Florida State University Journal of Transnational Law & Policy

Volume 11 | Issue 2 Article 5

2002

The Globalization of Law: International Merger Control and Competition Law in the United States, the European Union, Latin America and China

Kenneth J. Hamner

THE GLOBALIZATION OF LAW: INTERNATIONAL MERGER CONTROL AND COMPETITION LAW IN THE UNITED STATES, THE EUROPEAN UNION, LATIN AMERICA AND CHINA

KENNETH J. HAMNER

Table of Contents

I. INTRODUCTION

Economic and industrial globalization has increased international competition and given rise to the need for an increasingly integrated and evolving legal system. A number of trends have contributed to the accelerated globalization of industry and the integration of international economies. For instance, the growing similarity in available infrastructure, distribution channels, and marketing approaches has enabled companies to introduce products and brands to a universal marketplace.[1] Fluid global capital markets, falling tariff barriers, and technological innovation have led to an increasing ability for global competitors to reach international markets that were once beyond their grasp.[2] In addition, technological advancements and e-commerce have enabled firms to significantly improve the efficiency of operations, innovations in supply chain management, and increasing vertical and horizontal integration and industry concentration.[3] The fall of communism and the consequent market reforms of transitional developing economies have given rise to the emergence of multilateral global trade agreements and organizations such as the

1. MICHAEL PORTER, COMPETITION IN GLOBAL INDUSTRIES 2-3 (1986)
2. *Id.*
3. MICHAEL R. CZINKOTA ET. AL., GLOBAL BUSINESS 400-03 (3d ed. 2001) (1995) [hereinafter GLOBAL BUSINESS].

World Trade Organization ("WTO"), free trade areas such as the North American Free Trade Agreement ("NAFTA"), and customs unions such as the European Union ("E.U.").[4]

These trends have triggered significant changes in the structure of entire industries. With the emergence of the global marketplace, governments have promoted global competition through the increase in international trade, while developing legal systems to ensure industrial competitiveness. Antitrust laws, or competition laws, as they are known throughout much of the world, are designed to promote competition and protect against market concentration to the extent that monopoly power may emerge. Although the U.S. and the E.U. have by far the most comprehensive and aggressively enforced antitrust laws in the world, by 1998, over 70 countries around the world enacted competition laws for a variety of reasons.[5] This article summarizes the competition law regimes as they relate to international merger controls in the U.S., the E.U., and the emerging economies of Latin America and China. Further, it discusses some of the differences between these systems and the reasons those differences exist. In conclusion, this article discusses the convergence of competition laws, the global cooperative efforts that have arisen, and the likelihood of the development of a comprehensive and binding global competition law governing mergers and acquisitions.

II. MERGERS AND ACQUISITIONS: RECENT TRENDS AND CURRENT CONTROVERSY

Global merger and acquisition activity reached a record level in 1999, with over $3.4 trillion in mergers announced worldwide.[6] The recent mergers have consolidated virtually every major industry, including financial services, telecommunications, defense, airlines, pharmaceutical companies, supermarkets, automobile manufacturers, and food manufacturers/distributors.[7] For example, in 1999, companies in the telecommunications industry, Olivetti SpA and Telecom Italia SpA, agreed to a $35 billion merger; Vodafone Airtouch plc and Mannesmann AG agreed to a $140

4. *Id.* at 209.

5. William Hannay, *Transnational Competition Law Aspects of Mergers and Acquisitions*, 20 J. INT'L L. BUS. 287 (2000).

6. A. Douglas Melamed, Promoting Sound Antitrust Enforcement in the Global Economy, Address Before the Fordham Corporate Law Institute (Oct. 19, 2000), *in* 2001 FORDHAM CORP. L. INST. (B. Hawk ed., 2001), *available at* http:www.useu.be/ISSUES/trus1019.html.

7. Michael S. Jacobs, *Symposium: "Morph Mania: A Recipe for Mergers and Acquisitions": Foreword: Mergers and Acquisitions in a Global Economy: Perspectives from Law, Politics, and Business*, 13 DEPAUL BUS. L.J. 1, 2 (2001).

billion merger; and Sprint Corp. and MCI/Worldcom agreed to a merger valued at $114 billion.[8] In 1998, the financial services industry experienced consolidation when the Travelers Group and Citicorp agreed to a $73 billion deal, Northwest and Wells Fargo combined in a merger worth $34 billion, and Nationsbank and Bank of America combined in a deal worth $62 billion.[9]

There are a number of reasons explaining the trend toward industrial consolidation. With the rise of multilateral trade agreements and the reduction of national trade and investment barriers, average worldwide tariffs have dropped from 40% to 6% in the past twenty years.[10] In addition, there has been a substantial drop over that same period in transportation costs and information transaction costs.[11] For instance, the cost of rail transportation dropped 30% between 1981 and 1991, truck transportation costs fell 23% from 1980 to 1994, and airline transportation costs have fallen an average of 3% per year for the past thirty years.[12] These cost savings enable larger firms to increase their market reach and, where possible, redistribute capital to investments in market expansion. In addition, innovation in information technology has substantially shortened supply chains and enabled companies to reach international customers with greater ease.[13] In 1995, total Internet commerce sales were estimated at $200 billion,[14] and it is predicted that by the end of 2002, sales could reach $400 billion.[15]

Consequently, firms have restructured to focus on global industries and markets rather than multidomestic markets. Global industries are defined by Michael Porter, an expert in the field of international competition, as industries, "in which a firm's competitive position in one country is significantly affected by its position in other countries or vice versa."[16] Conversely, "in multidomestic industries, competition in each country (or small group of countries) is essentially independent of competition in

---

8. *Id.* at 2 (citing U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, FY 2000 CONGRESSIONAL BUDGET SUBMISSION 7, 18 (2000)).

