TOWARDS AN EXTRATERRITORIAL APPLICATION OF THE CHINESE ANTI-MONOPOLY LAW THAT AVOIDS TRADE CONFLICTS

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I. INTRODUCTION

On August 30, 2007, the twenty-ninth session of China's tenth National People's Congress adopted the Anti-Monopoly Law (AML), which entered into force on August 1, 2008.[1] Over four years later, results seem promising but leave room for improvement. The AML has been actively applied, especially concerning merger control, but seems perhaps less promising regarding horizontal agreements—particularly price fixing—as well as vertical

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1. Zhonghua Renmin Gongheguo Fanlongduanfa (中华人民共和国反垄断法) [The Anti-Monopoly Law of the Peoples' Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 57 (China) [hereinafter AML]. For comments on the AML, see Thomas T. Howell et al., *China's New Anti-Monopoly Law: A Perspective From the United States*, 19 PAC. RIM L. & POL'Y J. 53, 95 (2009); Bruce M. Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 ANTITRUST L.J. 231, 265 (2008); Bruce M. Owen et al., *Anti-Trust in China: The Problem of Incentive Compatibility*, 1 J. COMPETITION L. & ECON. 123, 148 (2005); Salil K. Mehra & Meng Yanbei, *Against Anti-Trust Functionalism: Reconsidering China's Anti-Monopoly Law*, 49 VA. J. INT'L L. 379, 429 (2008).

restraints.[2] In addition, China's adoption of the AML harmonizes with China's membership in the World Trade Organization (WTO) and its desire to become a world player on the globalized market.[3]

Many scholars in Europe and the United States follow the evolutions of the Chinese AML with great interest.[4] The AML and its application in China undoubtedly are important to companies outside China, particularly to the increasing number of foreign companies doing business in the Chinese market.[5]

Many foreign companies have already experienced the importance of the AML, particularly in take-over attempts or mergers relating to the Chinese market. For example, in 2009, the Chinese Ministry of Commerce (MOFCOM)[6] blocked the proposed merger between Coca-Cola and the Chinese company Huiyuan.[7] In such cases, where the merger concerns a proposed collaboration with a Chinese company active on the Chinese market, the application of Chinese competition law (and the AML) is unquestionably appropriate. But the AML's applicability is less clear in a truly extraterritorial context—for example, when two foreign companies, completely located outside of China (but presumably selling products or offering services on the Chinese market) merge, or when two completely foreign companies make horizontal or vertical

2. For an analysis of the first experiences with the AML, see the contributions in COMPETITION POLICY AND REGULATION: RECENT DEVELOPMENTS IN CHINA, THE US AND EUROPE (Michael Faure & Xinzhu Zhang eds., 2011).

3. The adoption of the AML signals the Chinese government's willingness to allow its economy to operate on market principles and is thus in line with World Trade Organization (WTO) membership. *See* David J. Gerber, *Economics, Law & Institutions: The Shaping of Chinese Competition Law*, 26 J.L. & Pol'y 271, 281–82 (2008). For a more detailed analysis of the economic background for the implementation of the AML in China, see Wentong Zheng, *Transplanting Anti-Trust in China: Economic Transition, Market Structure and State Control*, 32 U. PA. J. INT'L L. 643, 721 (2010).

4. *See, e.g.*, Roger Van den Bergh, *The Economics of Competition Policy and the Draft of the Chinese Competition Law*, *in* THE ECONOMIC ANALYSIS OF LAW IN CHINA 77 (Thomas Eger et al. eds., 2007) (conducting economic analysis of a draft AML).

5. *See Susan Beth Farmer, The Impact of China's Anti-Trust Law and Other Competition Policies on US Companies*, 23 LOY. CONSUMER L. REV. 34, 53 (2010); Howell et al., *supra* note 1, at 62–63.

6. The Chinese Ministry of Commerce is the Chinese authority charged with reviewing mergers. Shangwubu Zhuyao Zhize Neishe Jigou He Renyuan Bianzhi Guiding (Quanwen) (商务部主要职责内设机构和人员编制规定(全文)) [Primary Duties, Internal Structure and Staffing Requirements of the Ministry of Commerce] (promulgated by the Nat'l People's Cong., Aug. 24, 2008, effective Aug. 24, 2008), http://www.china.com.cn/policy/zhuanti/xbwzj/2008-08/24/content_16316678.htm (China).

7. For an analysis of the way in which the case was decided and for an economic appraisal, see Xinzhu Zhang & Vanessa Yanhua Zhang, *Chinese Merger Control: Patterns and Implications*, *in* COMPETITION POLICY AND REGULATION, *supra* note 2, at 241, 248–51.

agreements abroad (but again, presumably with effects on consumers in China).[8]

This so-called extraterritorial application of antitrust law has been an important issue in the United States and in Europe. Since a 1945 decision of the Second Circuit sitting as a court of last resort in *United States v. Aluminum Co. of America* (the *Alcoa* case),[9] the U.S. Sherman Act has applied where the "effects" of an agreement were felt in the United States.[10] In Europe, the European Court of Justice (ECJ) adopted similar reasoning in the so-called *Woodpulp* case,[11] whereby European competition law was applied to an agreement by Canadian, Finnish, and U.S. producers because the agreement was "implemented" in the (then) European Community.[12]

Such application has resulted in conflict. For example, Europeans reacted negatively to the outright extraterritorial application of U.S. law controlling a merger between two large pharmaceutical companies located in Europe,[13] while Europeans were also applying their law extraterritorially by threatening to block the announced merger between two U.S. located aircraft producers, Boeing and McDonnell Douglas.[14] Until recently, these conflicts over the extraterritorial application of competition law seemed to be limited to conflicts between the traditional large players on the global market—Europe, the United States, and Japan. But given China's recent AML, the question arises how China will position itself in this debate.

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8. Competition law often has a transnational dimension especially in the cases discussed in this Article, in which a state applies its competition law to activities outside its territory. *See* Gerber, *supra* note 3, at 275.

9. In the *Alcoa* case, the Second Circuit held that the Sherman Act also applies to acts outside U.S. territory if such acts were intended to affect imports and did affect them. United States v. Aluminium Co. of America, 148 F.2d 416, 444 (2d Cir. 1945).

10. *See* Salil K. Mehra, *Extraterritorial Antitrust Enforcement and the Myth of International Consensus*, 10 DUKE J. COMP. & INT'L L. 191, 205–06 (1999).

11. The European Court of Justice held in this case that E.U. competition law could apply if a cartel was "implemented" in the European Union even if it was concluded by foreign companies outside of the European Union. Joined Cases 89, 104, 114, 116, 117 & 125–129/85, Osakeyhtiö v. Comm'n, 1988-8 E.C.R. 5193, 5243.

12. *See* Karl M. Meessen, *Competition of Competition Laws*, 10 NW. J. INT'L L. & BUS. 17, 25–26 (1989).

13. *See* Brian Peck, *Extraterritorial Application of Antitrust Laws and the U.S.-EU Dispute over the Boeing and McDonnell Douglas Merger: From Comity to Conflict? An Argument for a Binding International Agreement on Anti-trust Enforcement and Dispute Resolution*, 35 SAN DIEGO L. REV. 1163, 1169 (1998).

14. *See* Chad Damro, *Building an International Identity: The EU and Extraterritorial Competition Policy*, 8 J. EUR. PUB. POL'Y 208, 213 (2001). This case was decided by the European Commission (EC) and is discussed in detail in Part IV.C.1 *infra*.

Whether the AML can be applied extraterritorially is, at least theoretically, not a difficult question for the simple reason that Article 2 of the AML explicitly addresses it.[15] Instead, this Article argues that the AML shall also apply to monopolistic conduct outside Chinese territory that has the effect of eliminating or restricting competition on the domestic market of China. The relevant question, then, is whether China will make use of Article 2's theoretical possibility to apply its AML extraterritorially.[16]

The extraterritoriality of the AML is not at all merely a theoretical question. Recently, MOFCOM announced that it had questions concerning a planned merger between two Russian companies, both located solely in Russia, but both having important influence on the Chinese market.[17] The merger effectively would result in a newly merged Russian company with twenty-five percent of the Chinese market and a heavily concentrated world market.[18]

This case raised the important question of whether the AML also provided a legal basis for an extraterritorial application of its competition law.[19] Additionally, the question also arises whether China will indeed have an interest in such an extraterritorial application of its laws, and if so, how this extraterritorial application subsequently will be enforced. Moreover, it raises the question of how to use effective remedies to address the potential competition harm caused by such extraterritorial cases, particularly when stringent measures such as a divestiture or even an injunction have to be implemented. Precisely because these questions have been extensively dealt with in the literature concerning conflicts between the European Union and the United States, the case law and commentary in the United States and in the European Union are helpful in analyzing the current Chinese position.[20]

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15. See *infra* Part VI for further discussion of Article 2 of the AML.

16. For a detailed analysis, see Christopher Hamp-Lyons, *The Dragon in the Room: China's Anti-Monopoly Law and International Merger Review*, 62 VAND. L. REV. 1577 (2009).

17. *See Antitrust, Competition and Economic Regulation Alert - China: MOFCOM Issues Conditional Clearance of Russian Potash Merger and Circulates Two Draft Regulations for Public Comment*, HOGAN LOVELLS 1 (June 23, 2011), http://www.hoganlovells.com/files/Publication/a87327ad-0095-4dbf-80d7-543c27fc5dfa/Presentation/PublicationAttachment/c17f70d7-4c2f-4344-b1fe-5f2784412a4d/11.06.23_Hogan_Lovells_ACER_Alert_China_June_2011.pdf.

18. *See id.* at 2.

19. *See infra* Part VI for more on the position of China with respect to the extraterritorial application of the AML.

20. *See generally* Howell et al., *supra* note 1 (comparing the Chinese AML and U.S. antitrust law).

This Article therefore begins in Parts II and III by sketching the evolution of extraterritorial application of antitrust law in the United States and Europe and then provides a comparative analysis of these two approaches in Part IV. Next, in Part V, the Article analyzes extraterritorial application of antitrust law from an economic perspective and comments on whether such an extraterritorial application of antitrust law is desirable. In Part VI, the Article turns to the central focus: a discussion of the challenges and opportunities posed by an extraterritorial application of Chinese antitrust law.

II. The Extraterritorial Application of Antitrust Law in the United States

Extraterritorial application of antitrust law has received widespread attention in U.S. legal doctrine.[21] It is now widely accepted that under U.S. antitrust law, and more particularly under the Sherman Act (which largely establishes antitrust law in the United States), conduct related to U.S. imports that harms U.S. consumers may be subject to U.S. jurisdiction, irrespective of where this conduct occurs or the nationality of the parties that cause the conduct.[22] Under the Clayton Act, which regulates mergers and acquisitions, similar behavior outside the United States is also subject to the U.S. jurisdiction.[23] The United States, therefore, unequivocally applies its own competition law in an extraterritorial manner.

