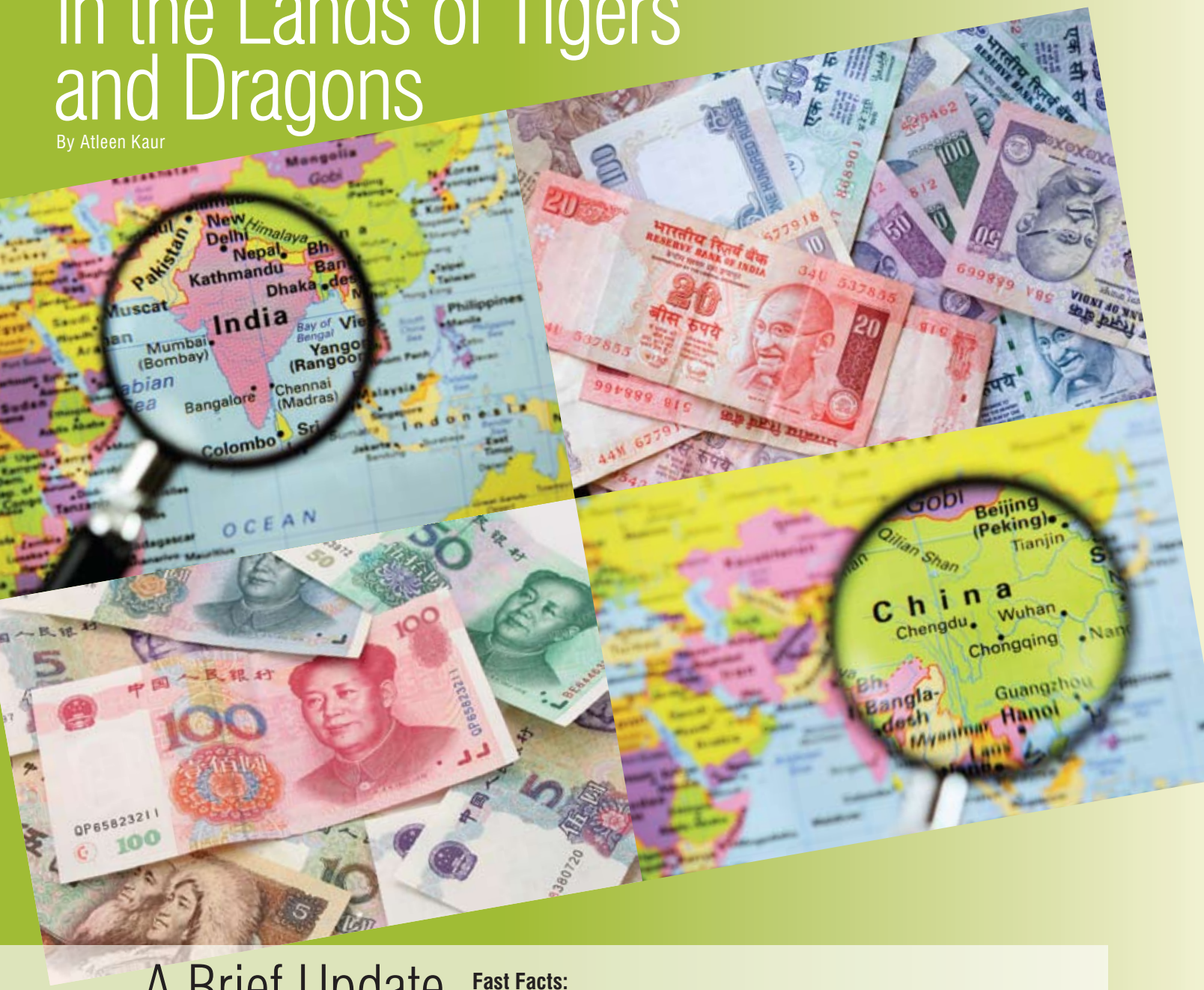
Competition Laws in the Lands of Tigers and Dragons

By Atleen Kaur



A Brief Update on India and China

Fast Facts:

The Indian and Chinese governments have developed competition laws that will encourage market competition and consumer welfare.

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The most provocative contemporary business stories are about globalization and the linking of the world's markets. The stories are fueled in part by the irrefutable ascent of India and China as economic powerhouses. With many multinational companies either conducting or seeking to conduct business in the two countries, and their domestic industries experiencing unprecedented growth, it is paramount that the governments of India and China work to ensure healthy and competitive markets to allow consumers to reap the benefits of economic development. The Indian and Chinese governments are responding by developing competition laws that will encourage market competition and consumer welfare. This article provides a brief summary of the current state of the development of competition laws and regimes in India and China.