9. *Id.*

10. Robert Pitofsky, FTC Staff Report on Competition Policy: Six Months After, Remarks Before the American Bar Association, Section of Antitrust Law (Nov. 7, 1996), *at* http://www.ftc.gov/speeches/pitofsky/rpaba g11.htm.

11. *Id.*

12. *Id.*; *see also* Jacobs, *supra* note 7, at 3.

13. ROSABETH MOSS KANTER, WORLD CLASS: THRIVING LOCALLY IN THE GLOBAL ECONOMY 94-97 (1997).

14. President William Clinton & Vice President Albert Gore, Jr., *A Framework for Global Electronic Commerce,* July 1, 1997, at n.4, *at* http://www.iitf.nist.gov/eleccom/ecomm.htm.

15. Press Release, Int'l Data Corp, Buyers on the Web to Increase Nearly Tenfold by 2002 (Aug. 17, 1998).

16. PORTER, *supra* note 1, at 18.

other countries."[17] The shift from multidomestic industry structures to global industries, that has accompanied the reduction in trade barriers, therefore has clearly encouraged industrial concentration on an international scale. As such, mergers and acquisitions are used not only as a means to achieve market penetration in international markets, but also to achieve greater economies of scope and scale to serve a global customer base more efficiently. In addition, since many formerly regulated or state-owned monopolies have privatized during the past decade, particularly in transitional democracies such as Eastern Europe, Russia, and China; the utilities, telecommunications, and transportation industries have experienced significant international competition and merger activity.[18]

Mergers and acquisitions often enable firms with capital, management expertise, and marketing savvy to expand internationally without having to build duplicative infrastructures. In addition, local marketing systems, distribution networks, management expertise, and sales forces in some circumstances can be obtained much more efficiently and effectively through mergers and acquisitions than through building an infrastructure from the ground up. However, when mergers and acquisitions occur, the relevant industry generally has fewer competitors, which can in some instances harm the competitive structure of the industry and confer monopolistic power upon the surviving firm. Monopolistic power enables firms to restrict output and achieve monopoly profits at the expense of consumers, who must pay higher prices than would otherwise exist at equilibrium in a competitive environment.[19] Determining whether mergers and acquisitions are likely to have anticompetitive effects and whether these outweigh the efficiency gains from economies of scale or scope is the task currently facing competition law legislators, regulators, and enforcement agencies. Nonetheless, as market economies replace centrally planned economic structures, competition laws are emerging to protect consumers from the anticompetitive effects of mergers and acquisitions.[20]

However, the globalization of industries has made defining the relevant geographic and product markets more difficult. For example, in the financial services industry, deregulation has resulted in substantial consolidation, but now banks compete in the

17. *Id.* at 17-18.
18. Jacobs, *supra* note 7, at 4.
19. GLOBAL BUSINESS, *supra* note 3, at 268.
20. *Id.*

brokerage, insurance, and securities industry.[21] Oligopoly market structures[22] have become the norm in the U.S. in a variety of industries, including airlines, energy, pharmaceuticals, supermarkets, department store chains, hospitals, banks, accounting firms, and automobiles. Since firms in concentrated industries with oligopoly market structures often attempt to coordinate their pricing and output decisions, and some actually form cartels to collude in this regard, antitrust and competition laws have arisen to regulate the behavior of firms in concentrated industries and to regulate the level of concentration that will be allowed.[23] However, in cases in which mergers do not result in significantly reduced competition, but economies of scale generate cost savings, prices to consumers can be reduced and the efficiency gains outweigh the potentially anticompetitive effects of market concentration.

Hence, although antitrust policies should focus on protecting the competitive process rather than the individual competitors, in an international setting where domestic competitors may be harmed by foreign competition, policymakers are increasingly subject to political pressure and unsure analysis. "Indeed, the competitive process itself has changed as this country has moved from a largely agrarian society, through the 'transportation/expansion' society, into the 'knowledge' and 'electronic global commerce' world of the 21st century."[24] Therefore, before an assessment of any injury to the competitive process may be accurately made, some characterization of the competitive landscape is necessary. Although it is important that antitrust policymakers protect consumer interest in free trade and open markets, the pressure from antitrust authorities "typically does not come from consumer interests agitating for more imports, but comes from national producers agitating for pressure against foreign competitors."[25] The competitive pressure brought by the reduction of trade barriers and greater exposure to international competition allows for greater large market effects and cost savings from economies of scale. Economists argue that the ultimate goal

---

21. Jacobs, *supra* note 7, at 9.

22. Oligopoly is an industry structure characterized by relatively few firms producing most, or all, of the output of some product. Oligopoly industries are usually characterized by significant economies of scale, which can be the result of high fixed costs. However, when there are relatively few firms competing in a specific market, the transactions costs associated with coordinating pricing information and output decisions are generally lower than in markets with more competitors.

23. GLOBAL BUSINESS, *supra* note 3, at 268-70.

24. Ky P. Ewing, Jr., *Introduction: Perspectives on Competition*, 69 ANTITRUST L.J. 349 (2001).

25. Lawrence H. Summers, *Competition Law in the New Economy*, 69 ANTITRUST L.J. 353, 357 (2001).

in developing an effective competition law policy is efficiency, not competition.[26] Consequently, there is great divergence among antitrust regimes regarding how best to formulate an effective competition law policy.