Many examples exist in which the U.S. Department of Justice (DOJ) has brought actions under the Sherman Act against foreign corporations and their directors for acts that occurred outside the United States where there is "a direct, substantial, and reasonably foreseeable effect" in the United States.[24] For instance, in *Caribbean Broadcasting Systems, Ltd. v. Cable & Wireless, PLC*, a court held that the plaintiff's allegations were sufficient to establish a "direct,

21. By 1982, a "selective bibliography" on the extraterritorial application of U.S. antitrust law spanned twenty pages. Howard A. Hood, *The Extraterritorial Application of United States Antitrust Laws: A Selective Bibliography*, 15 Vand. J. Transnat'l L. 765 (1982).

22. *See* Mehra, *supra* note 10, at 192–96.

23. Rodney Edward Falvey & Peter John Lloyd, An Economic Analysis of Extraterritoriality 4 (1999).

24. *See* Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of US Antitrust Law: What Is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 Tex. Int'l L.J. 11 (2003) (discussing how the U.S. Department of Justice, the U.S. Federal Trade Commission (FTC), and U.S. courts apply the "effects" test).

substantial, and reasonably foreseeable effect" because it alleged (1) that there is a significant market for the sale of English-language radio advertising in the eastern Caribbean, which includes Puerto Rico and the U.S. Virgin Islands, (2) that many companies based in the United States are customers in this market, (3) that there are substantial barriers to entry into the market, and (4) that the defendants engaged in international conduct that gave them monopoly power and injured consumers in this market.[25] Many additional examples in which the DOJ was successful in bringing similar actions are illustrated in the cases discussed in the remainder of this Part.

While it is unnecessary to review U.S. law in detail, it is helpful to briefly review the most important U.S. case law in the area.[26] The starting point is the 1909 decision of the U.S. Supreme Court in *American Banana v. United Fruit Co.*[27] In that case, the U.S. Supreme Court first considered the application of the Sherman Act to foreign trade and commerce and rejected extraterritorial application.[28] Justice Holmes noted that "the acts causing the damage were done . . . outside the jurisdiction of the United States" and that the legality of the act "must be determined wholly by the law of the country where the act is done."[29] Therefore, the U.S. Supreme Court originally took the strict view that the Sherman Act can only apply territorially and that territoriality relates to the place where the act was performed. If the action was outside of the United States, the Sherman Act could not be applied.[30]

A rather radical change took place in 1945 when the Second Circuit in the *Alcoa* case explicitly abandoned the territoriality principle and held that the main consideration is whether the Sherman Act also prohibited agreements made abroad that "would clearly have been unlawful, had they been made within the United States."[31] Judge Learned Hand presented an "effects" test, holding that the Sherman Act prohibited acts that took place outside of U.S. territory "if they were intended to affect imports and did affect

25. Caribbean Broad. System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1086–87 (D.C. Cir. 1998).

26. For an excellent overview of this case law, see generally Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. Rev. 1501, 1506–08 (1998).

27. Am. Banana v. United Fruit Co., 213 U.S. 347 (1909).

28. Roger P. Alford, *The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches*, 33 Va. J. Int'l L. 1, 7 (1992).

29. *Am. Banana*, 213 U.S. at 355–56.

30. For further analysis see Mehra, *supra* note 10; Guzman, *supra* note 26.

31. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 444 (2d Cir. 1945).

them."[32] Most commentators consider this *Alcoa* decision as a turning point in U.S. case law, creating a legal basis for an extraterritorial application of U.S. antitrust law.[33] Later, the U.S. Supreme Court adopted the view Learned Hand expressed in the *Alcoa* case.[34]

Notably, in Judge Learned Hand's view, the U.S. extraterritorial jurisdiction was not unlimited or unilateral in the sense that interests of other countries should not be taken into account.[35] The *Alcoa* case also held that courts should "not . . . read general words, such as those in [the Sherman] Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflicts of Laws.'"[36] This language refers to the comity doctrine, in which a balancing of interests takes place whereby at least legitimate interests of other countries should be taken into account when deciding upon the extraterritorial application of U.S. antitrust law.[37]

U.S. case law further evolved with the U.S. Supreme Court decision in *Hartford Fire Insurance Company v. California* (*Hartford*).[38] In *Hartford*, the plaintiffs alleged that the defendants, which included certain London reinsurers, had violated the Sherman Act.[39] The defendants argued *inter alia* that the court should decline jurisdiction on international comity grounds because the laws of the United Kingdom permitted the anti-competitive conduct, whereas the Sherman Act prohibited it.[40] In *Hartford*, the U.S. Supreme Court, however, ruled that the comity doctrine was immaterial to the determination since the "persons subject to regulation by two states can comply with the laws of both."[41] Commentators suggest

32. *Id.*

33. *See* Mehra, *supra* note 10, at 204–05; Wolfgang Wurmnest, *Foreign Private Plaintiffs, Global Conspiracies, and the Extraterritorial Application of U.S. Antitrust Law*, 28 HASTINGS INT'L & COMP. L. REV. 205, 210 (2005); Alexander Layton & Angharad M. Parry, *Extraterritorial Jurisdiction – European Responses*, 26 HOUS. J. INT'L L. 309, 310–11 (2004).

34. *See, e.g.*, Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704 (1962) ("A conspiracy to monopolize or restrain the domestic or foreign commerce of the United States is not outside the reach of the Sherman Act just because part of the conduct complained of occurs in foreign countries."); *see also* Mehra, *supra* note 10, at 205.

35. *See* 148 F.2d at 443; Mehra, *supra* note 10, at 204–05.

36. 148 F.2d at 443.

37. *See* FALVEY & LLOYD, *supra* note 23, at 5.

38. Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993).

39. *Id.* at 795.

40. *Id.* at 797–99.

41. *Id.* at 799 (quoting Restatement (Third) of Foreign Relations Law § 403, cmt. e (1987)).

that this decision strongly reduced the role of comity in U.S. law, given that the U.S. Supreme Court has refused to engage in comity analysis and therefore has maintained jurisdiction to allow U.S. interests to prevail.[42] Brian Peck stated that the *Hartford* decision led "from comity to conflict."[43]

The U.S. Supreme Court presented another nuance in *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, (*Empagran*), in which Justice Breyer held that ambiguous statutes should be interpreted in accordance with international law to avoid "unreasonable interference with the sovereign authority of other nations."[44] Breyer stated that this rule "helps the potentially conflicting laws of different nations work together in harmony—a harmony particularly needed in today's highly interdependent commercial world."[45] Breyer further held that U.S. antitrust law should apply in an extraterritorial manner when it is "reasonable, and hence consistent with respective comity principles."[46]

Wolfgang Wurmnest asserted that Breyer's holding in *Empagran* suggests that the U.S. Supreme Court considers international harmony and "reanimates the reasonable standard as a yardstick to measure the reach of U.S. antitrust law."[47] However, Wurmnest also notes that *Empagran* dealt with independent foreign harm.[48] Thus, *Empagran* is distinguishable from *Hartford*, in which the anticompetitive effects were felt solely in the United States.[49] Therefore, *Empagran* may not have modified the existing case law regarding foreign conduct causing domestic effects and domestic injuries in the United States.[50]

Professor Jeffrey Meyer, on the other hand, argues that the legal doctrine can be explained through understanding three competing viewpoints: (1) judicial unilateralists support a liberal imposing of U.S. law on acts occurring abroad; (2) judicial territorialists argue that U.S. law should not be applied extraterritorially to avoid

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42. *See* Guzman, *supra* note 26, at 1533; Mehra, *supra* note 10, at 193–96.

43. *See* Peck, *supra* note 13. For a discussion on the importance of this notion of comity see Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 163–68, 183–85 (1999).

44. F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 164 (2004).

45. *Id.* at 164–65.

46. *See id.* at 165.

47. Wurmnest, *supra* note 33, at 219.

48. *Id.* at 220 n.84.

49. *Id.*

50. *See id.* ("It is therefore arguable that *Empagran* does not suggest that comity must be considered in the more common cases involving foreign conduct which causes domestic effects and domestic injuries.").

international conflicts; and (3) judicial interests balancers suggest a multifactor case-by-case analysis to see whether in particular circumstances extraterritorial application of U.S. law may be indicated.[51]

Other U.S. Supreme Court decisions also address the issue.[52] The U.S. Supreme Court is not always clear regarding extraterritoriality even in cases outside the antitrust field. The U.S. Supreme Court regularly refers to a presumption against extraterritoriality, but just as often overlooks it and applies U.S. laws abroad.[53]

Ultimately, there are many cases in which U.S. courts apply antitrust law extraterritorially, not only to horizontal agreements but also to merger control.[54] For example, in 1996, the U.S. Federal Trade Commission (FTC) required two Swiss pharmaceutical companies that had merged (Ciba-Geigy and Sandoz) to sell off some units of their business and to license a patent to a competitor as conditions for the approval of the merger.[55] The FTC reasoned that the merger could harm U.S. consumers even though the pharmaceutical companies were located abroad, demonstrating the potential reach of U.S. antitrust law.[56]

Notably, this wide extraterritorial application of U.S. antitrust law is not merely troublesome for foreigners. It could be argued that this wide reach of U.S. law potentially violates the sovereignty of other nations.[57] On the other hand, this wide extraterritorial jurisdiction makes U.S. antitrust law very attractive for foreign plaintiffs. Wurmnest suggests that given the plaintiff-friendly characteristics of U.S. antitrust law, such as generously allowing private enforcement, liberal discovery rules, treble damages, and jury tri-

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51. Jeffrey A. Meyer, *Dual Illegality and Geoambiguous Law: A New Rule for Extraterritorial Application of U.S. Law*, 95 MINN. L. REV. 110, 114–18 (2010). Meyer himself adds a fourth approach, referred to as "dual illegality" which holds that U.S. law should only be applied if the conduct is also considered illegal abroad. *Id.* at 119. Thus territoriality and extraterritorial concerns could be reconciled and international conflicts avoided. *See id.* at 180.

52. *E.g.*, F. Hoffman-Laroche Ltd. v. Empagran, S.A. 542 U.S. 155 (2004). For discussions of the *Empagran* case, see Ralf Michaels, *Empagran's Empire: International Law and Statutory Interpretation in the U.S. Supreme Court of the Twenty-First Century*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 533 (Sloss et al. eds., 2011); Erika Siegmund, *Extraterritoriality and the Unique Analogy Between Multinational Antitrust and Securities Fraud Claims*, 51 VA. J. INT'L L. 1047 (2011); *see also* Minn-Chem, Inc. v. Agrium Inc., 657 F.3d 650, 659–653 (7th Cir. 2011) (applying a restrained approach to the extraterritorial application of U.S. antitrust law).

53. *See* Meyer, *supra* note 51, at 129.

54. *See* Peck, *supra* note 13, at 1212–13.

55. *Id.* at 1166–67.

56. *Id.* at 1166.