India

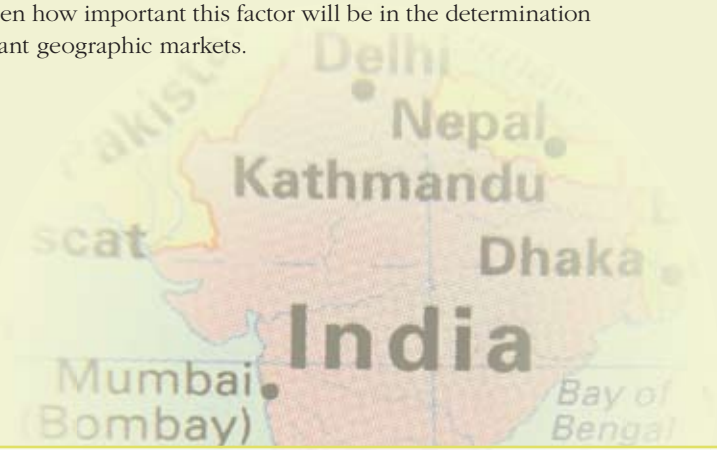
India's economic growth is attributable, at least in part, to the liberalization efforts of the central government that opened its markets to private companies and foreign investors beginning in the early 1990s. With economic growth came the realization that to sustain growth and allow consumers to benefit, free and healthy market competition had to be promoted. That recognition led to the enactment of the Competition Act of India by the central government in 2002,[1] amended in 2007. The Competition Act repeals the prior Monopolies and Restrictive Trade Practices Act of 1969, which had doubtful efficacy in the liberalized economy.

Chapter II of the Competition Act prohibits "anti-competitive agreements" and "abuse of dominant position." It also provides for the "regulation of combinations." In terms familiar to U.S. practitioners, these regulations are roughly similar to prohibition of agreement or conspiracy to restrain trade (Section 1 of the Sherman Act), prohibition of monopolization or attempt to monopolize (Section 2 of the Sherman Act), and merger review and control.

Chapter III of the Competition Act establishes the Competition Commission of India (the commission) to enforce the provisions of the act. The commission is to consist of a chairperson and no less than two and no more than six other members to be appointed by the central government. Currently, there is one member and acting chairman of the commission, Mr. Vinod Dhall, who is supported by a small staff of officers.[2] The commission is granted significant power under Chapter IV of the act to order injunctive relief and impose penalties. However, given the transition of India from a closed to a liberalized economy and the enormity of the task of enforcing the Competition Act vested in the commission, the commission is still in the stage of drafting regulations to enforce the act with more particularity, and of filling the seats on the commission with experts in the fields of law and economics. To that end, the commission is studying the state of competition in various industries and is engaged in learning from various jurisdictions, including establishing a competition forum during which enforcers, practitioners, and academicians from around the world are invited to present ideas.

The commission is poised to begin its enforcement activities in the near future. While enforcement efforts may not yet be in full force, businesses and their counselors would be amiss if they did not review the provisions of the Competition Act before proceeding with business ventures in India. This is especially true because while the Competition Act is influenced by the competition laws in the U.S. and the European Union (EU), some provisions of the act may present different challenges than the competition regimes in the U.S. and EU. For instance, when reviewing alleged anticompetitive agreements, monopolizations, or mergers, the act provides that the commission shall inquire whether the challenged activity "causes, or is likely to cause, an appreciable adverse effect on competition" in the relevant market in India.[3] To the U.S. practitioner, this language may seem similar to the requirement that plaintiffs have to prove "substantial" anticompetitive effect in a relevant market, but "appreciable" may be interpreted differently from "substantial." Appreciable may mean significant, noticeable, or perhaps substantial, and this lack of clarity may lend uncertainty to the markets until the commission provides regulations that explain how it will implement this provision of the act or until the law is allowed to develop through the commission's enforcement activities.

Similarly, uncertainty is introduced through various other ambiguous provisions of the act. For instance, the act provides that when considering whether an enterprise has dominant position in the relevant market under Chapter II, Section 4 (monopolization), the commission will consider the "size and importance" of its competitors. It is unclear what is meant by "importance." Perhaps importance means the ability to exert competitive pressure, or perhaps it is more nuanced. It remains to be seen. When determining the relevant geographic market, the commission will consider "language" as one of the factors. India is a land of thousands of dialects and several major languages; again, it remains to be seen how important this factor will be in the determination of relevant geographic markets.