III. U.S. INTERNATIONAL MERGER CONTROL

Antitrust law was enacted in the U.S. in 1890 primarily to control the concentration of economic and industrial power.[27] Equality among businesses was thought to enhance competition while the core values of freedom of individual choice, distributive justice, and pluralism underscored the purpose of the antitrust legislation.[28] Consequently, small businesses and entrepreneurs were favored and protected against the "encroaching economic leverage" of larger competitors, even if the result was increased costs to the consumer.[29] However, in the 1980s, economic efficiency began to emerge as the goal of antitrust policy, without regard to the inability of small struggling competitors to match the operating efficiency of larger competitors.[30] This approach seeks to protect competition rather than competitors. Robert Bork stated in his 1978 article, *The Antitrust Paradox*, "the whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."[31] Hence, Chicago economists find nothing wrong with highly concentrated markets per se and are less concerned with protecting small competitors against larger ones than with allowing an industry to find its own equilibrium level of concentration by maximizing the benefits of economies of scale.[32] Given this underlying goal, antitrust enforcement agencies in the U.S. are less likely to view mergers and acquisitions as anticompetitive than their counterparts in other parts of the world, such as in many nations of South America and Asia where local competitors are at times protected by legislation despite the adverse effect on consumer interest.[33]

26. *Id.* at 358.
27. GLOBAL BUSINESS, *supra* note 3, at 268-70.
28. E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE CASES, MATERIALS, PROBLEMS 1-2 (4th ed. 1999).
29. *Id.* at 2.
30. Shanker A. Singham, *Symposium Article Shaping Competition Policy in the Americas Scope for Transatlantic Cooperation?*, 24 BROOK. J. INT'L. L. 363, 385 (1998).
31. SULLIVAN & HOVENKAMP, *supra* note 28, at 2.
32. Singham, *supra* note 30, at 369.
33. GLOBAL BUSINESS, *supra* note 3, at 282-85.

Section 7 of the Clayton Act is the primary legislation in the U.S. governing mergers and acquisitions.[34] The Clayton Act applies to both mergers with immediate anticompetitive effects and those that have a future probability of substantially reducing competition.[35] In addition, the Sherman Act broadly states that every contract, combination, or conspiracy that restrains trade or commerce among the states, or with foreign nations, is illegal and that every person who monopolizes, or attempts to monopolize is guilty of a felony.[36] The U.S. applies its antitrust laws to foreign business combinations based on the "effects test," established initially in *United States v. Aluminum Co. of America.*[37] In that case, Judge Learned Hand ruled that the U.S. had jurisdiction and could apply its antitrust laws where wholly foreign conduct had an intended effect in the U.S.[38] Given the global nature of industry today, it is difficult to conceive of a wholly foreign act that could not be extended to meet the effects test, even if only in a remote way.

In 1976, the Ninth Circuit attempted to limit the effects test somewhat in *Timberlane Lumber Co. v. Bank of America.*[39] In that case, the court held that U.S. jurisdiction would be granted only if the intended effect on U.S. commerce was of substantial magnitude, or whether extraterritorial jurisdiction should be granted as a matter of international comity.[40] In other words, the court should balance the interests of the U.S. with the interests of the foreign nation and foreign relations to determine whether the effects are substantial enough to grant jurisdiction and application of U.S. antitrust law. Although the U.S. Supreme Court has not determined whether a reasonableness test applies to the effects test, in *Hartford Fire Ins. Co. v. California*,[41] the Court held that comity was only required when there is a true conflict between foreign and domestic law.[42] In other words, even if a U.S. court could withhold its exercise of jurisdiction based on comity, the only relevant inquiry is whether a foreign defendant was compelled by foreign law to violate U.S. law exists.[43] Consequently, in the field of mergers and

34. David Snyder, *Mergers and Acquisitions in the European Community and the United States: A Movement Toward a Uniform Enforcement Body*, 29 LAW & POL'Y INT'L BUS. 115, 123 (1997); *see also* Clayton Act, 15 U.S.C. § 18 (1994).

35. Snyder, *supra* note 34, at 124; *see also* Clayton Act, 15 U.S.C. § 18 (1994).

36. Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1994).

37. 148 F.2d 416, 444 (2d Cir. 1945); *see also* Snyder, *supra* note 34, at 117.

38. Joseph P. Griffin, *Extraterritoriality in U.S. and E.U. Antitrust Enforcement*, 67 ANTITRUST L.J. 159 (1999); *see also Aluminum Co. of America*, 148 F.2d at 444.

39. 549 F.2d 597 (9th Cir. 1976).

40. Snyder, *supra* note 34, at 118.

41. 509 U.S. 764 (1993).

42. *Id.*

43. Snyder, *supra* note 34, at 118-19.

acquisitions, comity would rarely be grounds for foreign acts not to fall under the jurisdiction of the U.S. courts, unless government-owned entities were participants. As such, although courts in the U.S. are largely free to exercise jurisdiction over a wide range of international merger activity, for policy reasons, U.S. courts rarely prohibit large international mergers. However, as stated above, these policy decisions are largely based on the acceptance of merger activity in the search for allocative efficiency and economies of scale rather than a belief in limited jurisdiction. Nonetheless, the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), the primary administrative agencies responsible for U.S. antitrust law enforcement, temper their enforcement efforts by employing a reasonableness test that considers "the degree of conflict with foreign law or articulated foreign economic policies."[44]

Much of the merger enforcement activity in the U.S. today is composed of pre-merger approvals and notification requirements. Congress enacted the Hart-Scott-Rodino Antitrust Improvement Act of 1976 by subjecting mergers, having an effect in the U.S., to be reviewed by either the DOJ or the FTC prior to completing a merger.[45] The purpose of this Act is to reduce the costs associated with having to reverse a merger or to seek remedies after a merger is completed.[46] Mergers are reviewed by the DOJ or FTC, who determine whether the resulting industry concentration will significantly reduce competition in either the product or geographic market.[47]

With international markets, some mergers could theoretically have anticompetitive effects in some geographic regions, but not others. U.S. antitrust law has historically concentrated enforcement efforts on preventing potential impairment of competition from a structural vantage point, which assumes that having more competitors in a particular market is naturally more competitive than having less.[48] However, these anticompetitive effects of market and industry concentration have rarely been deemed to offset the efficiency gains of merger activity since the 1980s, especially in the international marketplace.[49]

---

44. U.S. DEP'T OF JUSTICE, GUIDELINES FOR INTERNATIONAL OPERATIONS, 53 Fed. Reg. 21595 (1988).

45. 15 U.S.C. § 18(a) (1994); *see also* Snyder, *supra* note 34, at 120.