57. *See* Alford, *supra* note 28, at 45.

als, foreign victims of anti-competitive behavior may benefit from the liberal U.S. jurisdiction rules.[58] Moreover, the U.S. Supreme Court has also allowed the use of U.S. antitrust law by foreign plaintiffs because denying these foreign plaintiffs standing would "lessen the deterrent effect of treble damages."[59] In addition, foreign plaintiffs seem to do relatively better than domestic litigants in such suits.[60]

Furthermore, after considering the U.S. Supreme Court's case law, the DOJ, possessing proper jurisdiction over the Sherman Act, and the FTC, possessing proper jurisdiction over merger control under the Clayton Act, have jointly issued antitrust enforcement guidelines for international operations.[61] The guidelines provide specific criteria concerning the extraterritorial application of U.S. antitrust law, including: (1) the relative significance of the alleged violation of conduct within the United States as compared to conduct abroad, (2) the degree of conflict with foreign national law, and (3) the effectiveness of foreign enforcement as compared with U.S. enforcement.[62] The DOJ also has discretion in enforcing laws extraterritorially and can therefore determine whether to effectively bring conduct abroad within the scope of U.S. competition law.[63]

III. Extraterritorial Application of E.U. Competition Law

The approach in the European Union is at first blush different from that of the United States, mostly because the legal basis and terminology differ, but the effect of both approaches may largely be the same.[64] Based on ECJ case law, E.U. competition law can also be applied to conduct and parties that are wholly outside of the E.U. jurisdiction. The only condition required for applicability of E.U. competition law is that the conduct affects trade within the European Union.[65]

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58. Wurmnest, *supra* note 33, at 205.

59. Pfizer v. Gov't of India, 434 U.S. 308, 315 (1978).

60. *See* Kevin Clerment & Theodore Eisenberg, *Xenophilia in American Courts*, 109 Harv. L. Rev. 1120, 1122–28, 1138–41 (1996). The most likely explanation for this fact would be that given higher barriers foreign plaintiffs would be more selective in choosing potentially successful cases. *See. id.* at 1137 (explaining that "reluctant foreigners litigate only their strong cases in America").

61. Falvey & Lloyd, *supra* note 23, at 4.

62. *Id.*

63. *See id.* at 5.

64. *See infra* Part IV.

65. *See* Falvey & Lloyd, *supra* note 23, at 5.

This issue has been clarified in *Ahlström Osakeyhtiö v. Commission* (*Woodpulp*).[66] *Woodpulp* concerned an agreement by Canadian, Finnish, and U.S. producers that allegedly fixed the price of exports into the European Community.[67] The ECJ held in *Woodpulp* that the territoriality principle is "universally recognized in public international law," but clarified that the territoriality principle applies to the place of implementation of the conduct.[68] Therefore, under what literature has referred to as the "implementation theory,"[69] it would be immaterial that the conduct originated from foreign companies and was concluded outside of the European Union.[70] The ECJ hence explicitly seems to adopt the territoriality principle, but commentators agree that, although the wordings differ, the ECJ also seems to adopt an effects doctrine in practice that is similar to that utilized in the United States.[71]

The same broad approach to extraterritoriality becomes clear when looking at E.U. merger control policy.[72] When the European Economic Community introduced its merger control regulations in 1989,[73] some commentators argued that these regulations were "essentially unlimited in . . . territorial scope."[74] The European Commission (EC) "scrutinized transactions even though they had no effect on the European market."[75] The wide scope of the merger regulations followed more particularly from the definition of a "community dimension" of a particular merger, which was

66. Cases 89, 104, 114, 116, 117, and 125–129/85, Osakeyhtiö v. Comm'n, 1988-8 E.C.R. 5193.

67. *Id.* at 5196–97. At the time *Woodpulp* was decided, Europe was referred to as the European Community which only later changed to the European Union. *See* Wurmnest, *supra* note 33, at 211.

68. *Osakeyhtiö*, 1988-8 E.C.R. at 5243.

69. Wurmnest, *supra* note 33, at 211; *see* Olivier Bertrand & Marc Ivaldi, *Competition Policy: Europe in International Markets*, *in* FRAGMENTED POWER: EUROPE AND THE GLOBAL ECONOMY 156, 168 (Andre Sapir ed., 2007) (using the term "implementation doctrine").

70. *See* Meessen, *supra* note 12, at 25–26.

71. *See, e.g.*, Layton & Parry, *supra* note 33, at 319–21; Wurmnest, *supra* note 33, at 211 n. 30 (explaining that the implementation theory adopted by the European Court of Justice has been called an "effects principle in disguise").

72. *See* Griffin, *supra* note 43, at 177–79; Layton & Parry, *supra* note 33, at 321–22. For an overview of the allocation of merger control competence between the European Union and member states, see Oliver Budzinsky, *An Economic Perspective on the Jurisdictional Reform of the European Merger Control System*, EUR. COMPETITION J., Apr. 2006, at 119, 140.

73. Council Regulation 4064/89, 1989 O.J. (L 395) 1 (EEC).

74. *E.g.*, Andre Fiebig, *The Extraterritorial Application of the European Merger Control Regulation*, 5 COLUM. J. EUR. L. 79, 80 (1998).

75. *Id.* at 80.

related to the worldwide sales of the entities concerned and the amount of sales in the European Union.[76]

The community dimension is now determined based on objective criteria based on a more recent European Council regulation on merger control.[77] These criteria include, *inter alia*, the E.U.-wide turnover of the concentration.[78] Despite these formal criteria, the application of the E.U. merger control regulations to foreign companies has been the subject of debate. This debate is demonstrated by the well-known Gencor/Lonrho case. That case, which was handled by the Court of First Instance (CFI), concerned the merger between Gencor, a South African company, and Lonrho, a British company.[79] The merger of Gencor and Lonrho would have allowed them to control a large share of the world market of platinum, rhodium, and related metals, leaving only one substantial competitor and thus resulting in the creation of an oligopoly.[80] The EC held that the merger could negatively affect the common market by restricting the output of these materials and leading to upward pressure on prices.[81] The CFI referred to the principle of "extended territoriality" to hold that "application of the regulation is justified under public international law when it is foreseeable that the proposed concentration will have an immediate and substantial effect in the community."[82] In this case, the CFI referred to an "immediate and substantial effect" in the European Union, which effectively aligned the European Union's reasoning with the effects doctrine in the United States.[83]

In addition to the Gencor/Lonrho case, the EC has scrutinized mergers between foreign companies located totally outside the European Union in other cases, including: (1) the merger between Boeing and McDonnell Douglas in 1997;[84] (2) the 1998 case of World Com/MCI II concerning a merger of two U.S. firms in the

76. *Id.* at 81–82 (explaining the test for a community dimension).

77. *See* Council Regulation 139/2004, art. 1, 2004 O.J. (L 24) 1, 6.

78. *Id. See* Vincenzo Scordamaglia, *Merger Control Rules in the EU and Their Extraterritorial Application*, 60 MEDJUNARODNI PROBLEMI 47, 50–51 (2008).

79. Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, 761–62.

80. *See* Scordamaglia, *supra* note 78, at 53.

81. *Id.* at 54.

82. *Gencor*, 1999 E.C.R. at II-785.

83. *See id.*; Layton & Parry, *supra* note 33, at 321 (noting that reasoning of CFI in Gencor is "remarkably similar to that used by the American courts in their exposition of the effects doctrine," and arguing that, viewed in context, the court's decision "is strongly suggestive of a European adoption of the effects doctrine, as it is understood in the United States."). For a comparison between the U.S. and European approaches see Alford, *supra* note 28, at 37–44.

84. *See infra* Part IV.C.

telecommunication sector;[85] (3) the 2000 merger between MCI World Com and Sprint concerning a merger between two U.S. companies again active in the telecommunication sector;[86] and (4) the 2001 merger between General Electric and Honeywell, again a merger between two U.S. firms.[87] In the General Electric and Honeywell case, the EC decided to prohibit the proposed acquisition of Honeywell by General Electric due to its potential anticompetitive effects, despite prior clearance by U.S. authorities.[88] The EC considered that the merger would create or strengthen dominant positions on several markets, severely reduce competition in the aerospace industry, and result ultimately in higher prices for customers, more particularly for the airlines.[89]

The above-mentioned cases decided by the EC demonstrate that while an extraterritorial application of competition law may have been a U.S. invention, it is widely applied in Europe as well, with respect to both merger control and other more classic anti-competitive horizontal and vertical agreements.

The question remains whether it is possible to enforce a prohibition stemming from an extraterritorial application of a merger, for example, when the actors are foreign companies located outside of the jurisdiction. The European Union, for example, in the proposed merger between Boeing and McDonnell Douglas, could not formally have blocked the merger, but it could have imposed a very high fine for violation of competition law.[90] Given this potential use of fines, an extraterritorial decision of antitrust authorities may not always be difficult to enforce. Ultimately, enforcement will be easier against large economic players (given that they have more at stake and more to lose), but not necessarily impossible even against smaller ones.

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85. Commission Decision IV/M.1069 – WorldCom/MCI, 1999 O.J. (L 116) 1 (EC).

86. Commission Decision COMP/M.1741 – MCI WorldCom/Sprint, 2000 O.J. (L 300) 1 (EC).

87. Commission Decision COMP/M.2220 – General Electric/Honeywell, 2001 O.J. (L 48) 1 (EC).

88. *See id.* at 84.

89. *Id.*

90. Peck, *supra* note 13, at 1166 (referring to fact that the European Union "did have the authority to impose multi-billion dollar fines based on ten percent of Boeing's world income, if it had found that the merger would adversely affect trade in Europe. The EU could have also imposed other sanctions and conditions which would have made it very difficult for Boeing to sell its aircraft in the EU countries") (citations omitted). *See also* Sarah Stevens, *The Increased Aggression of the EC Commission in Extraterritorial Enforcement of the Merger Regulation and its Impact on Transatlantic Cooperation in Antitrust*, 29 SYRACUSE J. INT'L L. & COM. 263, 302 (2002).

IV. Comparative Analysis

A. *Differing Goals; Differing Practice?*

When global market players either collude or merge, global markets are affected. If one global antitrust authority existed to deal with this globally anti-competitive behavior, the problems of extraterritorial application of competition law would simply not arise. Given the lack of such a global antitrust authority,[91] however, individual countries make separate decisions. To the extent that anti-competitive behavior affects both European and U.S. markets, the possibilities of diverging decisions and resulting conflicts are created.

Some authors have argued that the many conflicts that have arisen over extraterritorial application of antitrust are unsurprising for the simple reason that the principles and goals of antitrust law may diverge.[92] For example, no consensus exists that competition law and more particularly merger control should be based on criteria of economic efficiency.[93] U.S. antitrust law tends to see consumer welfare as the ultimate goal to be achieved by consumer policy, whereas European competition law is not only concerned with consumers, but also with unfair competitive advantages of dominant firms.[94] There is, in other words, no common philosophy in competition policy in the United States and in Europe, thereby creating a risk of diverging judgments on similar behavior.[95]

Not only do the aims—and therefore unavoidably the rules—of competition policy in the European Union and United States differ, the language providing the basis for extraterritorial application

91. It is, moreover, questionable whether it is even possible to come to an international consensus on a global antitrust policy. *See infra* Part V.