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The merger regulations of the act have drawn reservations from the American Bar Association's Antitrust Law, Business Law, and International Law sections.[4] The sections commended India on its efforts, but expressed concerns that (1) the act would require notification to the commission of transactions that have no or de minimis connection to India, (2) the waiting period of 210 days for clearance of a merger is too long, and (3) provisions regarding notifications to be filed with the commission are ambiguous and burdensome. The commission has responded constructively and has offered to address "genuine concerns" regarding its regulations.[5]

Even with the uncertainties and reservations, there is good news for businesses and consumers. The commission's diligent efforts to implement the Competition Act reflect on the central government's commitment to foster healthy markets that encourage innovation and further growth. International enterprises can take further encouragement from the commission's conduct of official activities in English and its efforts to interact and learn from enforcement agencies and practitioners around the world.

China

Many sectors of China's economy are driven by state-owned enterprises (SOEs). It is no secret that China has also welcomed foreign investment since the mid-1990s, but has heavily regulated foreign investors. In 2001, when China joined the World Trade Organization (WTO), the regulation of foreign investment was relaxed to make China compatible with WTO regulations. That relaxation has led to an increase in the foreign investment in China, but there was some concern domestically that large foreign investors could hurt domestic companies.[6] China's effort to draft its Anti-Monopoly Law (AML) had begun in 1994, but drew renewed interest after China's accession to the WTO.[7] The AML is not written in English, but unofficial translations are available.[8] Although the AML is neutral on its face, it could be seen as a way to protect domestic companies from being harmed by large and dominating foreign investors.[9] It is comprised of 57 articles and went into effect in August 2008, but many details of its implementation are lacking in its text and are discussed below.

Although the AML borrows heavily from U.S. and EU competition laws, the context in which competition laws will be implemented and enforced in China is different from the U.S. and the EU given China's history as a centrally planned economy. Indeed, the AML's objectives as set out in Article 1 include inter alia: "promoting the healthy development of the socialist market economy." Therefore, at the outset, the AML does not promote unfettered market competition; instead, it allows the enforcement agency to take into account the government's objectives of maintaining a healthy socialist economy. "Exercising macro-control over the economy by means of law is a major characteristic of China's socialist market economy."[10] It is unclear how the interest in maintaining a socialist economy will be reconciled with market competition as the AML is being implemented and enforced.

Most of the concerns regarding the AML have surrounded its treatment of SOEs or state-favored businesses,[11] given the provision of maintaining macro control on a socialist economy and historical experience of foreign investors with SOEs that are dominant in regional markets and are protected from competition by local and regional government actions and policies. Article 7 of the AML provides that the state will protect those SOEs that are critical to the well-being of the national economy and security and in which exclusive operations and sales are the norm in accordance with the law. Thus, uncertainty surrounds the impact of the AML in bolstering competition in markets currently dominated by SOEs.

It is also unclear which agency has the responsibility for enforcing the AML. Although the AML is China's new competition law, various laws already exist that promoted the same objectives as antitrust laws and which were implemented through various government agencies and ministries. For instance, the National Development and Reform Commission (NDRC) has primary responsibility for China's economic planning and industrial policy. Currently, the NDRC administers China's pricing laws, which govern price fixing, price discrimination, and false or misleading pricing. Similarly, the Ministry of Commerce is responsible for domestic and international commerce, including approval of foreign investment in China and regulating monopolies and "regional blockage" in the markets.[12] Another governmental entity with responsibility for supervising "market competition" is the State Administration of Industry and Commerce (SAIC).[13] SAIC is responsible for China's consumer protection and unfair competition laws. All these agencies have in some way been involved in

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enforcing laws that oversee the functioning of the markets and consumer welfare. It is likely that the agencies there (and perhaps other governmental ministries or agencies, especially those that regulate particular industries or regions) will continue to have some role in implementing and enforcing the AML. With several different entities enforcing the AML, the risk for political clashes and inconsistent decisions is great. Experts have called for a single agency to implement the AML and coordinate efforts of the various ministries,[14] and Article 9 of the AML provides for the establishment of an antimonopoly commission, charged with the responsibility for coordinating all enforcement activities.