46. Snyder, *supra* note 34, at 127.

47. 15 U.S.C. § 18(a) (1994); *see also* Snyder, *supra* note 34, at 120.

48. Alessandro Bertolini & Francesco Parisi, *The Rise of Structuralism in European Merger Control*, 32 STAN. J. INT'L L. 13 (1996).

49. *Id.*

IV. E.U. INTERNATIONAL MERGER CONTROL

While the historical roots of antitrust law in the U.S. were founded in large part to decentralize industry in order to spur greater market competitiveness, the birth of competition law in Europe with the Treaty of Rome in 1958, was more concerned with preventing abuses of dominant market positions than with preventing structural concentrations of economic power.[50] European policymakers realized earlier than their American counterparts that market concentration afforded the advantages of economies of scale and that to combat mergers to decentralize large business concerns would at times impose costs that exceeded the benefits.[51] In addition, many European policymakers were opposed to economic decentralization due in part to its similarity to the measures imposed by U.S. occupation forces after World War II.[52] Hence, because the Allies had imposed measures to decentralize industries and break up industrial empires that had supported the Axis powers, policymakers of competition law were less concerned with the dangers of economic concentration of power than with the abuse of that power once concentration was achieved. Consequently, mergers have been viewed in the E.U. as legitimate tools to achieve economic efficiency through economies of scale rather than tools designed to intervene in order to preserve market structures.[53]

European competition law is governed primarily by Articles 85 and 86 of the Treaty Establishing the European Community.[54] Article 85 is designed primarily to achieve the same goal as the Sherman Act in U.S. legislation insofar as it prohibits all agreements and concerted practices that affect trade among E.U. members and which have as their main objective the prevention, restriction or distortion of competition.[55] Article 86 is designed to meet the policy objectives of the Clayton Act in that it prohibits the abuse of a dominant market position through unfair trading conditions, pricing, limiting production, tying, and dumping.[56] The European Court of Justice ("E.C.J.") has also adopted a similar approach to extraterritorial enforcement of competition laws than that of U.S. courts. In the *Wood Pulp*[57] decision, the E.C.J. applied

50. *Id.* at 14.
51. *Id.* at 15.
52. *Id.* at 16.
53. Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 NOTRE DAME L. REV. 981, 984 (1986).
54. Singham, *supra* note 30, at 366.
55. *Id.* at 366-67.
56. *Id.* at 367.
57. Snyder, *supra* note 34, at 120 (citing Case 89/85, Åhlströhm v. Commission, 1988 E.C.R. 5194 (1988) (applying *Wood Pulp* Test)).

a "modified effects test" to extend E.U. jurisdiction over a number of foreign firms, including eleven U.S. companies, who "colluded to establish higher prices on wood pulp."[58] Many of the defendants in that case had no subsidiaries or branches located within the E.U. and they argued that the E.C.J. lacked jurisdiction over them because they were not located within the E.U.[59] The E.C.J. held that jurisdiction under E.U. law existed over firms outside the E.U. by selling to E.U. purchasers.[60] This ruling had a similar extraterritorial effect with regard to E.U. competition law as the ruling by Judge Learned Hand in *United States v. Aluminum Co. of America*,[61] by extending jurisdiction over parties based on the effects of their actions rather than their location or nationality.

In addition, one of the defendants in *Wood Pulp* was a U.S. export association, which argued that the application of the E.U. competition laws would breach the public international law duty of non-interference since as an export association, the U.S. government's policy was to exempt exporters from U.S. antitrust laws to further the policy goal of promoting exports.[62] The E.C.J. rejected that argument by ruling that the Webb-Pomerene Act in U.S. law merely exempted export cartels from the U.S. antitrust laws and that it did not require that U.S.-exempted anticompetitive activity be implemented within the E.U.[63] This ruling was similar in effect to the U.S. Supreme Court decision in *Hartford Fire Ins. Co. v. California*[64] insofar as it rejected a comity argument to escape extraterritorial extension of jurisdiction unless the foreign law directly conflicted with the domestic law by requiring that domestic laws be broken. Although it could be assumed that the extraterritorial extension of competition laws could spark political controversy between the E.U. and the U.S., in the *Wood Pulp* cases, the U.S. antitrust authorities were kept informed from the early stages of the proceedings and did not object to them.[65] This underscores the international dialogue, if not outright cooperation between antitrust enforcement agencies in the U.S. and the E.U.

However, competition law policy is not without significant disagreement or controversy, both on domestic and international fronts. One need look no further than the recent Microsoft case, where Microsoft's alleged abuse of monopoly power in the software

58. Snyder, *supra* note 34, at 120.
59. Griffin, *supra* note 38, at 174.
60. *Id.*
61. 148 F.2d 416 (2d Cir. 1945).
62. Griffin, *supra* note 38, at 179.
63. *Id.*
64. 509 U.S. 764 (1993).
65. Griffin, *supra* note 38, at 179.

market is still the subject of much political and economic debate. Although Microsoft has settled its antitrust case with the federal government and with nine of the eighteen states that sued the company,[66] debate continues whether the right decision was reached; whether the competitive landscape was injured at all; and if so what an appropriate remedy should be.

