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I. INTRODUCTION

There was a considerable excitement when two of the fastest-growing economies and most populous countries—China and India—introduced competition law in their respective lands. The competition law in India was enacted in January 2003. However in India, the law, after enactment, remained practically ineffective till as late as May 20, 2009, the day when notification of the partial enforcement powers was declared by the Government. Till that time the provisions of the Competition Act, 2002("Act"), notified by the Government, permitted the Competition Commission of India ("CCI") to do little beyond competition advocacy of competition law among different stakeholders across the country.

On the other hand, the time gap between the preparation of the first draft and the actual full enforcement of competition law in China was much smaller. In August 2008, China could actually take pride in having a fully functional competition law regime in place despite having started its journey a little later than India. This speed reflects small costs associated with the types of political system a country follows. In a democracy, everyone is free to raise a different voice, and any legislation can only go through after the voices of dissent have been fully heard and taken care of. Such compulsions do not necessarily overburden the decision-making process in political systems other than a democracy. As we all know, in a democracy, the plurality is not just tolerated but desired. It was for these reasons that the competition law, after enactment, in India, was dragged to courts and made to justify its existence and the form. Chinese law, on the other hand, had to pass through no such rigors.

It may be recalled that during the run up to the full enforcement of competition law in China and India there was a huge interest taken by authorities representing two slightly differing systems of competition law—the United States and the European Union—each desiring to engage the competition bodies of Indian and China and "teach" them the finer nuisances of competition law. To varying degrees, some engagements did take place. India certainly had a Technical Assistance Support Programme ("TASP") running for some time with the U.S. Federal Trade Commission ("FTC") and Department of Justice ("DOJ"). And, without getting into levels of engagement, it was certain that exchange visits did take place between China and functional competition law jurisdictions in the region at that time.

Irrespective of the stated objective of engagement of these two styles of competition law, which was merely to assist new competition agencies in different countries, the fact remains that, to give the comfort of level playing field to their domestic industries and constituents—whether it

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was the United States or the European Union—each one wanted and still wants to create a competition law structure in the new territories which is as nearly a clone of their own competition law back home as possible. Seen from the perspective of the newly established competition agencies, it helps if those who are running competition agencies for some time are available for discussion and guidance without inhibition and at will. To this extent, an engagement of the agencies from these countries with the newly formed competition agencies was a welcome step.

Theoretically speaking, competition issues are not expected to have any nationalistic flavor or boundaries except, in some cases, where on account of historical reasons and in favor of equity, some provisions have been made in the law itself. These include provisions relating to possible harm to any historically oppressed segments of population, or instances where national security can be a consideration in the enforcement of competition law and merger reviews. These do give some leeway to the competition agency.

Competition law is an economic law. Simply stated, this law has to keep in mind and be dependent upon the economy and the economic conditions of the populace. Whether we accept it or not, unfortunately economic conditions of the people in different countries are vastly different. Economic needs and aspirations of the countries and their populations also vary substantially. It is not a border-less and visa-less world. It also does not appear to be the stated aim of any multilateral body or United Nations. That means we have to accept this world, with varying degrees of economic development and the consequential border controls, as a given variable. Among the main reasons behind border controls, in addition to a check on crime, are differing economic levels and, consequently, fear of movement of human traffic looking for a better economic lot in a land other than the land of their birth.

This implies that continuous efforts by nations to preserve and enhance their economic prosperity can be understood and may even be justified. It leads to a natural corollary that different nations do all within their power to support the enterprises which are identified with those countries so as to, in turn, enhance their economies and, consequentially, well being of their populations.

With this background in mind, it should not shock puritanical antitrust folks to find traces (or more) of nationalistic leanings in various aspects of competition law enforcement in the newly established competition law jurisdictions as well. This piece attempts to look at the recent merger review progress in China and South East Asia, from a neutral perspective, without either supporting or opposing such tendencies.

II. PROTECTIONISM IN RECENT ASIAN MERGER ACTIONS

A. Providing Context: Actions in Established Practices

Within a year of being functional, on March 18, 2009 the Chinese Antitrust authorities, operating under the new Anti-Monopoly Law ("AML")took a bold decision of prohibiting the takeover proposal of the local juice maker Huiyuan by Coca Cola. The AML in China has often been stated to be quite draconian and protectionist. There are numerous instances where a slight and unintentional change in variables has resulted in a substantial change in outcomes with the concerned party bearing the brunt of interpretation by Chinese authorities.

