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Same Plant, Different Soil: Japan's New Merger Guidelines

*Salil K. Mehra**

I. INTRODUCTION

Legal transplants are a funny thing. We appear to see them all over—even in lands that like to think that their legal flora are largely aboriginal.¹ Conversely, some have argued that legal transplants are not even truly possible,² and have debated as to how to judge their success or failure.³

Japan's New Merger Guidelines ("New Merger Guidelines"), issued by the Japan Fair Trade Commission ("JFTC") in May 2004, mark a turning point for antitrust in Japan. It is likely that Japan's New Merger Guidelines will be seen as a model for legal transplants in the future. Despite the similarities between Japan's New Merger Guidelines and the U.S. Horizontal Merger Guidelines ("U.S. Merger Guidelines"),⁴ Japan's New Merger Guidelines are unlikely to be a "success" in the same way that the U.S. Merger Guidelines have been a success since their adoption by the American competition agencies. Although Japan is far from a developing nation or a transitional economy, Japan's experience importing critical

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¹ See, e.g., BRUCE W. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 62–63 (1967) (describing art. I, § 8, cl. 8 of the United States Constitution, providing for copyright and patent protection, as a kind of legal transplant from England).

² See, e.g., R.B. SEIDMAN, STATE, LAW AND DEVELOPMENT (1978) (arguing that laws are generally not transferable between different nations). But see ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 12–14 (2d ed. 1993).

³ See Hideki Kanda & Curtis J. Milhaupt, *Re-Examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 887–88 (2003) ("There is little agreement among scholars on transplant feasibility and the conditions for successful transplants, or even how to define 'success'.").

⁴ See U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (revised), Apr. 8, 1997, available at <http://www.usdoj.gov/atr/public/guidelines/hmg.htm>.

features of the U.S. Merger Guidelines can provide useful lessons. For developing countries also undertaking major revisions to their competition laws, Japan's experience may show that the text of a legal transplant is only one important consideration. Additionally, the context of competition law and the subtext of changes to the existing norms of economic regulation may be just as important to "importing" antitrust law into developing nations or transitional economies.

Based on their text, context, and subtext, the New Merger Guidelines signal a great change in how Japan will deal with mergers in the future. The text of the New Merger Guidelines contains significant differences from its predecessor and shows a strong resemblance to the U.S. Merger Guidelines. In particular, the text of the New Merger Guidelines greatly fleshes out Japan's approach to merger review, such as substitution and market concentration, although the question of how to handle efficiencies, which continues to vex other enforcement agencies, remains largely unanswered.

However, the changed text of the New Merger Guidelines is not their only important implication. Based on their context, while Japan's New Merger Guidelines may prove important, their role will likely differ greatly from that of the U.S. Merger Guidelines. Indeed, because of the subtext of the New Merger Guidelines, they may mark a change in the norms of administrative practice in this area of Japanese governance.

II. JAPAN'S NEW MERGER GUIDELINES—THE TEXT

Japan's New Merger Guidelines are interesting as a literal example of comparative law.⁵ That is, it is interesting to compare them both to Japan's previous merger guidelines, adopted in 1998 ("Old Merger Guidelines"),⁶ as well as to the U.S. Merger Guidelines. Specifically, the New Merger Guidelines mark a stark difference in both text and content from the Old Merger Guidelines. The New Merger Guidelines incorporate important aspects of the U.S. Merger Guidelines, especially their reliance on numerical guideposts for industry concentration, a feature absent from the text of the Old Merger Guidelines.

While Japan's Old Merger Guidelines were not unusual in their content, they did not provide particularly detailed guidance. They did,

⁵ See Fair Trade Commission, Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination, May 31, 2004, available at <http://www.jftc.go.jp/e-page/legislation/ama/MAreview.pdf> [hereinafter New Merger Guidelines].