92. *See generally* Van den Bergh, *supra* note 4, at 80–90 (discussing the various goals that competition law should serve and the potential conflicts between them).

93. *Compare id.* at 85 (arguing that competition authorities should explicitly state when considering criteria other than efficiency) *with* Edward M. Graham, *Economic Considerations in Merger Review*, *in* Antitrust Goes Global: What Future for Transatlantic Cooperation? 57, 60 (Simon J. Evenett et al. eds., 2000) (arguing that efficiency should be the dominant consideration in merger review).

94. *See* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 Am. J. Int'l L. 1, 12 (1997) (arguing that U.S. antitrust mostly focuses on anti-competitive behavior which lowers output and raises prices, whereas European competition law also looks at protection for small businesses).

95. *See* Stevens, *supra* note 90, at 284–86 (focusing on the absence of a common philosophy in merger control); Bertrand & Ivaldi, *supra* note 69, at 175–79.

of such laws also largely differs.[96] As explained above, U.S. courts accept jurisdiction when anti-competitive behavior that takes place abroad negatively affects domestic commerce, which is referred to as the effects doctrine.[97] The European Union arguably adopted a more limited application of its competition laws, claiming in *Woodpulp* to apply the territoriality principle but asserting jurisdiction when anti-competitive behavior harms the common market.[98] At first blush, both approaches are completely different or at least approach the matter from different angles.[99] Nonetheless, both the European Union and the United States accept jurisdiction over foreign defendants concerning anti-competitive behavior taking place abroad. This difference between the U.S. "effects doctrine" and the European "implementation test" can have consequences in a few rare situations,[100] but these practical differences are minor.

B. *Mutual Blaming, Conflicts, and Frictions*

Interestingly, the United States and the European Union have engaged in mutual blaming regarding claims of excessive extraterritorial application of competition law, but extraterritorial enforcement of competition law has become routine in both regions.[101] The European Union especially has often strongly reacted against the United States' open assertions of an extraterritorial application of its antitrust laws, but European doctrine is remarkably similar to the language used by U.S. courts.[102]

In that sense, E.U. and U.S. approaches towards extraterritoriality appear to be converging.[103] Ultimately, some inconsistency may exist in governments' behavior in the sense that governments "are not prepared to have other governments act upon their citizens or

96. For an overview, see Florian Wagner-von Papp, *Competition Law, Extra Territoriality and Bilateral Agreements*, *in* RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 21 (Ariel Ezrachi ed., 2012). Although there is some convergence, for example as far as merger review is concerned. *See* Hamp-Lyons, *supra* note 16, at 1582–90.

97. *See supra* Part II.

98. *See supra* Part III.

99. *See* Alford, *supra* note 28, at 37.

100. Griffin, *supra* note 43, at 187. Such situations could include "concerted refusals to buy from, or export to, the EU or agreements to restrict non-EU production to create a scarcity outside the EU that would have the effect of raising prices within the EU." *Id.*

101. *See* Layton & Parry, *supra* note 33, at 315–22. In the words of Griffin, "Enforcement authorities on both sides of the Atlantic vigorously enforce their competition laws against conduct outside their borders to protect their consumers and markets." Griffin, *supra* note 43, at 159.

102. See the reasoning of the Court of First Instance in Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753, 785.

103. *See* Layton & Parry, *supra* note 33, at 321–22.

corporations in the same way as they act upon the citizens or corporations of other nations."[104] The U.S. government particularly has often protested against extraterritorial actions against its citizens by authorities of other nations, although the U.S. government itself likely would have done the same.[105]

C. *Remedies, Reactions, and Retaliations*

Extraterritorial application of competition law over foreign nationals acting abroad, a common practice in both the United States and Europe, often leads to serious conflicts and diplomatic frictions.[106] This Section analyzes key examples of such tension and of the remedies and reactions that often result therefrom.

1. The Ultimate Clash: Boeing/McDonnell Douglas

The reactions of foreign governments against an extraterritorial application of competition law take different forms. Since foreign governments may consider such an extraterritorial application of foreign law as a violation of their sovereignty, they could react, for example, with statutes against the discovery of evidence by foreign authorities.[107] They could also criminalize the request of certain types of information.[108] This could then relate to information that would enable the antitrust authority of the foreign country to start an extraterritorial antitrust procedure. In the worst case, the conflict could lead to trade wars. Foreign governments could even provide a statutory basis for recovering damages paid in U.S. courts and could more particularly allow for claiming back treble damages that would have been paid in antitrust cases.[109]

The threat of a trade war may only emerge in serious cases, as exemplified by the merger between Boeing and McDonnell Douglas, which one commentator called "political dynamite."[110] In this case, it were the Europeans, not the Americans, who sought to

104. *See* FALVEY & LLOYD, *supra* note 23, at 7.

105. *See id.*

106. *See* Scordamaglia, *supra* note 78, at 56–58; Peck, *supra* note 13, at 1193–95.

107. *See* Joseph P. Griffin, *Foreign Governmental Reactions to U.S. Assertions of Extraterritorial Jurisdiction*, 6 GEO. MASON L. REV. 505, 505–06 (1998).

108. In 1980, France made it a crime to request certain types of information located in France. FALVEY & LLOYD, *supra* note 23, at 7.

109. *See* Donald J. Curotto, *Extra Territorial Application of the Anti-Trust Laws and Retaliatory Legislation by Foreign Countries*, 11 GOLDEN GATE U. L. REV. 577, 592-605 (1981) (describing the implementation of such legislation in the United Kingdom). For an extensive overview of reactions by foreign governments against the U.S. assertion of extraterritorial jurisdiction, see Griffin, *supra* note 43.

110. *See* Mehra, *supra* note 10, at 211.

apply their competition law extraterritorially. Indeed, "[i]n December 1996, the Seattle-based company Boeing announced its intention to acquire its biggest U.S. competitor, St. Louis-based McDonnell Douglas."[111] "After the merger, Boeing would become the sole American manufacturer of commercial . . . aircraft[s]."[112] On July 1, 1997, the FTC announced that McDonnell Douglas was "no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market," so the merger posed no threat to competition.[113] The EC viewed the case differently and had serious objections.[114] It particularly feared that Boeing would have an increased ability to negotiate with customers for exclusive supply agreements, thus limiting foreign competitors from important segments of the worldwide market.[115] Following the EC's objections, negotiations took place resulting in important concessions by Boeing, including, for example, ending existing and future exclusive supply deals with several airlines and licensing away non-exclusive patents to other manufacturers.[116] Once these conditions were met, the EC approved the merger.[117]

Most commentators agree that from an economic perspective, the European Union absolutely had reasonable objections against the merger, given that the result of the merger would have allowed Boeing to increase its already dominant position.[118] Of course, the EC wished to guarantee market access for European firms.

On the other hand, the United States, and particularly the U.S. Senate and President Clinton, reacted furiously. President Clinton argued that the EC simply objected to the merger to protect the interest of Boeing's main competitor, the E.U.-based Airbus.[119] The case led to high-level political discussions that included the

111. *Id.* at 212.

112. *Id.*

113. *Id.* at 212–13 (quoting Joint Statement of FTC in the Matter of The Boeing Company/McDonnell Douglas Corporation, *available at* http://www.ftc.gov/opa/1997/07/boeingsta.shtm). This case has been commented upon by many. *See, e.g.*, Fiebig, *supra* note 74 (extrapolating the EC's handling of the Boeing/McDonnell Douglas merger for their overall merger control regulation); Peck, *supra* note 13 (arguing that there should be a binding agreement for dispute resolution relating to antitrust enforcement); Damro, *supra* note 14 (examining the development of anti-competition policy in the European Union).

114. *See* Mehra, *supra* note 10, at 213.

115. *Id.*

116. Damro, *supra* note 14, at 214–15.

117. Mehra, *supra* note 10, at 214–15.

118. *See, e.g.*, Damro, *supra* note 14, at 216.

119. *See* Fiebig, *supra* note 74, at 79–80 (describing the reaction of people in the United States and suggesting the EC was protecting Airbus); Damro, *supra* note 14, at 214 (describing the reaction of President Clinton).

personal involvement of the E.U. commissioner competent for competition policy at the time, Karel van Miert.[120] Karel van Miert considered the merger to be "totally unacceptable" whereas U.S. President Clinton hinted that Washington would consider retaliation if the EC tried to block the merger.[121]

Notwithstanding the furious reactions of some American politicians and commentators, others held that the EC, by broadly applying the territorial scope of its merger control policy, acted precisely as the United States had done in similar situations. For example, one year before the Boeing merger was announced, the FTC had, in 1996, done exactly what the European Union had done, by exerting its jurisdiction concerning the announced merger of two Swiss-based pharmaceutical companies, Ciba-Geigy and Sandoz.[122] Thus, only one year earlier, the FTC had engaged in similar behavior by exerting extraterritorial powers concerning the merger between two European-based companies.[123] These examples demonstrate a history of mutual blaming, although both actors have engaged in the same type of behavior in extraterritorially applying their antitrust laws.[124]

2. Now: Cautious Optimism?

Although the Boeing/McDonnell Douglas merger was a case of serious disharmony between the United States and the European Union, both have later undertaken joint efforts to review several high profile mergers.[125] Some commentators suggest that the Boeing case was an isolated instance, since there have been recent examples of successful collaboration.[126] The so-called "mega-

120. *See* Damro, *supra* note 14, at 213–14.

121. *Id.*

122. *See* Peck, *supra* note 13, at 1166.

123. A difference between the two cases is, however, that whereas in the European control of the Boeing/McDonnell Douglas merger there was a clear assertion that this was to protect the interests of European Union-based Airbus, the FTC control of the Ciba-Geigy/Sandoz merger was not clearly to protect the interests of one particular U.S. competitor although it may have benefitted the U.S.-based pharmaceutical industry generally. *See* Peck, *supra* note 13, at 1192–94; *see generally* Stevens, *supra* note 90, at 288–89 (discussing how the "needs of differing markets" can affect the decisions of antitrust authorities).

124. *See* Layton & Parry, *supra* note 33, at 324–25.

125. *See* Stevens, *supra* note 90, at 270–74.