Antitrust law enforcement has been no exception. A feeling of certainty at any stage during the process of review may elude the parties concerned and, at times, may be quite unnerving. Going by the account of the antitrust practitioners in China, it can be said that certainty of cause and effect relationship may sometime be missing as far as the practice of antitrust law is concerned. With this single decision taken so early in its enforcement mandate, China gave a signal to the world that it cannot be taken for granted and it had a mind of its own—despite all previous engagements with the developed economies during the preparatory phase.

Further, the impression the western world may like to create that the countries which are now introducing competition law in their territories are new to the application of this craft and, since the developed countries have been practicing this for many years, the new entrants should follow the old practitioners, was demolished with a bang.

In fact, historically speaking, despite the claims to the contrary, protectionist sentiments have always been believed to have fuelled many an action of the different competition law regimes across the world—including in the developed world. The differing treatment given to various mergers, at different points of time, across the world proves this surmise. A case in point was the proposed GE/Honeywell merger in 2001. In the proposed merger between these two U.S. companies, the European Commission ("EC") issued a prohibition[2] after the merger was cleared by the DOJ and 11 other jurisdictions. In its decision, the EC highlighted the effect of market foreclosure due to the increased competitiveness of GE/Honeywell post-merger on their competitors including Rolls Royce (a European competitor of merger undertakings).

Similarly, tempers flared when it appeared that the European Union may be preparing to block the proposed merger between Boeing/McDonnell Douglas. The merger had been cleared by the DOJ earlier. Transatlantic barbs were traded with concerned U.S. lawmakers suggesting that the EU concerns were based on the protectionist agenda of promoting Airbus (a French competitor).[3]Questions were asked whether the European Union may have had a desire to protect its own aircraft manufacturing industry behind any impending prohibition of the merger.[4] Eventually, the European Union approved the merger after several key commitments were agreed to by Boeing.[5] A lot of writing in the press at that time hinted this merger was cleared in the European Union, after initial hiccups, not on the strength of competition law or its analysis alone. In addition, a lot of diplomatic support, involving backdoor maneuvering, came handy.

Article 21(4) of European Union Merger Regulation ("EUMR"), by empowering the EU Member States to retain control over "legitimate interests" considered to be sensitive provides a cover of legitimacy to protectionism. This provision empowers Member States to separately scrutinize and even prohibit mergers—without regard to the fact that the EC may be of the view that the mergers are compatible with the common market. Public security and plurality of the

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[2] Case No. COMP/M.220

[3] James V. Grimaldi, *EC Boeing Stand Worries Clinton*, SEATTLE TIMES (July 17, 1997), *available at* http://community.seattletimes.nwsource.com/archive/?date=19970717&slug=2550061.

[4]*See*, *A 'Dangerous' Merger*? WALL ST. J.,A22 (July 21, 1997).

[5] Case No IV/M.877 - *Boeing/McDonnell Douglas.*

media are expressly recognized as "legitimate Interests" within Article 21(4) of EUMR. In BSCH/A. Champalimaud, the Portuguese Minister of Finance, opposed a concentration with a community dimension that would give BSCH joint control of a group of companies, which included several insurance companies and Portuguese banks.[6] Eventually, changes were brought to the structure of the transaction to lift Portugal's concerns, and the Commission cleared the revised transaction in January, 2000.[7]

Circumventing the powers of competition authorities, certain governments may have also been directing approval/prohibition of mergers even where a competition authority prima-facie found the merger anticompetitive. For instance, the acquisition by Lloyds of HBOS was not even referred to the U.K. Competition Commissionfor deeper competitive analysis since the Secretary of State for Business and Enterprises intervened,[8]claiming that the public interest of the U.K. financial system outweighed competition concerns by the Office of Fair Trading.[9]