⁶ See Fair Trade Commission, *Guidelines for Interpretation on the Stipulation That 'The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade' Concerning M&As*, Dec. 21, 1998, available at <http://www.jftc.go.jp/e-page/ICNmerger/maGL.pdf> [hereinafter Old Merger Guidelines].

however, acknowledge many factors in merger review that would be familiar to an American antitrust lawyer. Specifically, the Old Merger Guidelines pointed to issues such as the market share of the merging firms, the possibility of new entrants, the existence of substitute products, and the possibility of efficiencies.⁷ However, the Old Merger Guidelines' discussion of these points was relatively sparse, often listing relevant factors with no indication of how important they were or how they would be measured.

The New Merger Guidelines have greatly expanded the detail in which they discuss particular aspects of merger review (e.g., the question of substitution). If two merging firms produce the same product X, antitrust authorities ask whether another product Y can serve as a substitute for X in order to determine whether the market in question is "just X" or whether it contains both X and Y. If consumers readily substitute Y for X, then the products should be readily considered to be competitors in the same market.⁸ Providing little explanation of this concept, the Old Merger Guidelines contained a one paragraph example case description:

When markets exist for substitute products with functions and uses similar to the goods, th[e] substitute products might have an impact on competition in a particular field of trade in accordance with the degree of substitutability in terms of marketing networks, demand sources, prices, and other factors.⁹

By contrast, the New Merger Guidelines spend three pages on substitution,¹⁰ setting forth the idea of "demand and supply substitution that informs traditional antitrust analysis of market power"¹¹ in terms that would be quickly recognizable to American antitrust lawyers as the cross-price elasticity of demand test:¹²

On the other hand, when the products X and Y have similar functions and efficacy, if the price of product X is increased, then users [will] [come] to purchase the product Y and the price of product Y is likely to increase. Therefore, if the sales or the price of product Y increases in response to an increase in the price of product X, it can be considered that products X and Y have similar functions

⁷ See *id.* at 12.

⁸ See HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 3.4 (1999).

⁹ See Old Merger Guidelines, *supra* note 6, at 19.

¹⁰ See New Merger Guidelines, *supra* note 5, at 15–18.

¹¹ Jerry A. Hausman & J. Gregory Sidak, *A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks*, 109 YALE L.J. 417, 423–24 (1999).

¹² See HOVENKAMP, *supra* note 8.

and efficacy.¹³

While this paragraph of the New Merger Guidelines alone shares more detail with the reader than the Old Merger Guidelines' entire discussion of substitution, the several remaining pages of the New Merger Guidelines' section on substitution flesh out additional details relevant to this standard.

But not every aspect of merger review receives such explication in the New Merger Guidelines. To take another example that is particularly interesting to scholars and practitioners in the area,¹⁴ the Old Merger Guidelines' *entire* discussion of efficiencies states:

Economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs, efficiency in research and development, and other improvements of efficiency caused by the M&A are examined in their impact on competition. When improvement of efficiency is deemed likely to stimulate competition (for example, a low-ranking company increase[s] its cost competitiveness, financing capability, raw material procurement ability and other fundamentals through a merger, which leads to lower product prices and higher quality of the goods, and in turn promotes competition with high-ranking companies), these positive impacts are considered.¹⁵

This amounts to little more than a laundry list of potential efficiencies and the statement that they are relevant to merger review. Unlike the case of substitution, the New Merger Guidelines basically left this section unaltered.¹⁶ However, unlike substitution, the issue of how antitrust authorities should apply the concept of efficiencies continues to be a source of argument as well as agreement. How and whether the U.S. antitrust authorities should consider increased efficiency as a justification for an otherwise anti-competitive merger continues to be a contentious question in the United States,¹⁷ while internationally, there is a significant gap with the

¹³ See New Merger Guidelines, *supra* note 5, at 16.

¹⁴ See Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 209 (1992) ("The most controversial issue in current U.S. merger policy is whether there ought to be an 'efficiencies defense' to individual mergers when the combined market share of the parties, existing concentration in the market and other factors would make those mergers otherwise illegal."). This has continued to be a controversial topic up until the present day.

¹⁵ See Old Merger Guidelines, *supra* note 6, at 20.

¹⁶ See New Merger Guidelines, *supra* note 5, at 30–31.