126. *E.g.*, *id.* at 295. Stevens more particularly references the collaboration between the EC and the U.S. competition authorities concerning the mergers of AOL and Time Warner in 2002 and between World Com and Sprint in 1999. *Id.* at 271–73. She describes the joint reviews in these high profile transactions whereby the authorities on both sides of the Atlantic shared information and coordinated their reviews as "encouraging." *Id.* at 300–01.

phone diplomacy" seems now to have been replaced by a diplomacy promoting a harmonious relationship between two key partners in the global economy.[127] The new E.U. Commissioner for Competition, Mario Monti, cited examples of collaboration in new merger cases as a "model for transatlantic cooperation generally."[128]

There remains, however, reason for caution. Despite two successful cases of cooperation, problems arose again in 2001 concerning the announced acquisition by General Electric of Honeywell.[129] Although the DOJ approved the merger, the EC was dissatisfied by concessions offered by General Electric and blocked the merger,[130] again, leading to tensions and political conflicts.[131] Therefore, given the differences (and to some extent divergences) between competition policies in the two powers, some conflicts may be unavoidable.[132]

V. Policy Analysis

A. *Global Antitrust; National Enforcement*

Problems of extraterritorial application of competition policy arise because no supranational competition authority having the ability to maximize global social welfare exists to correct coordination failures and externalities caused by decentralized enforcement of antitrust by national authorities.[133] To the extent the actions of enterprises limit competition in globalizing markets, no supranational authority exists to resolve disputes. Although the WTO was created to supervise international trade generally, a similar institution for competition law is lacking.[134]

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127. *See* Layton & Parry, *supra* note 33, at 324. This concept of "megaphone diplomacy" is used to refer to the fact that in the major conflicts concerning large mergers like the Boeing case, the "diplomacy" between the European Union and the United States was basically based on mutual blaming via the symbolic "megaphone" and less on a constructive dialogue.

128. *Id.*

129. *See* Scordamaglia, *supra* note 78, at 58.

130. Stevens, *supra* note 90, at 274.

131. Scordamaglia, *supra* note 78, at 58.

132. *See* Meessen, *supra* note 12, at 29–30.

133. *See* Hamp-Lyons, *supra* note 16, at 1590–99 (providing suggestions regarding international convergence of antitrust policy).

134. Takaaki Kojima, International Conflicts over the Application of Competition Law in a Borderless Economy 1–2 (2002). Centralized enforcement is of course plagued by its own problems, such as asymmetric information. *See* Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J. Int'l L. 1, 43–44 (1999). In addition, a supranational agency has to deal with the sovereignty problem, which will create tremendous transaction costs as witnessed by the WTO. *See id.*

Hence, it is understandable that national states also try to impose their competition law on foreign nationals acting abroad if that anti-competitive behavior could harm national markets. Extraterritorial application of competition law should thus not necessarily be viewed negatively, since it could be considered an instrument to protect a nation against offshore conspirators.[135] Some therefore strongly defend an extraterritorial application of competition law as a tool to act against offshore cartels.[136]

Realistically, an extraterritorial application of competition policy only makes sense for nations that subsequently also have economic power to enforce their decision.[137] For example, it would not make much sense for a country like Iceland, which has limited economic power, to threaten to take action against an international cartel or merger that could harm domestic interests.[138]

Therefore, from a national perspective, it is understandable that states attempt to protect their national markets by extending the territorial scope of their competition policy. Resultantly, the competition policies of various national competition authorities will be applied to globally anti-competitive behavior.[139] Given that antitrust policies of different countries serve different goals, the potential for conflict is large.[140] More competition authorities dealing with one issue, such as a merger between two internationally active companies, unavoidably creates potential for conflicts.[141] To reduce or limit the scope of potential conflicts, international law developed the so-called principle of comity.[142] Comity suggests that when a state applies its own laws extraterritorially, the legiti-

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135. *See* Eleanor M. Fox, *Can We Solve the Antitrust Problems of Globalization by Extraterritoriality and Cooperation? Sufficiency and Legitimacy*, 48 ANTITRUST BULL. 355, 356 (2003).

136. *See, e.g.*, Henry C. Thumann, *Multijurisdictional Regulation of Monopoly in a Global Market*, 2008 WIS. L. REV. 261, 263–64 (2008).

137. *See* Guzman, *supra* note 26, at 1506.

138. *See id.* In the words of Guzman:

> At one extreme, for example, is a country that has minimal power over the behavior of foreign firms because those firms do only a small fraction of their business in the country and hold no assets there. Such a country, even if it threatens to deny access to the national market, will be relatively powerless to affect the behavior of foreign firms.

Id.

139. *See* Damien Geradin, *The Perils of Antitrust Proliferation: The Globalization of Antitrust and the Risks of Over-Regulation of Competitive Behavior*, 10 CHI. J. INT'L L. 189, 191–92 (2009) (describing "decentralized globalization," in which each nation enacts its own antitrust laws and applies enforcement measures to firms that must comply with multiple antitrust regimes).

140. *See* Guzman, *supra* note 26, at 1539.

141. *See* Bertrand & Ivaldi, *supra* note 69, at 156–58.

142. *See* Griffin, *supra* note 43, at 183–85.

mate interests of other countries also should be considered.[143] In practice, however, the principle of comity has not played much of a role in resolving conflicts arising between the European Union and the United States, and was even largely abandoned in U.S. law.[144]

It is also important to understand the economic implications associated with extraterritorial application of competition laws. Falvey and Lloyd indicate that from an economic perspective, distortions and negative spillover effects should be distinguished. Actions of one state may cause a negative spillover for another state by reducing the welfare in that other state.[145] This explains why the other state will oppose an action—for example, a merger—that may harm its national interests; however, from an economic perspective, negative spillovers are merely distributional problems.[146] A distortion only arises when an action would be chosen—for example, an international cartel—that would reduce global welfare.[147] In an ideal world, actions should aim to avoid distortions at a global level, even though some negative spillover effects may be unavoidable.[148] Realistically, divergences often exist between the global interest and national interests, which could result in a national authority vetoing a merger that is in the global interest.

Hence, from a global welfare perspective, an extraterritorial application of competition policy is not always desirable, since although such extraterritoriality can serve national interests, it can also lead to the prohibition of a merger that would increase global welfare.[149] Therefore, at least on paper, the ideal solution is to assess whether behavior, such as a proposed merger, negatively or positively affects global welfare.[150] But again, the problem arises that the authorities judging the behavior do not have a global responsibility, rather they are national competition authorities merely considering domestic interests.

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143. *See* FALVEY & LLOYD, *supra* note 23, at 5. For an extensive discussion of the principle of comity, see Spencer Weber Waller, *The Twilight of Comity*, 38 COLUM. J. TRANSNAT'L L. 563 (1999). *See also* Damien Geradin, Marc Reysen & David Henry, *Extraterritoriality, Comity and Cooperation in EC Competition Law* 4-7, *available at* http://ssrn.com/abstract=1175003 (discussing comity and its role within European competition law).

144. *See* Waller, *supra* note 143, at 573.

145. *See* FALVEY & LLOYD, *supra* note 23, at 8.

146. *See id.* at 12 (describing how merger spillovers merely redistribute income and welfare).

147. *Id.* at 8.

148. *See id.*

149. *Id.* at 13.

150. *See id.* at 14–15.

The question arises whether there are any solutions to the problem that while transnational anti-competitive behavior should be judged by the standard of its effect on global welfare, national competition authorities will only analyze the question on the basis of domestic concerns. There is no international antitrust authority. The WTO has competences for international trade, but not for international anti-competitive behavior.[151] The following Sections consider potential solutions to this problem.

B. *Harmonization and Multilateral Treaties*

A starting point for avoiding conflicts in the future could potentially consist of a harmonization of competition law. If principles, aims, and rules of competition policy in the various countries were harmonized, it at first glance seems plausible that the potential for conflict would be reduced. However, both legal scholars and law and economics scholars hasten to argue that this is a naive approach because the views on competition policy between various nations are so fundamentally different that it may be impossible to create a global antitrust law.[152] An international antitrust standard therefore does not exist.[153]

Although some still argue that a harmonization of rules—perhaps via the Organization for Economic Co-operation and Development (OECD)—would be important,[154] most scholars argue that a harmonization of competition policy is neither possible nor desirable.[155] Some argue that the existence of a variety of competition laws also has the great advantage of creating competition between competition laws, which can lead to an information exchange and improve the quality of national competition laws.[156] Professor Andrew Guzman also explained that an international agreement on antitrust would be difficult if not impossible to achieve simply because such an agreement may not benefit all parties equally.[157] Therefore, Guzman considers an international agreement on antitrust to be highly unlikely.[158] He further argues that all past

151. KOJIMA, *supra* note 134, at 1.

152. *See* Guzman, *supra* note 26, at 1539 (discussing the different goals of antitrust policies).

153. *See* Griffin, *supra* note 43, at 197–99.

154. *E.g.*, Bertrand & Ivaldi, *supra* note 69, at 157.

155. *E.g.*, Guzman, *supra* note 26, at 1525–26.

156. *E.g.*, Meessen, *supra* note 12, at 20–21.

157. *See* Guzman, *supra* note 26, at 1548.

158. *Id.* ("[T]he prospects for successful negotiation of an international antitrust agreement are not good.").

attempts either at harmonization, or even merely at cooperation, have largely failed.[159]

Because of the lack of international consensus, nations do not possess the requisite trust needed to create a multilateral treaty, both with respect to substantive competition law itself as well as the conditions under which extraterritorial jurisdiction could be exercised. Simply put, the lack of international consensus in this domain severely hampers any realistic attempts at harmonization.[160]

The same scepsis concerns any proposal for a multilateral treaty on mutual enforcement.[161] It is very unlikely that countries would agree to surrender authority over international mergers to a supranational enforcement agency.[162] Moreover, it is also not clear which institution should provide this international framework. Some scholars suggest the WTO since it already provides rules on transboundary trade.[163] Others argue that the WTO would not be the appropriate forum because it is less equipped to deal with hardcore cartels or to review mergers and acquisitions.[164]

C. *Bilateral Treaties*

Given the above scepsis concerning a multilateral treaty, either on substantive competition law or on the conditions under which extraterritorial enforcement could take place, others refer to the possibility of a bilateral agreement.[165] In such a bilateral agreement, states could agree under which conditions they would allow an execution of extraterritorial jurisdiction on their territory.[166]

Such an agreement did exist bilaterally between the United States and the (then) European Community.[167] This agreement was referred to as the U.S.-E.C. Competition Laws Cooperation Agreement (1991 Agreement) and was signed on September 23,

159. *Id.* at 1535–38.

160. *See* Stevens, *supra* note 90, at 291–94.

161. *See* Meessen, *supra* note 12, at 21–24 (arguing that joint and mutual enforcement apparently has not worked in practice).

162. *See* Hamp-Lyons, *supra* note 16, at 1591.

163. *See* Peck, *supra* note 13, at 1213 (arguing "that an international agreement for antitrust enforcement is feasible").

164. *E.g.*, Bertrand & Ivaldi, *supra* note 69, at 157 (discussing possible involvement of the Organization for Economic Co-operation and Development or the creation of a new institution).

165. *See, e.g.*, Hamp-Lyons, *supra* note 16, at 1593–94.

166. *See id.* at 1593.