B. China

The AML is the umbrella collection of anti-monopoly legal statutes in China. Under Article 31 of the AML foreign mergers and acquisitions of domestic enterprises are subject to both national security and anti-monopoly review. Further, in 2011, the scrutiny of cross-border mergers was heightened with promulgation of a comprehensive process for assessing national security implication of such transactions.[10] Circular 6, with its implementing regulation,[11] permits the Chinese regulators to change, amend, or even rescind a merger if the Government determines that the transaction has national Security implications. Certain Sensitive Industries (including agricultural products, energy resources, transportation services, etc.) have been listed. Any transaction resulting in 50 percent or more foreign ownership in any of the Sensitive Industries is subject to a heightened National Security Review.[12]

The decision of the Ministry of Commerce ("MOFCOM") to prohibit the Coca-Cola's planned acquisition of China Huiyuan Juice Group Limited in 2009, referred to in preceding paragraphs, was suspiciously looked at as a protectionist measure. Among other things, the MOFCOM considered that the transaction would have restricted competition in the Chinese fruit juice market (*Huiyuan* had held 46 percent of the market). Despite denials by MOFCOM that non-competition law considerations played no role in the decision, the decision's references to the transaction's effects on domestic small and medium-sized manufacturers and the sustainable and healthy development of the Chinese fruit juice drink industry led to a widespread belief that industrial policy considerations played a significant role in this prohibition. Not just in

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[6] Case IV/M.759. Although the decision of the Portuguese was later suspended by the EC.

[7] Case COMP/M.1799, BSCH/Banco Tottay CPP/A. Champalimaud.

[8] Section 42 of the Enterprise Act, 2002 allows the Secretary of State for Business and Enterprise to issue an intervention notice in mergers in particular circumstances, including public interest considerations.

[9] http://webarchive.nationalarchives.gov.uk/20090609003228/http://www.berr.gov.uk/files/file48745.pdf.

[10] *Notice on Establishing a Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors* Circular 6, (Promulgated by the Gen. Office State Council, February 3, 2011, effective March 3, 2011.

[11] *Provisions on the Implementation of the Security Review System for Mergers and Acquisitionsof Domestic Enterprises by Foreign Investors.*

[12] *Supra* Note 8, Article 9.

case of merger reviews, in nearly all aspects of antitrust enforcement China is believed to be focusing on foreign companies with an unwritten intention of promoting domestic concerns.

C. Singapore

The Singapore Competition Act (2004) provides for a voluntary merger assessment scheme. However, the parties may do so if they have serious concerns as to whether the merger or anticipated merger has led to or may lead to a substantial lessening of competition.[13] The law in Singapore is applicable to all natural and legal persons capable of commercial or economic activity and includes public sector enterprises. Some sectors are, however, excluded from law due to public interest considerations such as national security and defense or because of a pre-existing sector competition law framework such as telecommunications and energy.

Parties to a merger, which has been held by Competition Commission of Singapore ("CCS") to be anticompetitive, may seek to apply to the Minister for the merger to be exempted on the grounds of public considerations. Under the Act, public interest considerations refer to "national or public security, defense and such other considerations as the Minster may, by order published in the gazette prescribe." To date, there has been no other public interest considerations gazetted.

In its short-history, the CCS has formed a relatively non-protectionist and liberal image. In the merger between *The Thomson Corporation/Reuters Group plc,*[14]the commitments offered by the merging enterprises in the European Union and the DOJ were considered sufficient to remove competition concerns in Singapore, even though the CCS stressed that the same may not necessarily imply that the CCS will allow the merger to proceed in Singapore.[15]

D. Indonesia

In another neighboring country, the Anti-Monopoly Law[16] is the substantive law regulating competitive assessment of mergers in Indonesia.[17]Under the Indonesian law, business actors are prohibited from merging or consolidating business entities or acquiring shares in companies if they may cause monopolistic practices and/or unfair competition. Post-merger notification to Indonesian Business Competition Supervisory Commission ("KPPU") is mandatory.

The protectionist pre-disposition of the KPPU and the Indonesian Government in general has been accepted by the KPPU itself.[18]The KPPU is increasingly cited by foreign investors as a reason for concern. Temasek, a Singaporean sovereign wealth fund, was penalized in 2007 for having made a portfolio investment via a string of intermediate companies in two Indonesian mobile operators. Temasek wasn't a majority, let alone a controlling, shareholder of

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[13] Sections 56 & 57, Competition Act, 2004(Singapore).