¹⁷ See Daniel J. Gifford & Robert T. Kudrle, *Rhetoric and Reality in the Merger Standards of the United States, Canada and the European Union*, 72 ANTITRUST L.J. 423, 447 (2005) ("No published court of appeals decision, however, has yet upheld a merger solely on the ground that it furthered efficiency.").

European Union, where increased efficiency has at times been treated as a reason to block a merger because a more efficient firm will harm competitors.¹⁸

Arguably, the most important difference between the Old Merger Guidelines and the New Merger Guidelines lies in the New Merger Guidelines' approach to measuring market concentration, namely the adoption of the U.S.-style Herfindahl-Herschmann Index ("HHI") guideposts in the New Merger Guidelines.¹⁹ As with substitution and efficiencies, the Old Merger Guidelines took a qualitatively normal, but quantitatively sparse, approach to market share:

Market share is a basic indicator which indicates the position of the companies in the market. If the companies attempting to effect an M&A have a high market share, the increase in shares caused by the M&A is large, or there is a substantial difference between the market shares of the companies concerned and those of the competitors, the M&A will have a substantial impact on competition.²⁰

Again, we see an acknowledgment of the concept, but the statement is not particularly detailed, especially in comparison to the New Merger Guidelines.²¹ The Old Merger Guidelines did not mention the HHI, which has become a key touchstone in American²² and European merger review.²³

¹⁸ *Id.* at 458 (“[S]everal instances of European merger enforcement in the past fourteen years have treated efficiencies as negative factors because of their potential for damage to competitors.”).

¹⁹ HHI is a measure of market concentration. Once a market's limits are properly defined, HHI can be calculated by summing the squares of market shares of the firms in the market. See HOVENKAMP, *supra* note 8, § 12.4(a)(2).

²⁰ See Old Merger Guidelines, *supra* note 6, at 14.

²¹ See *supra* Part II.

²² See William Blumenthal, *Clear Agency Guidelines: Lessons from 1982*, 68 ANTITRUST L.J. 5, 12 n. 29 (2002) (“Among all of the Guidelines’ provisions, the adoption of the HHI seems to be the one that has most influenced common antitrust parlance.”); Joe Sims et al., *Countering Bad Statistics: Strategies for Dealing with the Problem Merger*, in 27th Annual Advanced Antitrust Seminar: Mergers, Markets, and Joint Ventures 331, 333 (Donald I. Baker et al. eds., PLI Corporate Law & Practice Course Handbook Series No. B4-6807, 1987) (describing HHI as the “touchstone” of merger analysis once the product market has been defined).

²³ See Gifford & Kudrle, *supra* note 17, at 457 n.135 (“The EU Guidelines employ a Herfindahl-Hirschman Index (HHI) of concentration as a guide to determining competitive effects” in addition to using measures of market share); see also *Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings*, 2004 O.J. (C 31) 5, ¶ 14–21 (adopting HHI and setting forth guideposts on likely administration action given certain HHI values for a merger in question), available at http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/c_031/c_03120040205en00050018.pdf (last visited Dec. 10, 2005).

The HHI, a metric of market concentration,²⁴ has been very prominent in American merger review since 1982. In particular, the U.S. Merger Guidelines presume that markets with an HHI below 1000 are “unconcentrated,” those with an HHI between 1000 and 1800 are only “moderately concentrated,” and those with an HHI above 1800 are “highly concentrated.”²⁵ Where a market has an HHI of about 1800, a merger that increases HHI by more than 100 is presumptively considered to increase or enhance market power or facilitate its use.²⁶ As a result, the numbers 1000, 1800, and, to a lesser extent, 100, have fostered a kind of numerology among American antitrust lawyers.