Perhaps the best example of this controversy on an international scale is the proposed merger of Boeing and McDonnell Douglas, the two largest commercial aircraft manufacturers in the U.S.. In the U.S., antitrust authorities viewed the market as having only two significant competitors U.S.-based Boeing and E.U.-based Airbus.[67] McDonnell Douglas' market share was much smaller than the other two and was declining,[68] so a merger could greatly enhance efficiencies while at the same time prevent large-scale layoffs in the industry.[69] However, the European Commission ("Commission"), the E.U. competition law enforcement agency, objected to the merger and expressed concerns that Boeing would have an increased customer base from sixty percent to eighty-four percent of planes currently in worldwide service.[70] The merger was eventually approved when Boeing agreed to withdraw from a number of long term supply contracts with E.U.-based airlines, under the pretense of improving the competitive landscape between Airbus and Boeing.[71]

The Boeing/McDonnell Douglas merger captures many of the great controversies regarding extraterritorial application of competition laws where differing enforcement agencies can: (1) define markets differently; (2) weigh the anticompetitive effects against the efficiency gains differently; (3) view the effects of the merger on the competitive landscape differently; and (4) disagree with regard to appropriate remedies. In the Boeing case, the U.S. had the incentive to approve the merger, even if it had substantial anticompetitive effects on a global scale because the costs imposed by these anticompetitive effects would, for the most part, be realized outside of the U.S.[72] Hence, by externalizing the costs of the merger, while internalizing many of the efficiency gains, the merger could

66. Allison Linn, *Microsoft Settles Antitrust Suits*, ASSOCIATED PRESS, Nov. 20, 2001.

67. Eric J. Stock, *Explaining the Differing U.S. and E.U. Positions on the Boeing/McDonnell-Douglas Merger: Avoiding Another Near-Miss*, 20 U. PA. J. INT'L ECON. L. 825, 906 (1999).

68. *Id.*

69. Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 212 (1999).

70. *Id.* at 213.

71. *Id.* at 214.

72. Snyder, *supra* note 34, at 137.

be approved in favor of national welfare gains for the U.S.[73] In other words, the higher prices born by consumers will be paid somewhat by customers outside the U.S., whereas some of the benefits accompanying a monopolist residing within the U.S. will be realized only within the U.S., such as increased tax revenues and high employment.[74] On the other hand, by blocking the merger, the E.U. is in effect protecting Airbus' business interests, thereby protecting its tax revenue and employment base.

It is interesting to note that the E.U.'s blocking of the Boeing/McDonnell Douglas merger was a preemptive regulation enforced through its pre-merger notification procedures rather than an attempt to punish any abuse of market dominance after such abuse is detected.[75] In this manner, the historical goals of the E.U.'s competition law policy seems to have shifted toward a more active approach similar to that historically characteristic of U.S. antitrust laws. The Boeing/McDonnell Douglas merger is not an anomaly on the E.U. competition law landscape in this respect. In April 1996, the E.U. blocked the proposed merger of UK-based Lonrho PLC and South Africa's Gencor because it would have created a duopoly[76] in the platinum and rhodium markets.[77] In the telephone market, the European Commission imposed a number of pre-merger conditions on the Vodafone/Mannesmann transaction that created a seamless mobile European telephone network. The European Commission limited the undertaking to a three-year duration and mandated that Universal Mobile Telecommunications System licenses be awarded in sufficient number to allow competitors to replicate the Vodafone network.[78] Another prominent telephone regulation case that garnered significant U.S. attention was the E.U. prohibition of the merger between MCI Worldcom and Sprint. The Commission ruled that the extensive networks and large customer bases of MCI Worldcom and Sprint would allow the merged entity to control terms and conditions for access to its Internet networks in such a way that the potential for abusive monopoly power and hinder technological innovation was too great of a possibility.[79] It is noteworthy that despite the fact that the E.U. prohibited this merger, which involved two large U.S. companies, the E.U.'s

---

73. *See id.*

74. *Id.*

75. *Id*

76. Duopoly is "a market in which there are only two buyers of a product." BLACK'S LAW DICTIONARY 519 (7th ed. 1999).

77. Griffin, *supra* note 38, at 175.

78. Mario Monti, *European Community Competition Law: European Competition for the 21st Century*, 24 FORDHAM INT'L L.J. 1602, 1608-09 (2001).

79. *Id.* at 1609.

investigation was carried out in close cooperation with antitrust agencies in the U.S.. This illustrates that despite divergent views on a sporadic basis and occasional disagreements in specific cases, the competition law authorities in the U.S. and the E.U. are in constant communication with one another and have far more similarities, from a policy perspective, than differences.

In addition, the Commission appears to apply close scrutiny to the anti-competitive effects of mergers wholly within its boundaries as well. The Renault/Volvo merger between the French and Swedish automobile manufacturers was conditioned on Volvo's agreement to sell its minority stake in Scania, its major competitor in the Scandinavian market.[80] In addition, the Commission conditioned its approval of the merger between Nestle and Perrier, two French firms, on a number of complex agreements designed to decentralize the spring water market to ensure its competitiveness.[81] This further illustrates the evolution of E.U. competition law, from one of a behavioralist approach to punish the abuse of market dominance, to a structuralist approach whereby an extensive investigation of market structures and potential post-merger effects are considered as a condition precedent to any merger approval. Most of the controversy today between the U.S. and the E.U. concerns the interpretation of the economic data in terms of whether anticompetitive effects of a proposed merger are likely to outweigh the efficiency gains the merger promises.