167. Griffin, *supra* note 43, at 180–86.

1991.[168] However, the Boeing/McDonnell Douglas merger revealed the weakness of the 1991 Agreement. The 1991 Agreement consisted of provisions on exchange of information, joint conduct of enforcement activities, consultation, and confidentiality of information, but Article V paragraph 4 stated that "[n]othing in [the] article . . . precludes the notifying party from undertaking enforcement activities with respect to extraterritorial anti-competitive activities."[169] The Boeing/McDonnell Douglas conflict could therefore not be prevented by the 1991 Agreement.[170] As a result, some suggest that such bilateral agreements and comity principles are of no value in international conflicts.[171]

Meanwhile, a new agreement between the European Communities and the U.S. government (1998 Agreement) was concluded in 1998 "on the application of positive Comity Principles in the enforcement of their competition laws."[172] Article III of that agreement, referring to positive comity, stated that "the competition authorities of a Requesting Party may request the competition authorities of a Requested Party to investigate and, if warranted, to remedy anti-competitive activities in accordance with the Requested Party's competition laws."[173] Requests may be made "regardless of whether the activities also violate the requesting party's competition laws or whether the competition authorities of the requesting party have commenced or contemplated taking enforcement activities under their own competition laws."[174] The 1998 Agreement is meant to supplement the 1991 Agreement, which remains fully in force.[175] It remains to be seen whether the 1998 Agreement can prevent the type of conflicts that arose in the case of Boeing/McDonnell Douglas if a similar merger case were again to arise.

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168. Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-E.C., Sept. 23, 1991, 30 I.L.M. 1491.

169. *Id.* art. V, para. 4.

170. *See* Damro, *supra* note 14, at 219 ("[T]he bilateral agreement may not be a panacea for cooperation. While it represents a positive step toward formalizing transatlantic cooperation, the agreement emphasizes conflict avoidance, not resolution.").

171. *See, e.g.*, Bertrand & Ivaldi, *supra* note 69, at 157 (stating that such bilateral cooperation may be of no value).

172. Agreement Between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, U.S.-E.C., June 4, 1998, T.I.A.S. No. 12,958.

173. *Id.* art. III.

174. *Id.*

175. *See id.* art. VI.

Commentators suggest that the 1998 Agreement emphasizes conflict avoidance, but still lacks an explicit dispute settlement mechanism.[176] Moreover, domestic U.S. and E.U. legislation do not permit deferral or suspension of merger control authority to other parties.[177] Domestic legislation may therefore be necessary to achieve a more effective cooperation in merger control.[178]

D. *Information Cooperation*

Finally, scholars stress that the most important (although also potentially weak) method for preventing and resolving conflicts over extraterritorial jurisdiction is simply the mechanism of information cooperation.[179] Information cooperation refers to agreements on an exchange of information between competition authorities either generally with respect to enforcement policy or with respect to specific enforcement actions. Informal channels of communication, for example, through the OECD, may help facilitate international cooperation and maintain the stability of international political economy.[180] Other scholars stress the role of networks within the OECD; for example, the international competition network has fora providing possibilities for informal exchange and conflict resolution.[181]

VI. The Position of China

A. *The AML as a Retaliation Tool?*

Existing literature has discussed China, as far as an extraterritorial application of antitrust is concerned, as both a potential injurer and as a potential victim.[182] Indeed, Chinese scholars refer to several cases in which Chinese companies encountered difficulties when entering foreign, and particularly U.S., markets.[183] For example, when the Chinese company Lenovo proposed to purchase IBM's personal computer division, the U.S. Congress strongly opposed the transaction.[184] Hostility against Chinese companies reemerged in 2005 when the Chinese company COMCC

176. *E.g.*, Damro, *supra* note 14, at 219.
177. *Id.* at 219.
178. *Id.*
179. *See, e.g.*, *id.* at 220.
180. *See id.*
181. Bertrand & Ivaldi, *supra* note 69, at 12–15.
182. *E.g.*, Yong Huang, *Pursuing the Second Best: the History, Momentum, and Remaining Issues of China's Anti-Monopoly Law*, 75 Antitrust L.J. 117, 122–23 (2008).
183. *E.g. id.* at 123.
184. *Id.* (mentioning that the deal was ultimately cleared).

attempted to acquire the U.S. petroleum firm Unocal, leading to strong reactions by U.S. politicians who used the attempted acquisition of a U.S. firm as an argument to apply U.S. law.[185] Ultimately, the transaction was not completed.[186]

Many Chinese scholars criticized the fact that Chinese companies could not gain fair access to the U.S. market and some even argued that the drafting of the AML was to some extent a weapon against unwanted foreign buyers.[187] By implementing a merger control framework via the AML, China could at least reciprocate what developed countries had done to Chinese companies.[188] In policy debates accompanying the drafting of the AML, Chinese officials indeed often mentioned that the AML was also needed to protect China against foreign multinationals that could dominate or monopolize the market in China.[189] More particularly, anticompetitive conduct by Tetrapak, a Swedish company specializing in packaging equipment for beverage products, prompted a report by SAIC warning against the trend of foreign companies monopolizing the Chinese market.[190] This Tetrapak incident accelerated the process of drafting the AML.[191] Some scholars have even argued that it is very likely that AML enforcement will be targeted solely at foreign firms.[192]

B. *Necessary to Control Global Mergers*

The AML was also necessary as a mechanism for China to exert influence on the global merger market. Prior to the AML, China had little ability to protect its businesses from foreign mergers. For example, China comprises the market for specialized pipes for oil drilling operations made only by Italian and German producers.[193] When Italian producer Italimpiante and German producer Mannesmann threatened to merge, the proposed merger potentially created a monopoly supplier to the Chinese market.[194] At the time, no competition authority in China existed to judge the desirability of the proposed merger, so "the victims had no ability to

185. *See id.*; Bertrand & Ivaldi, *supra* note 69, at 158.
186. Huang, *supra* note 182, at 123.
187. *See id.*
188. *See id.*
189. *See* Howell et al., *supra* note 1, at 60–63.
190. Zheng, *supra* note 3, at 718–19.
191. *See id.* at 716–20.
192. *See* Angela Huyue Zhang, *The Enforcement of the Anti-Monopoly Law in China: An Institutional Design Perspective*, 56 ANTITRUST BULL. 630, 632 (2011).
193. *See* Fox, *supra* note 135, at 372.
194. *See id.*

protect themselves."[195] This example underscores not only the necessity of a Chinese anti-monopoly law, but also clarifies that China may have an interest in applying its anti-monopoly law in an extraterritorial manner.[196] Protecting national interests may thus have been a major driver motivating the adoption of the AML.[197]

C. *Extraterritoriality under AML Article 2*

China had been aware of the importance of applying competition law to conduct occurring outside of its territory even before the adoption of the AML in 2007.[198] For example, interim provisions for foreign investors attempting to merge with domestic enterprises existed in 2003.[199] Depending upon particular quantitative criteria, a merger between a foreign and a Chinese company had to be announced to the competent authorities.[200] Current merger guidelines of the AML still incorporate these criteria in mandating that merging parties file pre-merger notification to MOFCOM for antitrust review.[201]

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195. *See id.*

196. *But see* Thomas S. Ulen, *The Uneasy Case for Competition Law and Regulation as Decisive Factors in Development: Some Lessons for China*, *in* COMPETITION POLICY AND REGULATION, *supra* note 2, at 13, 30–34 (doubting whether the antimonopoly law will enhance China's already high growth rate); Huang, *supra* note 182, at 118 (questioning whether there are clear benefits in having an anti-monopoly law).

197. Huang, *supra* note 182, at 128.

198. *See* WANG XIAOYE (王晓晔), COMPETITION LAW (竞争法学) 78 (2007).

199. Waiguo Touzizhe Binggou Jingnei Qiye Zanxing Guiding (外国投资者并购境内企业暂行规定) [Interim Provisions for Foreign Investors Merging with or Acquiring Domestic Enterprises] (promulgated by the Ministry of Foreign Trade & Econ. Cooperation, Mar. 7, 2003, effective Apr. 12, 2003), http://finance.sina.com.cn/roll/20030629/1822358069.shtml [hereinafter Interim Merger Provisions]. The 2003 Interim Regulations were superseded by revised regulations in 2006. Guanyu Waiguo Touzizhe Binggou Jingnei Qiye De Guiding (2006 Nian Xiuding) (关于外国投资者并购境内企业的规定 (2006年修订)) [Provisions for Foreign Investors Merging with or Acquiring Domestic Enterprises (Revised in 2006)] (promulgated by the Ministry of Commerce, Aug. 8, 2006, effective Sept. 8, 2006), http://www.chinaacc.com/new/63/73/157/2006/8/wa07732053901860021900-0.htm. [hereinafter Merger Provisions].

200. *See* Interim Merger Provisions, *supra* note 199, art. 19. Such criteria include assets owned by the domestic enterprise within China and turnover. *Id.*

201. "The pre-merger notification regulation" issued by the State Council requests merging parties satisfying some specific combined domestic and global turnover thresholds to notify the Chinese Ministry of Commerce which is the agency charged with merger review. Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhn De Guiding (国务院关于经营者集中申报标准的规定) [Provisions of the State Council on Thresholds for Prior Notification of Manager Concentration] (promulgated by the St. Council, Aug. 3, 2008, effective Aug. 3, 2008), at art. 3, http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm.

However, Article 2 of the AML provides the most explicit reference to an extraterritorial application of the law, stating that: "this law shall apply to the monopolistic conducts outside the territory of the People's Republic of China that has the effect of eliminating or restricting competition on the domestic market of China."[202] Thus, Article 2 explicitly provides for the possibility of applying the AML to extraterritorial anti-competitive conduct if the conduct affects the domestic market in China.[203] Oliver Zhong therefore explains that the drafters of the AML undoubtedly aimed to create an effect-based, broad extraterritorial jurisdiction.[204] The relevant question is therefore not whether the AML can be applied extraterritorially, but whether China has an interest in doing so.

Western commentators are deeply concerned that China will use its AML to block mergers that would have a net positive effect on worldwide competition, but that may harm Chinese national interests.[205] For example, after China blocked Coca-Cola's proposed acquisition of the Chinese juice company Huiyuan,[206] many argued that the decision was motivated by nationalist concerns.[207]

D. *China's Interest in Extraterritoriality*

Given the policy considerations advanced in the previous Section, it is easy to argue in favor of an extraterritorial application of China's AML: in the absence of such an extraterritorial application, China would be unable to prevent mergers that would negatively affect consumer welfare in its domestic market or to react against price fixing by international cartels having negative effects. Thus, one could make the argument that it would be in China's domestic interest to apply the AML extraterritorially. Moreover, it is possible that in some circumstances, this extraterritorial applica-

202. Zhonghua Renmin Gongheguo Fanlongduanfa (中华人民共和国反垄断法) [The Anti-Monopoly Law of the Peoples' Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 Standing Comm. Nat'l People's Cong. Gaz. 68, at art. 2.