By contrast, the New Merger Guidelines set forth explicit HHI signposts describing when certain levels of market concentration will trigger particular policy responses by the JFTC. In particular, like the Old Merger Guidelines, the New Merger Guidelines purport to be an interpretation of the Antimonopoly Law’s²⁷ prohibition on mergers “where the effect of [the] merger may be to substantially restrain competition.”²⁸ But the New Merger Guidelines diverge by setting forth more than just “[underlying] principles.”²⁹ For example, the New Merger Guidelines conclude that a merger will not substantially restrain competition if, along with other factors, the market in question is “not oligopolistic,” which is further defined as being a market with an HHI of “less than 1000.”³⁰ Similarly, the New Merger Guidelines propose a higher level of scrutiny for markets with an HHI above 1800, and an intermediate analysis for markets with an HHI between 1000 and 1800, which is deemed to be “not highly oligopolistic.”³¹ The New Merger Guidelines also conclude that “the possibility that the effect” of a merger “may be substantially to restrain competition . . . is usually thought to be small” where the incremental increase in HHI of the merger “is less than 100.”³²

The New Merger Guidelines’ use of HHI marks a fairly stark contrast to the Old Merger Guidelines. The New Merger Guidelines obviously closely resemble the standards that have been set forth in the U.S. Merger

²⁴ See *supra* note 19.

²⁵ U.S. Merger Guidelines, § 1.5, available at http://www.usdoj.gov/atr/public/guidelines/horiz_book/15.html.

²⁶ *Id.*

²⁷ The Antimonopoly Law is Japan’s main antitrust statute. See Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 14 April 1947 (The Antimonopoly Act) (as amended), available at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf (last visited Nov. 30, 2005).

²⁸ *Id.*

²⁹ See New Merger Guidelines, *supra* note 5, at Introduction.

³⁰ *Id.* at 23.

³¹ *Id.* at 27.

³² *Id.*

Guidelines. However, it would be a mistake to view them as a wholesale importation. For example, a market's HHI is only one determinant, along with the merged firm having a market share no greater than 25%, for the conclusion that "the effect of a horizontal business combination *may* not be substantially to restrain competition in a particular field of trade."³³ The word "may" seems to reserve some continued discretion in this apparent safe harbor and the JFTC has not fully embraced HHI alone. Yet, the JFTC's New Merger Guidelines show an unmistakable American influence—and by extension, the influence of the economic analysis that has greatly informed the U.S. Merger Guidelines.

III. THE CONTEXT

While Japan's New Merger Guidelines may resemble the U.S. Merger Guidelines in form, due to their context, the New Merger Guidelines will likely perform a different function. Unlike in the United States, the New Merger Guidelines in Japan are not a response to perceived overactive merger enforcement in the face of a merger boom. Instead, Japan's move appears to be part of a larger domestic plan of administrative law reform, together with domestic and external pressure to harmonize antitrust laws with the European Union and United States.³⁴ While the New Merger Guidelines may succeed in Japan, any success will be different from that of the U.S. Merger Guidelines.

The U.S. Merger Guidelines represent a cautious success against the backdrop of overaggressive, unpredictable antitrust enforcement. Antitrust enforcement during the decades prior to the Guidelines' enactment has been seen as questionably overactive.³⁵ *United States v. Von's Grocery*³⁶ is a case in which the U.S. Federal Trade Commission ("FTC") blocked the merger of two grocery chains with a combined market share of 7.5%.³⁷

³³ New Merger Guidelines, *supra* note 5, at 23.

³⁴ See *infra* Sections III–IV.

³⁵ See, e.g., Robert Pitofsky, *Antitrust At The Turn Of The Twenty-First Century: A View from the Middle*, 76 ST. JOHN'S L. REV. 583, 584 (2002) ("In the 1960s, United States antitrust enforcement was extremely aggressive The most extreme examples of questionable enforcement occurred in the merger area The heightened enforcement levels of the 1960s led to a reaction in the Bar, in the private sector, and in academia . . ."); Stephen F. Ross, *From Von's to Schwinn to the Chicago School: Interview with Judge Richard Posner, Seventh Circuit Court of Appeals*, 6 ANTITRUST 4, 4–5 (Spring 1992) (talking to Judge Richard Posner, once an assistant to the Solicitor General who argued for the FTC in *Von's Grocery*. Commenting on the position of the government in challenging the merger, Posner notes that the government "regarded it as a frontier case seeking the furthest extension of merger law that was defensible. The Supreme Court used the case as a vehicle for announcing an even broader rule, far beyond what we advocated" and states that he later viewed it as a "harmless" case).