Hence, for global markets, national interests can still weigh heavily on competition law policy, which has spurred some to seek a global enforcement body, perhaps through the WTO, to develop international competition law standards and perhaps an international enforcement body.[82] Nonetheless, there can be little debate that competition laws have converged greatly over the past 30 years in the U.S. and the nations that make up the E.U. Further, all of the countries of Central and Eastern Europe have essentially adopted the provisions of E.U. competition law in order to assist them in their bids to join the E.U.[83] In addition, as is discussed below, competition law regimes have begun to emerge in the developing economies of Latin America and even China, as that nation attempts to adopt a market-based economy.

---

80. *Id.* at 1611.

81. Bertolinin & Parisi, *supra* note 48, at 30.

82. Thomas P. O'Toole, *"The Long Arm of the Law" – European Merger Regulation and Its Application to the Merger of Boeing & McDonnell Douglas*, 11 TRANSNAT'L L. 203, 225 (1998).

83. Singham, *supra* note 30, at 363.

V. THE EMERGENCE OF COMPETITION LAW IN LATIN AMERICA

In Latin America before the 1990s, competition law was a relative non-factor in industrial policy and played virtually no role in international merger control.[84] However, after the fall of the Soviet Union, previous centrally-planned economies turned to market reforms and the developing nations have liberalized their economic policies in the attempt to revitalize their economies. This is particularly evident in Latin America, where competition laws were enacted in Argentina in 1980, Brazil in 1994, Columbia in 1992, Chile in 1979, Costa Rica in 1994, Mexico in 1992, Panama in 1996, Peru in 1991, and Venezuela in 1991.[85] Mexico's competition laws were enacted in concert with the NAFTA, and consequently are closely aligned with those of the U.S. and Canada. Mexico's statute establishes the Federal Competition Commission as its antitrust enforcement agency, which is empowered to challenge mergers and acquisitions whose purpose or effect is to diminish, impair, or impede competition and free market access.[86] Mexican competition law establishes pre-merger notification requirements similar to both the E.U. and the U.S.[87]

Although other Regional Integration Agreements within Latin America, such as MERCOSUR and CARICOM, do not currently include competition law provisions, there has been some discussion of including them in the future.[88] Nonetheless, most Latin American nations have modeled their competition laws with those of the U.S. or with the E.U.'s statutory treatment.[89] In fact, with the exception of Costa Rica, Panama, and Mexico, which model their competition laws after those of the U.S., most Latin American nations are modeled after E.U. statutes which penalize the abuse of a dominant position rather than the attempt to monopolize.[90] However, the abuse of a dominant position in these countries is predicated on the degree of concentration in the market and the existence of barriers to entry.[91] Columbia, Chile and Venezuela specifically denote within their statutes "the conduct that constitutes abuse of dominant position."[92] To balance the legislation designed to protect against monopolies, Brazil, Columbia, and

---

84. *Id.* at 389-90.
85. *Id.* at 390.
86. Hannay, *supra* note 5, at 298.
87. *See id.*
88. Singham, *supra* note 30, at 390.
89. *Id.* at 363, 390.
90. *Id.* at 391-92.
91. *Id.* at 392.
92. *Id.*

Venezuela competition laws take into consideration the allocative efficiency a merger might produce and weigh this against the anticompetitive effects when approving mergers and acquisitions.[93] Brazil, Chile, Jamaica, and Venezuela also allow for practices that help enhance economic efficiency with respect to both market participants and consumers.[94] Although there is sporadic and inconsistent application of competition laws throughout Latin America,[95] the pace of the emergence of competition law is in itself evidence of the magnitude by which this area of law is experiencing globalization.

Critics may point to the underdevelopment of competition law in Latin America, due to a more prominent state role, in certain industries such as electricity in Peru, and certain other sectors such as agriculture, professional sports, labor organizations, and export activities. However, the U.S. also exempts many of these industries from antitrust law. For instance, labor organizations and export activities are not regulated by competition law in the U.S. and most professional sports are specifically exempt from antitrust regulation. Moreover, many of these industries enjoy the same exemptions in the E.U. Hence, regardless of the pervasive nature of competition laws, there will almost always be specific exceptions built into the statutory or enforcement framework whereby cooperation is allowed that would otherwise be considered anticompetitive if not for overriding social considerations.

The challenges that Latin America has had, and for that matter Eastern Europe as well, is that there is not a widespread culture of competition.[96] This is due in part to the historical dependence on public sector participation in most sectors of industry, including agriculture, energy, banking, communications, and transportation.[97] Governmental price fixing and controls have only recently been eliminated in many of these countries.[98] In addition, the public and private sectors in Latin America are not equipped to enforce compliance with legal determinations in part because of the lack of sufficient human and material resources.[99] Inefficient bureaucratic administrative systems also serve to further impede the effectiveness of the legal systems.[100] Claims that should

93. *Id.* at 393.

94. *Id.*

95. *Id.*

96. Gesner Oliveira, *Symposium Commentary Competition Law in Brazil and MERCOSUR Aspects of the Recent Experience*, 24 BROOK. J. INT'L L. 465, 486 (1998).