Some commentators have pointed to the ambiguity regarding intellectual property (IP) and its intersection with AML, as mentioned conclusively and without much detail in Article 55 of the AML, which prohibits restraint of competition through "abuse" of IP. The monopoly granted by IP laws has always presented interesting questions for antitrust practitioners, but under the AML it is entirely unclear what constitutes abuse of IP.

Still, China has taken important steps in recognizing the need for a comprehensive law governing market competition. Furthermore, its open and inclusive drafting process of the AML is commendable and in contrast with its past opaque processes.

Conclusion

Recognizing the virtues of competitive markets, many countries have embarked on efforts to invigorate old competition laws or draft new laws, including India and China. With the commercial nexus of the world balancing between Eastern and Western countries more than ever before, the competition laws of these countries are of significant benefit to entrepreneurs and consumers across the world. India and China have taken significant steps toward drafting and implementing their competition laws; however, many uncertainties remain about the actual experience under these laws. These uncertainties will be resolved as the governments go forward with their enforcement activities. In the meantime, it is advisable for all businesses and entrepreneurs looking to conduct business in India and China to gain familiarity with or seek counsel regarding these laws. ■

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FOOTNOTES

1. For more detailed information and the text of India's Competition (Amendment) Act, 2007 and information regarding the Competition Commission of India, visit <http://www.cci.gov.in/> (accessed August 6, 2008). All websites cited in this article were accessed August 6, 2008.
2. However, Mr. Dhall is expected to retire shortly. His retirement will require the appointment of a new chairman of the commission, which may contribute to the uncertainty regarding the time by which the commission will begin its enforcement activities.
3. See Chapter II of the Competition Act, available at <http://www.cci.gov.in/index.php?option=com_content&task=view&id=18>.
4. Joint Comments of the American Bar Association's Section of Antitrust Law, Section of Business Law, and Section of International Law on Implementing Regulations for and Amendments to the Merger Control Provisions of India's Competition (Amendment) Act, 2007, available at <http://www.abanet.org/antitrust/at-comments/2007/11-07/IndianCompetition.shtml>.
5. For informal comments and responses by the commission to concerns over the merger control process, see materials from the ABA Center for Continuing Legal Education's program titled "Perspectives on the Recent Amendments to India's Competition Act 2002" available for purchase as an audio CD package at <http://www.abanet.org/abastore/index.cfm?section=main&fm=Product.AddToCart&pid=CET08RAIC>.
6. See, e.g., Ross, *China's antimonopoly law,* 22 Antitrust No. 2 (Spring, 2008), p 66 ("During the long, drawn-out process of finalizing the AML, China in 2003, and again in 2006, promulgated merger control regulations, both of which applied only to acquisitions by foreign investors, not to acquisitions by domestic parties.").
7. For a good discussion of the AML, see Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead,* The Antitrust Source (October, 2007), available at <http://www.abanet.org/antitrust/at-source/07/10/10-07.html>. This article also attached an unofficial translation of the AML from Chinese to English.
8. A translation can be found at <http://www.lawinfochina.com>. An unofficial translation is also attached to Bush, *supra,* and that translation is used for purposes of this article.
9. See, e.g., Deng and Leonard, *Incentives and China's new antimonopoly law,* 22 Antitrust No. 2 (Spring, 2008), p 75. ("To some extent, government officials in China may be expected to enforce the AML more harshly against foreign based multinationals, as compared with Chinese companies. However, this outcome is not certain."). See also Huang, *Pursuing the second best: The history, momentum, and remaining issues of China's antimonopoly law,* 75 Antitrust L J 117, 213 (2008).
10. Chinese Government White Paper: *Legal Systems Regulating the Order of the Market Economy,* available at <http://www.china.org.cn/government/whitepaper/2008-02/29/content_11118784.htm>.
11. China.Org.CN, *Effectiveness of Anti-monopoly Law on SOEs Questioned* <http://www.china.org.cn/business/news/2007-09/14/content_1224417.htm>.
12. China Daily, *Main responsibilities of the Ministry of Commerce* <http://www.chinadaily.com.cn/bizchina/2006-11/16/content_734839.htm>.
13. State Administration for Industry and Commerce, People's Republic of China <http://www.saic.gov.cn/english/About%20Us/t20060225_14598.htm>.
14. China.Org.CN, *Calls for single anti-monopoly agency* <http://www.china.org.cn/government/opinions/2007-12/14/content_1235609.htm>.