³⁶ *United States v. Von's Grocery*, 384 U.S. 270 (1966).

³⁷ See HOVENKAMP, *supra* note 8, §12.2.

Since then, it has become a kind of byword for the FTC's overly aggressive enforcement policy. Similarly, *Brown Shoe v. United States*³⁸ and *United States v. Philadelphia National Bank*³⁹ have long since become shorthand for the pre-Guidelines era's rejection of increased efficiency as a justification for mergers.⁴⁰ As a result, the 1982 iteration of the U.S. Merger Guidelines was seen as a kind of watershed in American antitrust, in which substantive standards and procedural steps are based more on economic logic merger review.

By contrast, Japan's merger enforcement has been characterized as severely under-aggressive.⁴¹ In the forty year period after the Antimonopoly Law's adoption, there was only one clear instance where Japanese government opposition led to the abandonment of a merger.⁴² Of course, that statistic could be the result of informal consultations that made clear to merging entities which transactions would be approved before the merger became public, or the result of active industrial policy whereby mergers were government-led.⁴³

There is another reason why Japan has not seen highly aggressive merger enforcement: historically, Japan has not had many mergers. The volume of mergers in America, measured by either the dollar amount or as a percentage of the total capitalization of the stock market, has historically dwarfed the volume of mergers in Japan.⁴⁴ And while Japan has recently seen an increase in merger activity, including a notable hostile takeover battle,⁴⁵ from 1971 to 1990, Japan saw only three takeover bids. In contrast, the United States saw 1032 bids during the much shorter period

³⁸ *Brown Shoe v. United States*, 370 U.S. 294 (1962).

³⁹ *United States v. Philadelphia National Bank*, 374 U.S. 321, 371 (1963).

⁴⁰ See *Brown Shoe*, 370 U.S. 294 (holding that a merger between competing retailers of shoes was illegal because the large post-merger firm could undersell its competitors).

⁴¹ Yasuhide Watanabe & Yuko Tamai, *Japanese Merger Notification and Enforcement Policy*, 15 ANTITRUST 49, 49 (Spring 2001) (stating that "in the past, the [Japan Fair Trade Commission] was ridiculed as the watchdog that had never bit" and that even in its more currently active period, "[a]s far as domestic mergers are concerned, it is reasonable to assume that the JFTC's generally likely to take a lenient view.").

⁴² Pitofsky, *supra* note 14, at 214.

⁴³ See CHALMERS A. JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1975* (1983) (discussing how, in past era, Japanese bureaucrats took initiative in fostering mergers in industries where consolidation seemed appropriate).

⁴⁴ See Stephen Prowse, *Corporate Governance in an International Perspective: A Survey of Corporate Control Mechanisms Among Large Firms in the United States, the United Kingdom, Japan and Germany*, BIS Economic Papers, No. 41 (July 1994) (showing that, during a five year period from 1985 to 1989, the total volume of mergers in the United States was \$1.070 trillion, representing 41.1% of U.S. market capitalization; in Japan the comparable numbers were \$61.3 billion and 3.1%).

⁴⁵ See Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Corporate Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2178-80 (2005) (discussing the Livedoor hostile takeover battle).

from 1985 to 1990.⁴⁶

Accordingly, while Japan's New Merger Guidelines may be seen as a success, they cannot play the same role that the U.S. Merger Guidelines have. The baseline from which Japanese merger enforcement starts is too significantly different. Nonetheless, the New Merger Guidelines could succeed as an example of a late-mover advantage, giving Japan the opportunity to learn from the U.S. experience, as its own merger wave may be only just beginning.

IV. THE SUBTEXT

The New Merger Guidelines do not merely announce a list of concerns that the JFTC will consider, as the Old Merger Guidelines did with such important issues in merger review as efficiencies⁴⁷ and substitution.⁴⁸ Instead, the New Merger Guidelines add an explicit discussion of the method that the JFTC will use. The adoption of HHI and clear benchmarks for how it will be used in decision-making directly informs merging firms and antitrust lawyers about the JFTC's intended practice.