97. GLOBAL BUSINESS, *supra* note 3, at 163-68.

98. *Id.*

99. Oliveira, *supra* note 96, at 486.

100. *Id.*

be relatively easy to move through the system, for example, take years to settle, only increasing the uncertainty of the legal system.[101] Uncertainty of inefficiency and lack of reliability, in the legal system imposes costs on multinational firms doing business under these conditions, thereby raising the required rate of return to attract seed capital to develop these economies. The bottom line effect of this uncertainty is that there is less foreign investment than there would be otherwise and that these economies will likely develop at a slower pace than they otherwise would. In other words, legal certainty and the stability of the rule of law are key ingredients in attracting foreign investment. It is for this reason that competition laws have emerged in Latin America, and many of the problems of uneven enforcement are being considered as the basis for inclusion in the form of a global competition law to be included in the Free Trade Agreement of the Americas.[102]

VI. COMPETITION LAW IN CHINA: THE CREATION OF COMPETITIVE MARKETS

For economies in transition from centrally planned regimes to market driven economies, the legal framework is burdened with many challenging tasks. The deregulation of industry, the break-up of state-run monopolies, and the development of a private sector present monumental challenges to China, the former states of the Soviet Union, Vietnam, and the countries of Central and Eastern Europe. While the former states of the Soviet Union and the countries of Central and Eastern Europe have approached this challenge more rapidly, they have experienced severe economic and political turbulence as a result of the rapid change. China and Vietnam, on the other hand, have approached the decentralization of their economic structures with a more gradual plan, which is intended to promote and sustain social, economic, and political stability while instituting far reaching reforms. However, as stated previously, the absence of a culture of competitiveness will take time to transform, and it is questionable whether the same heavy-handed regimes can decentralize economic decision-making while maintaining control over other social conditions to such a degree. Nonetheless, China has joined the world economy and due in large measure to the size of its consumer base, promises to play a key role in industrial globalization for years to come.

The underlying reason for economic and legal reform in China is to create systems that will attract a wider range of foreign

101. *Id.*
102. Singham, *supra* note 30, at 374.

investment and provide a framework of greater competition that is necessary to convince foreign investors of China's potential for stable economic growth.[103] With regard to competition laws, the National People's Congress passed the Act Against Unfair Competition in 1993.[104] The purpose of the Act, as stated in Article 1, "is to encourage and protect fair competition, to punish unfair competition, and to protect the interests of both operators and consumers."[105] This legislation is significant in China, despite its inadequacies, because it is the first competition law to be enacted in China's history and it signals a desire by the Chinese on some level to incorporate competition laws into their legal framework.[106]

However, the anticompetitive effects of mergers and acquisitions are virtually ignored in the Act, as are the abuse of monopoly powers.[107] Instead, the Act primarily concentrates on intellectual property protection, false advertising, disclosure of trade secrets, bid-rigging, forgery, and defamation.[108] One of the reasons that monopoly abuse and merger control are absent from the competition law in China is that China has a relatively low level of industrial concentration.[109] Instead, China's economy is structured in a cellular manner, which means that self sufficiency at the local and provincial level were a stated goal of Chinese policy under Mao Tse Tung.[110] When coupled with China's poor transportation infrastructure and communication networks,[111] and with its vast geographic expanses, it is little mystery why China's economy is both fragmented and characterized by low industrial concentration. However, since the 1980s, the Chinese government has actively encouraged industrial combinations, especially with state-owned enterprises to improve its industrial efficiency.[112] As such, mergers as a whole do not pose a major anticompetitive threat in China and almost certainly will endow Chinese industry with significantly

103. THE WORLD BANK, CHINA ENGAGED, CHINA 2020: INTEGRATION WITH THE GLOBAL ECONOMY 19-21 (1997).

104. LAW AGAINST UNFAIR COMPETITION, Dec. 1, 1993 (*adopted by* the 8th National People's Congress at its Third Meeting, Sept. 2, 1993), *available at* http://www.ultrachina.com/english/doc.cfm?OID=274 [hereinafter UNFAIR COMPETITION ACT].

105. *Id.* art. 1; *see also* Bing Song, *Competition Policy in a Transitional Economy: The Case of China*, 31 STAN. J. INT'L L. 387, 413 (1995).

106. Song, *supra* note 105, at 417.

107. *Id.* at 414.

108. *Id.* at 414-15.

109. John L. Holden, *China's Modernization: The Role of Competition*, HARVARD UNIV. ASIA CTR., Mar. 26, 1999, *available at* http://www.fas.harvard.edu/~asiactr/MAS_032699.htm.

110. Audrey Donnithorne, *China's Cellular Economy: Some Trends Since the Cultural Revolution*, 52 CHINA Q. 605 (1972).

111. *WTO Entry Generates Greater Logistics Demand*, HONG KONG TRADE DEV. COUNCIL, *at* http://www.tdctrade.com/alert/ch0009c.htm (last visited May 15, 2002).

112. Song, *supra* note 105, at 397.

more benefits from allocative efficiency and economies of scale than the costs imposed by the anticompetitive effects of industrial concentration. Hence, unlike competition law in the U.S. and the E.U., Chinese law lacks any provision for notice of intent and no central agency has been established to approve or oversee mergers.[113] The approval of the supervising governmental office of a merger is based more on whether the merger or joint venture will help capitalize a struggling business or turn around an unprofitable one.[114]

In China, key sectors of the economy such as telecommunications, transportation, and utilities are dominated by state-owned enterprises and it is not uncommon for these enterprises to abuse their dominant position.[115] When state agencies also participate as owners of private concerns, high barriers to entry can be erected at the local and provincial level, which puts firms without official backing at a tremendous disadvantage. In addition, China's written laws do not necessarily reflect what happens in practice.[116] Consequently, this lack of transparency leads one to doubt whether consistent application of competition laws in China will become a reality in the near future. Of course, given the changes in policy that have occurred in the U.S. regarding antitrust enforcement insofar as its evolution from protecting small competitors to the efficiency enhancing approach currently espoused, one could argue that antitrust policy is inconsistent by its very nature. In other words, since economic and political conditions greatly differ between nations and over time, competition policy must consider these differences to some degree. Nonetheless, the lack of enforcement of China's competition laws in areas where the need for strict enforcement is great, such as price-fixing, output restriction agreements, and other widespread cartel activities,[117] leads to the inevitable conclusion that it will be quite some time before China's merger control competition laws will reach the level of development currently existing in the U.S. and the E.U.

