See discussion supra Part II.E.
188 See Crane, supra note 3, at 154 (“The ostensible goals of US antitrust, for example, have changed and adapted considerably over time.”).
regulatory brethren accountable for their decisions.189 This accountability should help China increase foreign investment in their industries via mergers, as the increased accountability would relieve international tensions brought on by a perceived foreign bias in China’s application of the AML.190

India would similarly benefit from greater transparency with regards to how they utilize the information required by the Competition Act’s notification procedures. More in depth explanation as to the interplay between the CCI and the different sectoral regulators would allay international business concerns over the confidentiality of potentially sensitive information tendered during merger review, which would further incentivize foreign investment in the Indian economy.

Increased transparency, in addition to maintaining policies in favor of accepting international input and advice, would likely promote both countries’ stated primary and secondary goals for their competition laws. But these soft harmonization techniques are not the only harmonization mechanisms of which China and India should avail themselves.

As noted in Part V.B, India is currently a member of the ICN while China remains unaffiliated.191 Membership in the ICN is voluntary and, as of 2009, ninety-two jurisdictions were contributing members in ICN’s mission “to improve and advocate for sound competition policy and its enforcement across the global antitrust community.”192 The ICN seeks input from its member nations to cut down on inefficient application of competition law, and China’s membership would likely enrich both MOFCOM’s expertise in administering merger review as well as other ICN member-nations’ understanding of the AML. Because China invested so much research and acquired so much feedback during the fourteen year gestation period of the AML, its involvement in the ICN would both further global convergence of competition law as well as provide additional reassurance to the international community. Because involvement with the ICN is voluntary, China’s ability to promote its “socialist market economy” would not face the same danger of being swept away as it would if hard harmonization were implemented.193

189 See Kovacic, supra note 187, at 838–84 (identifying that transparent policymaking informs outside observers of the rationale of specific decisions and ensures regularity and honesty in public administration).
190 See discussion supra Part III.A (describing the perceived bias in the AML’s application).
191 International Competition Network Members, supra note 176.
193 See discussion supra Part V.B (explaining the benefits of soft harmonization).
China’s involvement with ICN would be especially timely considering its recent bilateral trade agreement with India.\footnote{\textit{India and China Set $100bn Trade Target by 2015}, BBC NEWS: SOUTH ASIA (Dec. 16, 2010), http://www.bbc.co.uk/news/world-south-asia-12006092.}

China and India have both made great strides in implementing successful market economies in the last twenty years.\footnote{See \textit{id.} (stating that China and India are anticipated to be the world’s two largest economies by 2050).} Their implementation of competition laws as a means to ensure continued growth, although causing trepidation among the international business community, has thus far been a reasonably smooth operation. Both countries would benefit from continued input from more experienced antitrust authorities as their fledgling enforcement authorities gain expertise. Membership in non-binding international groups like the ICN would benefit both countries by allowing them access to greater levels of expertise from the international community, while still imparting the added benefit of maintaining the freedom to promote their respective domestic goals. These goals, the “socialist market economy” in China and the “level playing field” in India, should be regarded by the international community not as a millstone weighing down the economic possibilities inherent in investment in China or India, but as another starting point for debate and change in the field of international competition law.\footnote{See \textit{DABBH}, supra note 7, at 14–15 (explaining that differences in competition laws can be viewed as a problem or as a catalyst for greater convergence in international competition law).}

VII. CONCLUSION

China and India are two of the world’s largest and fastest growing international markets. These countries recognize that to continue this growth, effective regulation of their domestic industries must contend with an increasing international presence as foreign firms seek to carve out a piece of the Chinese and Indian markets. There are many other broad similarities between the two nations’ respective economic situations: each have, in the last twenty years, decided that a domestic movement toward a market economy is necessary to ensure their continued economic evolution; both view their implementation of more modern, internationally friendly competition laws as crucial to this evolution’s success; and both, while inviting foreign investment in their economies, are utilizing their competition laws to ensure that the international presence in their markets does not overwhelm their domestic industry.

However, the two Asian powers also have their own specific, domestic goals they hope to promote through the implementation of their competition
laws. For China, this goal is to promote a “Harmonious Society” and to allow for the continuing growth of their “socialist market economy.” India, meanwhile, seeks simply to maintain a “level playing field” for the growth of their domestic industries. Due to the relative newness of these two countries’ competition laws generally, and the merger provisions specifically, the international antitrust community has concerns about how the laws will be applied in the future. The AML and the Competition Act each contain provisions that make clear the laws apply extraterritorially, which causes further trepidation among the international community. However, China and India have, throughout the gestation periods for their competition laws, shown themselves to be open and accepting of international input regarding how their competition laws can function most effectively in the international context.

There is general agreement that further convergence among the world’s antitrust laws is a positive goal, and is one that the international community should attempt to facilitate. The debate begins once the conversation turns to how such harmonization should occur. There are many disparate ideas as to the most effective way to encourage global harmonization, and they can be broadly grouped under the headings of soft, intermediate, and hard antitrust harmonization. Soft harmonization is the most widespread method currently in practice, as it is the least binding of the three, and is essentially just the voluntary exchange of information between countries. Intermediate harmonization, as well as hard harmonization, have both been found to be appropriate in some specific contexts, but are not as widely adopted as the less binding soft harmonization model.

To further their specific domestic goals, China and India should continue their practice of accepting and listening to the ideas posited by international experts to encourage further investment in their respective economies. Also, both countries should strive to promote greater transparency in the application of their competition laws in order to mollify foreign concerns over the potential for arbitrary enforcement and to encourage beneficial mergers to be pursued in their countries.

While hard harmonization is unlikely to be viewed favorably by China or India, an intermediate resolution such as China’s membership in the ICN, would prove beneficial for both competition regimes. Each country has received enormous amounts of international expertise throughout the drafting and implementation of their competition laws, and their competition authorities’ unique perspectives should prove valuable to other ICN members. If both countries take active roles in the global antitrust and merger review conversation, it might sharpen the Chinese and Indian competition authorities’ skills in the application of their laws and in their
merger review process, thus assuaging international fears of extraterritorial abuse and potentially hastening the slow current of global antitrust law harmonization.