203. *Id.*

204. Oliver Q.C. Zhong, *Dawn of a New Constitutional Era or Opportunity Wasted? An Intellectual Reappraisal of China's Anti-Monopoly Law*, 24 Colum. J. Asian L. 87, 105 (2010). In both the United States and in Europe, the expansion of jurisdiction is subject to a qualification of substantiality which is missing in Article 2 of the AML, as a result of which it could in theory apply universally. *See* H. Stephen Harris, Jr., *The Making of an Antitrust Law: The Pending Anti-Monopoly Law of the People's Republic of China*, 7 Chicago J. Int'l L. 169, 187 (2006).

205. *See, e.g.*, Hamp-Lyons, *supra* note 16, at 1599.

206. *See supra* Part I.

207. Hamp-Lyons, *supra* note 16, at 1601.

tion will also increase global welfare. This would be particularly likely when extraterritorial application of the Chinese AML consists of a reaction against distortions affecting global welfare. One could think of the example of a horizontal agreement by foreign producers outside of Chinese territory aiming, for example, at price fixing. In such cases, a relatively strong case can be made that it is both in China's interest and in the global interest that China applies its AML in an extraterritorial way.

Another question is whether, at the policy level, China also has an interest in applying its antitrust law extraterritorially. In principle, China has an interest in applying the law extraterritorially in order to protect its domestic interests.[208] An unconditional and explicit extraterritorial application of domestic law can also lead to political and domestic conflicts, which China probably would like to avoid.[209] Thus, literature indicates that an extraterritorial application of competition law seems practical if a country has sufficient economic power to protect its interests abroad.[210] Just as the United States applied its merger control to a merger between two Swiss companies—Ciba-Geigy and Sandoz—in 1996, and Europe acted similarly regarding the announced merger of Boeing and McDonnell Douglas to American companies, China also could apply its merger control provisions resulting from the AML and its guidelines to the announced merger of two Russian companies having a substantial effect on the Chinese market.[211] Undoubtedly, China's current market power suggests that it can use this economic power to enforce such application.

Thus, the crucial question that must be answered to determine the effects of extraterritorial jurisdiction is whether the particular country is also able to enforce its jurisdiction extraterritorially.[212] If the country cannot, it could remain a paper tiger.

E. *Enforcement*

China could learn from the Boeing/McDonnell Douglas case by not formally prohibiting the merger between two Russian companies taking place in Russia, but instead by imposing substantial fines upon those companies if the merger would violate the AML.

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208. *See* Zhenguo Wu, *Perspectives on the Chinese Anti-Monopoly Law*, 75 ANTITRUST L.J. 73, 102–03 (2008).

209. *See id.* at 103.

210. See Guzman, *supra* note 26, at 1506–07.

211. *See supra* Part I.

212. See Zhong, *supra* note 204, at 105.

Given that these Russian companies want to do business in China,[213] China could execute those fines on the Russian companies. In other words, the U.S. and E.U. experiences teach that enforcement is possible even if the companies engaging in anti-competitive behavior are situated abroad.

The first extraterritorial application of the AML in a recent case of merger control already proves this point: on August 13, 2010, MOFCOM published a decision applying the AML to the purchase of a share majority of seventy-seven percent in Alcon by Novartis.[214] Both companies had their head office in Switzerland, but the merger affected many jurisdictions, including the United States and Europe.[215] On April 20, 2010, Novartis announced its intended merger to MOFCOM, which conditionally approved the merger.[216] This demonstrates an application of the AML in a merger case of two companies situated completely outside of China, but apparently affecting the Chinese market.

Since then, two more merger cases of extraterritorial application have been conditionally approved by MOFCOM.[217] On June 2, 2011, MOFCOM released a conditional approval of the acquisition of Silvinit by Uralkali, the two major potash fertilizer producers and the world's leading exporters based in Russia.[218] On July 2, 2011, MOFCOM conditionally approved the acquisition of Savio Macchine Tessili S.p.A., an Italian textile manufacturer, by Pene-

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213. *See supra* Part I.

214. *See* Zhonghua Renmin Gongheguo Shangwubu Gonggao [2010 Nian] Di 53 Hao (Guanyu Fu Tiaojian Pizhun Nuohua Gufen Gongsi Shougou Ai'erkang Gongsi Fanlongduan Shencha Jueding De Gonggao)
(中华人民共和国商务部公告[2010年]第53号(关于附条件批准诺华股份公司收购爱尔康公司反垄断审查决定的公告) [The People's Republic of China Ministry of Commerce Announcement Number 53 of 2010 (Announcement of Antitrust Investigation Decision to Conditionally Approve Novartis Joint-Stock Company Acquisition of Alcon)] (Aug. 13, 2010), http://fldj.mofcom.gov.cn/article/ztxx/201008/20100807080639.shtml.

215. *See* Adrian Emch, *Die MOFCOM-Entscheidung im Fall NOVARTIS/ALCON: Erste Anwendung des chinesischen Antimonopolgesetzes bei Schweizer Firmen* [*MOFCOM's Decision in Novartis/Alcon: First Swiss Companies Subject to China's Anti-Monopoly Law*], JUSLETTER 2 (Nov. 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1712124.

216. *Id.* at 1 (providing further analysis).

217. *See infra* notes 218–19.

218. Zhonghua Renmin Gongheguo Shangwubu [2011] Di 33 Hao Gonggao (Guanyu Fu Tiaojian Pizhun Wula'er Kaifangxing Gufen Gongsi Xishou Hebing Xie'erweinite Kaifangxing Gufen Gongsi Fanlongduan Shencha Jueding De Gonggao)
(中华人民共和国商务部[2011]第33号公告（关于附条件批准乌拉尔开放型股份公司吸收合并谢尔维尼特开放型股份公司反垄断审查决定的公告）) [The People's Republic of China Ministry of Commerce Announcement Number 33 of 2011 (Announcement of Antitrust Investigation Decision to Conditionally Approve Uralkali Joint-Stock Company Acquisition of and Merger with Silvinit Joint-Stock Company)] (June 2, 2011), http://fldj.mofcom.gov.cn/aarticle/ztxx/201106/20110607583288.html.

lope S.r.l., which is wholly controlled by Alpha Private Equity Fund V.[219] In these cases, no enforcement issues arose since the merging parties themselves applied to MOFCOM for merger control.[220] Additionally, the potential remedies for these cases were at most modest, because only behavior remedies or insignificant divestiture were imposed.[221] The outcome would be less certain if the offshore merging parties did not notify MOFCOM or if they had notified MOFCOM but more drastic remedies would be imposed.

MOFCOM has issued a regulation dealing with circumstances in which qualified merging parties do not notify.[222] Fines and injunctions would be imposed if such non-compliance is discovered.[223] Instead of targeting specifically the extraterritorial application of the AML, the regulation is meant more to target State Owned Enterprises (SOEs), as they have thus far mostly not complied with the mandatory notification requirement.[224] An important challenge for the enforcement of the AML generally is how it can be applied to SOEs and how, in other words, they can be forced into compliance. Moreover, the question also arises how an extraterritorial application of the AML can be enforced. This enforcement issue is not addressed in the interim regulation. Future cases will shed light on these more complicated issues.

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219. Shangwubu Gonggao 2011 Nian Di 73 Hao Guanyu Fu Tiaojian Pizhun Peineiluopu Youxian Zeren Gongsi Shougou Saweiao Fangzhi Jixie Gufen Youxian Gongsi Fanlongduan Shencha Jueding De Gonggao
(商务部公告2011年第73号 关于附条件批准佩内洛普有限责任公司收购萨维奥纺织机械股份有限公司反垄断审查决定的公告) [Ministry of Commerce Announcement Number 73 of 2011 Regarding Antitrust Investigation Decision to Conditionally Approve for Penelope Limited Liability Company to Purchase Savio Textile Machinery Ltd.] (Oct. 31, 2011), http://fldj.mofcom.gov.cn/aarticle/ztxx/201111/20111107855585.html [hereinafter MOFCOM Announcement Number 73].

220. *See supra* notes 218–19.

221. *See* MOFCOM Announcement Number 73, *supra* note 219.

222. Zhonghua Renmin Gongheguo Shangwubu Ling 2011 Nian Di 6 Hao (Wei Yifa Shenbao Jingyingzhe Jizhong Diaocha Chuli Zanxing Banfa)
(中华人民共和国商务部令2011年第6号 (未依法申报经营者集中调查处理暂行办法)) [The People's Republic of China Ministry of Commerce Order Number 6 of 2011(Interim Measure for Investigating and Addressing Failure to Report Manager Concentration)] (promulgated by the Ministry of Commerce, Dec. 30, 2011, effective Feb. 1, 2012) (Dec. 30, 2011), http://fldj.mofcom.gov.cn/aarticle/c/201201/20120107921682.html.

223. *See id.* art. 13.

224. *See* Henry Chen, James Jiang & Frank Schoneveld, *China's MOFCOM Now Fully Armed to Prosecute Companies Failing to Notify a Concentration*, McDermott Will & Emery (Jan. 10, 2012) http://www.mwe.com/publications/uniEntity.aspx?xpST=PublicationDetail&pub=7183.

F. *Avoiding Conflicts*

Given China's international trade relations, China would be wise to avoid the type of negative diplomatic and political reactions that the United States experienced resulting from the extraterritorial application of its competition law.[225] China can, to some extent, prevent these diplomatic struggles, for example, by applying principles of comity, weighing China's interests in applying its AML against the interests of foreign countries whose sovereignty would be affected.

China could also follow the United States' example by creating guidelines providing clear criteria on enforcement of competition law abroad, which would demonstrate to the outside world that Chinese exertion of extraterritorial jurisdiction would not be unlimited. Guidelines could explain that the significance of the competitive behavior is much more important for China than for foreign markets if China is the main importer of the products or services. Guidelines could also clarify that an absence of enforcement of competition policy in a foreign country would obligate China to take control.[226]

Finally, the conflicts between the European Union and the United States also provide an important lesson that it may be possible to reduce sources of conflicts through joint actions and mutual information between various antitrust authorities. The agreement between the United States and European Union concerning extraterritorial application of enforcement in antitrust and referring to principles of comity also may provide an interesting example for China.[227] The drafting of such an agreement between two main trading partners shows that it is possible to agree *ex ante*, for example, on the situations in which a jurisdiction will apply its competition policy in an extraterritorial manner. Such a bilateral agreement can also provide indications on the information exchange that will take place in case of such an extraterritorial exercise of jurisdiction. By lying down the conditions under which this jurisdiction will be exercised and by stipulating provisions on information exchange, the likelihood of potential conflicts—as they have risen between Europe and the United States—can be reduced.

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225. *See* KOJIMA, *supra* note 134, at 4; *see generally* Griffin, *supra* note 107 (describing reactions to U.S. assertions of extraterritorial jurisdiction).

226. *See* FALVEY & LLOYD, *supra* note 23, at 4 (describing similar criteria in guidelines of the U.S. Department of Justice and FTC).