VII. THE ROAD AHEAD

The primary purpose of competition law is to maximize the economic welfare of consumers by, among other things, eliminating

---

113. *Id.* at 398-99.
114. *Id.* at 399.
115. *Id.* at 402.
116. Anyuan Yuan, *Foreign Direct Investment in China - Practical Problems of Complying with China's Company Law and Laws for Foreign-Invested Enterprises*, 20 NW. J. INT'L L. & BUS. 475, 482 (2000).
117. Song, *supra* note 105, at 408.

barriers to market entrance and eliminating the abuse of market dominance by cartel behavior and monopolistic strategies.[118] Although these laws were originally designed to govern domestic economic activity, the "effects test" reflected the need to regulate economic activity injurious to domestic consumers but originating or taking place outside of national borders.[119] In addition, the globalization of business has blurred the lines between domestic and international business, thus creating the need for extraterritorial jurisdiction as well as convergence within separate bodies of competition law. This is especially true with the significant liberalization of international trade within the past decade. International agreements governing intellectual property ("TRIPS"), investment ("TRIMS"), and services ("GATS") have already been signed.[120] In addition, the emergence of powerful trade agreements such as NAFTA, the WTO, and the various E.U. agreements have led to proposals to create international agreements governing competition policy. To this end, the Commission has taken a leadership role by proposing an exploratory working group to study implementation of an international competition policy within the WTO framework.[121]

A number of proposals have emerged ranging from WTO adoption and dispute resolution, to multilateral adoption of a fully articulated international antitrust code, to multilateral agreements on enforcement bodies.[122] However, proposals of this type, regarding international competition law, have been discussed since the League of Nations in the early 1900s.[123] One overriding reason justifying the adoption of an international competition law regime is to reduce the controversy that can arise between conflicting rulings by overlapping jurisdictions. Another compelling reason is to reduce the significant public and private compliance costs imposed by duplicative and overlapping merger control jurisdiction. Since a single transaction can potentially be exposed to many merger control regimes, compliance costs can be substantial in terms of meeting international pre-merger notification requirements and remedying concerns expressed by the various independent antitrust enforcement agencies. In addition, governments must invest

---

118. Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1 (1997).
119. *Id.* at 3.
120. *Id.* at 4.
121. *Id.* at 9.
122. Harry First, *Symposium: Antitrust at the Millennium (Part II): The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L.J. 711 (2001).
123. Andre Fiebig, *A Role for the WTO in International Merger Control*, 20 NW. J. INT'L L. & BUS. 233 (2000).

substantial resources in monitoring merger activity, enacting effective legislation, and enforcing policies. An international body of competition law governing merger control and an independent enforcement agency would be significantly more economically efficient.

However, it is unlikely that an adoption of a comprehensive body of international merger law will be adopted in the near future. National interests are often so intertwined with competition law policy that governments would have great difficulty in reaching consensus regarding enforcement, much less consistent policy aims.[124] Ultimately, the reluctance to relinquish sovereignty over such a wide body of economic regulatory law is unlikely on a large scale. The U.S. is opposed to a WTO-administered global antitrust regime for a number of reasons.[125] For instance, the WTO is thought to be too large and too diverse to develop and adopt a common definition of and approach to competition law.[126] Additionally, the U.S. government has expressed the fear that such negotiations would lead to the adoption of a body of law that would be so diluted that it would erode the effectiveness of existing laws.[127] Consequently, it is highly unlikely that any global antitrust law will be adopted in the near future to the extent that an independent international body will replace the role currently played by national and regional bodies.

Nonetheless, in many respects competition laws have developed on an international scope already through cooperation and convergence. Such convergence is especially evident in the cases of the U.S. and the E.U., where U.S. policy has drifted away from enforcement activity centering on limiting the concentration of economic power, toward a policy aimed at enhancing economic efficiency and preventing the actual abuse of monopoly power by oligopolists. On the other hand, as the rulings discussed above illustrate, E.U. competition law enforcement and policy has evolved from a behaviorist approach designed to punish abuses of monopoly power to one that undertakes significant measures to prevent potential abusive oligopolies from forming altogether. The emergence over the past twenty years of a large body of competition law and merger control in emerging economies reflects the trend toward convergence as well. Although these antitrust regimes have problems, this is more indicative of their infancy and of the difference in industry structures inherent in emerging economies,

---

124. *Id.* at 245.
125. Griffin, *supra* note 38, at 153-54.
126. *Id.*
127. *Id.*

than of a lack of convergence in the body of competition law. In addition, the former states of the Soviet Union, Eastern and Central Europe, and even China and Vietnam have also adopted competition laws. Although it is clear that these systems also have questionable effectiveness, the trend itself toward both the development of antitrust law and the convergence of the various regimes is unmistakable.

Clearly, a global standard is premature and it is questionable whether such a standard will ever become a reality.[128] This is due in part to the constant evolution of antitrust law to meet the needs of the economic conditions prevalent at any one particular time, which is dependent on the state of the economy, the shifts in industrial concentration, the strength of the political democracy, and the power of the judiciary.[129] Nonetheless, as national economies become increasingly global and as firms shift from multidomestic to multinational and eventually global in strategic focus, competition laws will naturally converge. Although the application of antitrust laws will never escape national political pressure, the pressure from the globalization of industry will create increasing pressure for transparency, due process, and a reduction in transaction and compliance costs, which will lead to the inevitable convergence of competition laws and the increasing possibility that a global standard may yet see the light of day.

---

128. Russell J. Weintraub, *Symposium: Competing Competition Laws: Do We Need a Global Standard?: Panel One: Different Anti-Competitive Visions in the Western World: The U.S. and the E.U.: Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27, 37 (1999).

129. Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1783 (2000).