While these explicit statements are important, what they implicitly communicate is also important. By making such statements, the JFTC effectively makes a commitment about what it will do. To the extent that firms and lawyers read and believe the guidelines, they will take actions that rely on them. As a result, the *subtext* of the New Guidelines is that the JFTC is moving towards an administrative model that relies less on the reservation of discretion and more on establishing clear patterns and processes.⁴⁹

In fact, the New Merger Guidelines explicitly state that their purpose is "to enhance transparency and predictability regarding the review of business combination," in contrast to the Old Merger Guidelines, which "clarified [underlying] principles."⁵⁰ The implicit message is that telling the world the factors you will consider in making your administrative determinations is not enough anymore; you must actually explain how you will weigh these factors and what kind of process you will use. The result on paper is a more constrained model of administrative decision-making.

The importance of the JFTC's commitment is accentuated by the baseline model of how the JFTC has operated in the past. Looking beyond

⁴⁶ See Katsumoto Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 608-09 (1999).

⁴⁷ See *supra* notes 6-8.

⁴⁸ See *supra* notes 14-18.

⁴⁹ Indeed, this is a broader aim of Japan's current overarching legal reform project. See *id.*

⁵⁰ See New Merger Guidelines, *supra* note 5, at Introduction.

merger review alone, the JFTC has tended to act informally and tries to get compliance by firms that seek to merge without resorting to formal agency decisions.⁵¹ By shifting towards a model of clear statements, safe harbors, and numerical measures, the JFTC would seem to be changing not just the rules of merger review, but their mode of regulation.

There are many possible reasons for this shift. One in particular is certainly the recent drive towards harmonization in global merger review. Through institutions such as the International Competition Network, a lot of effort has been invested in trying to promote global adoption of so-called “best practices” in merger review.⁵² Thus, by adopting the New Merger Guidelines, Japan has signed on to both a new mode of regulation as well as a harmonized standard for global mergers.

V. LESSONS FOR DEVELOPING NATIONS

Japan is definitely not a developing nation. Despite that fact, developing nations may want to watch what happens with Japan’s New Merger Guidelines. For several reasons, Japan’s experience will involve challenges that many developing nations also face. First, Japan is trying to tame a discretionary, sometimes interventionist, approach to economic regulation—something many developing and transitional economies are also trying to do. Second, Japan is trying to fit its merger review regime into a world where American and European models of merger review are already established—a challenge that developing nations, including China,⁵³ are also undertaking. Finally, Japan is trying to implement these measures while simultaneously reforming its underdeveloped legal system.

The New Merger Guidelines could provide developing nations with a lesson about how to move from a less predictable *ad hoc* approach to regulation to one that provides more certainty for market players. Recent studies have suggested that state-centered interventionist systems of law and regulation tend to inhibit economic growth.⁵⁴ Although they have their detractors, there has been a proliferation of studies and prescriptions based on the notion that restraining and formalizing government regulation is

⁵¹ See Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L. J. 137, 147 (1995); John Haley, *Antitrust in Germany and Japan: The First Fifty Years 1947–1998*, 43 VA. J. INT’L L. 303, 313 (2002) (suggesting that because of informal enforcement and the ability to shape compliance, available statistics may underestimate the influence of the JFTC).

⁵² See Description of the International Competition Network, available at <http://www.internationalcompetitionnetwork.org/aboutus.html/>.

⁵³ See Andrew Batson, *China Antitrust Law Could Alter Landscape*, Nov. 6, 2005, available at <http://abcnews.go.com/Business/wireStory?id=1286360&CMP=OTC-RSSFeed s0312>.

⁵⁴ See, e.g., Rafael La Porta et al., *The Quality of Government*, 15 J.L. ECON. & ORG. 222, 222–24 (1999) (considering this among other variables in a cross-country study involving developing nations).

critical for economic development.⁵⁵ Adopting a set of standards such as the New Merger Guidelines represents Japan's attempt at moving towards formal rules and away from the kind of discretion that is more easily abused. As a public statement, the New Merger Guidelines also serve as an attempt at creating a level of insulation for the antitrust regulators and at committing the regulators to a particular course of action in advance of any one merger that may generate political pressures.