227. *See supra* Part V.C.

Perhaps China could avoid potential conflicts by drafting a similar bilateral agreement with competition authorities of some of its main trading partners like Japan, the United States, and the European Union. Moreover, the literature has also indicated that once domestic competition authorities intend to act against a foreign producer, conflicts can be minimized if a mutual non-confidential information exchange takes place.[228]

G. *Private Enforcement*

Finally, an extraterritorial application of the AML may also provide opportunities for foreign victims wishing to explore the possibilities of the AML by bringing a private enforcement action in China. For example, in the United States, foreign plaintiffs, victims of anti-competitive behavior, successfully use the U.S. enforcement system.[229]

The initial literature on the AML was pessimistic on the issue of whether private enforcement of the AML would be possible. Although Article 50 of the AML imposes civil liability on undertakings carrying out monopoly conduct and causing losses to others, critics doubted whether the Chinese judiciary would allow private enforcement of competition law.[230] Chinese scholars argued that private enforcement might not be a viable option within the current Chinese legal context.[231] They pointed to several difficulties that private parties face in China in bringing lawsuits.[232] In addition, there were concerns that private parties would not have strong incentives to use the litigation system because group litigation and treble damages are lacking in China.[233] Therefore, the possibility of private actions based on the AML was originally considered as a mere theoretical option.

However, this pessimism was unwarranted. More than forty cases have been filed based on private enforcement and courts already

228. *See, e.g.*, Damro, *supra* note 14, at 220–21 (describing such exchanges of non-confidential information).

229. Wurmnest, *supra* note 33, at 205.

230. *See, e.g.*, Xinzhu Zhang & Vanessa Yanhui Zhang, *The Antimonopoly Law in China: Where Do We Stand?*, 3 COMPETITION POL'Y INT'L 185, 185, 198, 201 (2007).

231. *Id.*

232. *Id.*

233. *Id.*; *see also* Michael Faure & Roger Van den Bergh, *Critical Issues in the Enforcement of the Anti-Monopoly Law in China: A Law and Economics Perspective*, *in* COMPETITION POLICY AND REGULATION, *supra* note 2, at 54, 68–70 (discussing private enforcement in the United States, the European Union, and China).

have decided approximately thirty.[234] Moreover, the Supreme Court of China has recently issued interpretations on private enforcement that allow generous possibilities for plaintiffs to use private actions as a tool to enforce the AML.[235] Other Chinese authors also now hold that private enforcement in China should be encouraged since it is an indispensable complement to public enforcement.[236] Therefore, substantial examples of the private enforcement of the AML based on Article 50 exist to suggest the initial doubts in this regard were incorrect.[237]

Private enforcement of competition law is already taking place in China, and may develop even further with the recent Supreme Court guidelines. Still, the Chinese enforcement system is less plaintiff-friendly than that of the United States, given that China lacks treble damages and that attorneys cannot be paid on a contingency fee basis.[238] Interestingly, an extraterritorial case arose recently related to the AML's prohibition against the abuse of a dominant position in a relevant market. Late last year, Huawei, China's leading manufacturer in telecommunications equipment and handsets domestically and internationally, filed a lawsuit against a U.S. based company, InterDigital Technology Group

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234. *See* Dennis Lu & Guofu Tan, Economics and Private Antitrust Litigation in China 26 n.1 (2012).

235. Guanyu Shenli Yin Longduan Xingwei Yinfa De Minshi Jiufen Anjian Yingyong Falu Ruogan Wenti De Guiding
(关于审理因垄断行为引发的民事纠纷案件应用法律若干问题的规定) [Provisions Regarding Applying the Law to Certain Questions when Trying Civil Monopolistic Conduct Cases] (promulgated by the Sup. People's Ct. May 8, 2012, effective June 1, 2012) (May 8, 2012, 2:18 PM), http://legal.people.com.cn/GB/17836437.html. Under the Interpretations, natural persons hurt by a party's monopolistic behavior can file a claim to the intermediate people's court in the provincial capital or in any court designed by the Supreme Court as the first instance court. *Id.* art. 1. On the other hand, Article 6 stipulates that similar complaints at the same court can be combined, paving the way for class action of private enforcement. *Id.* art. 6. As for the burden of proof of a dominant position, the plaintiff usually has the responsibility but if the defendant is a public utility or an entity with a monopolistic position by law, its dominant position is presumed by the court unless it can be proved otherwise. *Id.* art. 9. In addition, the plaintiff can count on public information as evidence of proof for the defendant's market dominance. *Id.* art. 10.

236. *See* Huyue Zhang, *supra* note 192, at 660.

237. An interesting overview of such cases is provided by Thomas Brook, *China's Anti-Monopoly Law: History, Application, and Enforcement*, 16 Appeal 31, 42–45 (2011).

238. *See* Faure & Van den Bergh, *supra* note 233, at 69–70. Indeed, in all reported cases, the plaintiffs have lost. *See* Jiangxiao Athena Hou & Jane Yi, *A Progress Report on the Implementation of China's Anti-Monopoly Law*, 20 Competition 79, 83 (2011) ("To date, no case has been reported to have proceeded to a judgment for plaintiffs.") (citations omitted).

(IDT), for abusing its dominant position.[239] IDT is a technology company that owns several patents in 3G standards but does not produce any tangible goods.[240] The conflict arose because Huawei needed royalty payment arrangements for the patents owned by IDT in the 3G standards.[241] As the court has not opened the case yet, it is uncertain how the court will deal with the extraterritorial issue implied in this case.

Moreover, it is also not yet clear to what extent the Chinese judiciary would welcome foreign plaintiffs like the United States has done. Therefore, the hypothesis that foreign plaintiffs would use the Chinese AML to act against competitive behavior taking place outside of China should, for the moment, probably still be considered as a merely theoretical option.

VII. Conclusion

The question of whether anti-monopoly law should be applied in an extraterritorial manner is the unavoidable result of two phenomena: first, globalized markets lead to the possibility of anti-competitive behavior that may affect those globalized markets; and second, no global antitrust authority is available that would be able to solve these problems. Thus, the national antitrust authorities of sovereign states must decide to what extent anti-competitive behavior taking place outside their country's boundaries but still affecting consumer markets within their territory should lead to the application of their national competition law.

Given that different antitrust authorities in different national countries may examine the same or similar cases of anti-competitive behavior differently, conflicts may arise. These conflicts are to some extent unavoidable because there is no consensus on the principles and goals of competition policy.[242] The literature also indicates that the solution that may look ideal on paper (for example, to harmonize all competition laws and to create one global antitrust authority) is probably neither possible nor actually desirable.[243] The lacking desirability stems in part from the fact that a differentiation of competition laws can have positive mutual learn-

239. Press Release, Huawei (华为), Huawei Xiang InterDigital Tichu Fanlongduan Susong (华为向InterDigital提出反垄断诉讼) [Huawei Files Anti-Monopoly Lawsuit Against InterDigital] (May 25, 2012), http://www.xinwengao.net/release/huawei/62280.shtml.

240. *See id.*

241. *See id.*

242. *See supra* Part V.B.

243. *See e.g.*, Guzman, *supra* note 26, at 1525–26.

ing effects. Moreover, the impossibility of harmonization is furthered because countries' insights on goals of competition policy may largely diverge and not all countries may benefit from a harmonized competition law.

The nature of this conflict regarding extraterritoriality can largely be understood through a comparative analysis of U.S. and E.U. law. On paper, the E.U. and U.S. approaches differ. Whereas the United States applies a so-called effects doctrine following the *Alcoa* decision, the European Union follows *Woodpulp* and examines whether the anti-competitive behavior was implemented within the European Union.[244] Commentators agree, however, that both the United States and the European Union apply their competition law in a *de facto* extraterritorial manner.[245] The different wordings have only limited relevance in practice. Moreover, competition law is applied in an extraterritorial manner against both extraterritorial horizontal agreements and mergers taking place outside the territory but affecting consumer markets within. Inevitably, the extraterritorial application of competition laws leads to applying laws of one nation to behavior that takes place in the territory of another nation. Therefore, such an extraterritorial application of competition law is often considered a breach of the sovereignty of the other state,[246] often leading to political and diplomatic conflicts and mutual blaming.[247] Interestingly, a discussion of a few cases showed that even though the United States and the European Union often blame the other for breaches of sovereignty, they in fact often perform exactly the same type of extraterritorial application of competition law that, if done by the other partner, would be considered a breach of sovereignty.[248]

Notwithstanding the many conflicts that have arisen, history also shows that conflicts can be prevented, mitigated, or even solved through various measures. One possibility is the provision of guidelines on extraterritorial enforcement of competition policy. These guidelines foster predictability by allowing the state to make clear under what conditions it will apply its competition law in an extraterritorial manner. Moreover, on paper, states can consider principles of comity to show respect for the position of the other state.

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244. *See* Griffin, *supra* note 43, at 159–75.
245. *Id.* at 153.
246. *See* Alford, *supra* note 28, at 45.
247. *See supra* footnotes 101–05 and accompanying text.
248. *See Alford, supra* note 28, at 45.

Bilateral agreements specifying the conditions under which a country can engage in extraterritorial application of its competition law present another solution. Ideally, these bilateral agreements could even lead to joint action regarding anti-competitive behavior. Experience also shows that many conflicts can be prevented if an adequate system of information exchange is instituted which clarifies the intention of one competition authority to engage in actions against anti-competitive behavior which may also affect another country.

Extraterritorial enforcement may also be an important aspect of China's AML. Article 2 of the AML refers explicitly to the possibility of such an extraterritorial enforcement. The first cases of an extraterritorial application of the AML have also arisen. Given its position in the global market, this Article argues that China may have a clear interest in an extraterritorial application of its competition law. At the same time, China also has, given its large reliance on export, an obvious interest in maintaining good trade relations with other countries. In that respect, China likely would want to prevent the type of diplomatic and trade conflicts that the United States and the European Union have encountered.

China can learn a few important lessons from these U.S./E.U. conflicts. First, China may have an interest in drafting guidelines with general principles on the extraterritorial enforcement of its AML, thus providing clear criteria on the conditions under which the AML will be applied in an extraterritorial manner. Second, China may have an interest in drafting bilateral agreements with some of its main trading partners—the United States, the European Union, and probably Japan—following some of the earlier models of similar bilateral agreements and agreeing on how to proceed when potential conflicts arise in case of an extraterritorial application of the AML. Third, because in many cases China and its main trading partners may have a joint interest in acting against anti-competitive behavior affecting globalized markets, partners may agree on joint enforcement actions in particular cases. Finally, experience with the U.S./E.U. conflicts shows that agreements on mutual information exchange may significantly contribute to preventing conflicts.

This Article concludes that if China adopts a proactive approach by taking some of these suggested steps, China may be allowed to protect its national economic interests (which may be endangered

by anti-competitive behavior taking place outside of its territory) while simultaneously preventing conflicts with its major trade partners.