[14] CCS 400/007/07.

[15]*Id.*at ¶ 47.

[16] Law Prohibiting Monopolistic Practice and Unfair Competition (No. 5 of 1999).

[17]*Id*, Articles 28 or 29.

[18]*KPPU urges buffer for smaller firms,* THE JAKARTA POST, *available* athttp://www.thejakartapost.com/news/2008/11/07/kppu-urges-buffer-smaller-firms.html.

either company and yet the KPPU claimed it was a monopolist.[19]In another instance of uncertain application of the law by KPPU towards foreign enterprises, KPPU fined Pfizer holding that the American pharmaceutical company and local partner Dexia illegally colluded via a licensing agreement they entered into at the government's own behest. The decision was eventually over-ruled by the Supreme Court since it was based on indirect evidence.[20]

The decisions of KPPU on various aspects on enforcement of competition law have been often criticized for lack of appreciation of the basic concepts of competition law. However, the brush of the corruption charges against those in charge of enforcement of competition law does leave a question mark as to whether such instances of the efficacy of enforcement are because of the level of understanding or intent. Either way, it is not good news for competition law enforcement including merger review in that country.

E. Thailand

We can also have a look at Thailand. Section 26 of the Trade Competition Act, 1999 (“TCA”) is the primary merger review regulation in Thailand. Mergers that may result in monopoly or unfair competition are prohibited, unless permission is obtained from Trade Competition Commission (“TCC”).Most importantly, the TCA does not discriminate between firms on the basis of nationality. As such, the Section 26 applies to any merger that may result in a monopoly or unfair competition Thailand. Finally, State Owned Enterprises (“SOEs”) are exempted.[21] However, for various practical reasons, the actual enforcement of the law to date has not yet left any serious impressions regarding actual practice.

F. India

Compared to all its neighbors in the region, India has adopted a quite liberal merger review regime. There is no preferential treatment to the SOEs or the Government in the Act. Public sector enterprises and Government departments are covered within the ambit of the competition law in India, unless they are performing regulatory or sovereign functions. In fact, all provincial Governments have been held to be covered within the statute where the functions were commercial and not sovereign.[22]

The CCI has adopted a strictly uniform approach without discrimination between public and private sector enterprises in antitrust enforcement.[23]The merger review regime is barely three years into enforcement in India. Notification of the merger is mandatory where certain thresholds are met. To date, the CCI has received close to 200 notifications. However, the CCI has not issued any prohibition or commitments as of yet. The *Sun-Pharma/Ranbaxy*[24]merger is the first case that has been referred to detailed (Phase-II) investigation.

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[19] Case No. 07/KPPU-L/2007.

[20] 294 K/PDT.SUS/2012 on June 28th, 2012. *See also* http://indocomnews.wordpress.com/2012/07/19/supreme-court-affirms-lower-court-ruling-on-pfizer-dexa-vs-kppu/.

[21] Thailand,Trade Competition Act, 1999(B.E. 2542), Section 4.

[22]*Jupiter Gaming Solutions vs Govt. of Goa and Anr.* CCI Case 15/2010.

[23]*SeeMaharashtra State Power Generation Company Ltd. vs M/s Mahanadi Coalfields Ltd & Ors* CCI Case 03/2012. To compare the uniformity of the approach, the decision of the CCI in the matter of *Faridabad Industries Association vs M/s Adani Gas Limited* [CCI Case 71/2012]may also be referred to.

[24]Combination Registration No. C-2014/05/170.

The unconditional approval of an acquisition of a stake in a domestic airline, Jet Airways(India) Limited, by Etihad Airways(Abu Dhabi) reveals the non-protectionist and hands-off approach of CCI, which displays a maturity far greater than what might be expected of a young competition authority. In all the cases of merger view dealt by CCI so far it has ensured that all the market players are viewed without any favor or bias on the basis of nationality. It is a welcome relief.

III. CONCLUSION

Therefore, it can be said that—with the exception of India and Singapore—protectionist leanings have been not too difficult to spot in the merger review regimes in the region. However, this only reflects the general trend observed by many different countries over the years. We can only expect elimination of these protectionist leanings when the economies across the border become more or less equal and border control loses its meaning.