Additionally, the New Merger Guidelines provide an example to developing nations of harmonization within the global trading system. Increasingly important cross-border mergers have ratcheted up the pressure to harmonize standards for merger review.⁵⁶ The New Merger Guidelines integrate important standards, such as the use of HHI as a guidepost, that are already common in the United States and the European Union. But the New Merger Guidelines integrate these standards with an existing Japanese agency, the Fair Trade Commission, and within the context of Japan's bureaucracy and political system. As a result, should this effort succeed, it may yield important lessons for developing nations about how to introduce substantive "global" standards into their own domestic regulatory institutions.

Finally, the New Merger Guidelines may provide lessons to developing nations about how to craft competition policy while simultaneously building a deep and broad-based legal infrastructure. While Japan is not a developing country, it is nevertheless in the midst of a process to develop its legal institutions.⁵⁷ Developing nations are also undertaking similar challenges.⁵⁸ Japan's challenge is to develop its

⁵⁵ See Kevin Davis, *What Can the Rule of Law Variable Tell Us About Rule of Law Reforms?*, 26 MICH. J. INT'L L. 141, 145 (2004) (describing how "the World Bank has conducted, or at least sponsored, several cross-country statistical analyses of the relationship between legal variables and measures of development" including variables such as "government effectiveness", "regulatory quality," [and] "rule of law" and discussing methodological problems with these studies).

⁵⁶ See Spencer Weber Waller, *The Internationalization of Antitrust Enforcement*, 77 B.U. L. REV. 343, 386-87 (1997) (discussing pressures for merger review harmonization from "transnational enterprises"); Mitsuo Matsushita, *International Cooperation in the Enforcement of Competition Policy*, 1 WASH. U. GLOBAL STUD. L. REV. 463, 465 (2003) (noting how the conflict between the United States and the European Union over antitrust concern about the GE-Honeywell merger showed the "need to coordinate the enforcement policies of competition laws of different nations").

⁵⁷ See Daniel Foote, *Justice System Reform in Japan*, Colloquium: Law and Justice Beyond Borders (July 11-13, 2005), Annual Meeting of the Research Committee of Sociology of Law, ISA, 9, available at <http://www.reds.msh-paris.fr/colloque/foote.pdf> (describing how Japan's legal system is being reformed in order "to transform the excessive advance-control/adjustment type society to an after-the-fact review/remedy type society" and how the inadequate "size of the legal profession and access to legal service" were "fester[ing]" problems that "could no longer be ignored").

⁵⁸ See, e.g., Paul Gewirtz, *The U.S.-China Rule of Law Initiative*, 11 WM. & MARY BILL

antitrust regime while simultaneously building its legal institutions. To the extent that it succeeds in this effort, there may be important lessons for developing nations that also must tackle both of these challenges.

The lessons for developing nations from Japan's experience are not yet totally clear. After all, the New Merger Guidelines are quite new. However, given the rapid increase in Japanese merger activity, as well as the potential increase in cross-border merger activity, we should soon have cases involving the New Merger Guidelines from which to draw lessons on what to do and—just as importantly—what not to do.

VI. CONCLUSION

Japan's New Merger Guidelines look pretty familiar to American antitrust eyes, particularly the Japanese embrace of the U.S.-style HHI guideposts. However, Japan has an unfamiliar historical background of infrequent mergers and almost nonexistent formal merger review.⁵⁹ As a result, Japan's New Merger Guidelines mark a significant change, but given the different context, they cannot bring exactly the same kind of significant change that the U.S. Merger Guidelines did upon their adoption. Despite that, Japan's New Merger Guidelines may come to represent a successful legal transplant by incorporating global norms of substance and process.

RTS. J. 603, 604 (2003) (stating that “[a]fter a long period of devaluing law, China’s leaders are placing considerable emphasis on the role of the legal system in ensuring stable and sustainable social development” and describing U.S.-assisted efforts); TOM GINSBURG, LEGAL REFORM IN KOREA (2004) (describing recent efforts to deepen and broaden South Korea’s legal institutions).

⁵⁹ See *supra* notes 26–31.