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The Implementation of China's Anti-Monopoly Law: A Case on Coca-Cola's Abortive Acquisition of Huiyuan Juice

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Abstract In 2009 after a six-month investigation, the case regarding Coca-Cola Company's acquisition of Huiyuan Juice Co., Ltd. (Huiyuan Juice) ended when the Ministry of Commerce of the People's Republic of China (MOFCOM) rejected this acquisition. This is the first anti-monopoly case since the implementation of Anti-Monopoly Law of China (the "AML"). Foreign acquisitions introduce capital, technical and management experience into China, while they also impair competition in China and lead to the disappearance of some Chinese national brands. In recent years, a series of foreign acquisitions attract extensive attention and even controversies. This phenomenon should be addressed rationally. Following the case concerning Coca-Cola's attempted acquisition of Huiyuan Juice, this article first assesses the pros and cons of foreign acquisitions, and then analyzes foreign acquisitions by the specific requirements of the AML, pointing out the rationalization, grounds and complexity of the law applicable to foreign acquisitions.

Keywords Coca-Cola, Huiyuan Juice, foreign acquisition, anti-monopoly, relevant market

The AML, as a foundation stone of the market economy, was implemented on August 1, 2008. After an investigation for half a year, Coca Cola's acquisition of Huiyuan Juice was rejected by the MOFCOM on March 18, 2009. It is the first case being rejected since the implementation of the AML, which aroused strong repercussions both at home and abroad. While Chinese people applauded this rejection, overseas media generally took a skeptical attitude, taking it as a case of

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trade protectionism. This case needs to be interpreted rationally and the domestic and international media should be insightful. On the one hand, foreign-capital acquisition may bring advanced technology and management experience and promote economic development; on the other hand, it may lead to the monopoly of relevant market, hamper competition and force some domestic brands disappear. There are merits and demerits in relation to Coca Cola's acquisition of Huiyuan Juice. The AML enforcement agencies (the "agencies") should not only focus on the adverse effect of the acquisition on competition, but also consider the positive impact of the mergers and acquisitions (the "M&A"), i.e., promoting economic development. The agencies should balance the pros and cons so that it can reach a rational conclusion with respect of law. Society should take a balanced attitude towards foreign-capital acquisition, and refrain nationalism from spreading at will. The international media should not overreact towards this case, which may be taken by other countries as an excuse to enforce trade protectionism.

1 Coca-Cola's Acquisition of Huiyuan Juice

On September 3, 2008, Huiyuan Juice, one of the largest fruits and vegetable juice companies in China, was informed that a wholly owned subsidiary of Coca-Cola intended to acquire all equity interest of Huiyuan Juice with a total amount of USD 2.4 billion. If this USD 2.4 billion deal was done, it would have been the largest acquisition case in the history of the Chinese food and beverage industry; it would also have been one of the largest acquisition cases in China's domestic market over the past several years.

Coca-Cola submitted the application dossiers to the MOFCOM on September 19, 2008. After a six-month investigation, the MOFCOM eventually made a decision to reject the deal. When reviewing this case according to the AML, the MOFCOM considered many factors, such as the market share of the undertakings concerned, their ability to control the market, market concentration, the effect on market entry, the technological improvement, the effect on consumers and other companies concerned, and the brand effect on the competition of the juice industry. In conclusion, the MOFCOM affirmed that the acquisition would have a negative impact on competition. With increasing market concentration, Coca-Cola may take advantage of its dominant position in the carbonated soft drink market, and bundle its current sales with fruit juice drinks, or set forth other exclusive transaction terms so as to restrain the competition in the fruit juice market, resulting in higher consumer prices and less varieties of drinks. In the meantime, due to the existing market thresholds of

brands, it is unlikely that restrictive effects of merger could be eliminated by competition. Additionally, the market concentration would squeeze the living space of small and medium-sized enterprises and impose negative impacts on the competition pattern of the juice industry. In order to reduce the negative impacts on competition, the MOFCOM requested Coca-Cola to provide feasible solutions to mitigate the negative impacts of the acquisition. Coca-Cola expressed its views on the issues raised by the MOFCOM and provided some preliminary solutions in a revised proposal. After assessment, the MOFCOM concluded that the revised proposal was not able to reduce the negative impacts on competition. As a result, the MOFCOM made an unfavorable decision to the acquisition in accordance with Article 28 of the AML. Shortly afterwards, this decision aroused extensive discussions with a variety of voices, among which the voice from the foreign media was particularly notable. The positions held by those major financial media, such as The Wall Street Journal, Reuters, Financial Times, the Associated Press, and Bloomberg, were almost the same, decrying this decision as trade protectionism. The MOFCOM and the Ministry of Foreign Affairs both made an announcement to refute such accusation. China's first antitrust case on acquisition instantly triggered wide discussions both at home and abroad.

According to the data collected from 1990s, the global M&A cases are increasing at a rate of 42% per year, whose value is equal to 11% of the world GDP. In 2004 alone, the transnational M&A cases grew by 28% at an amount of USD 381 billion.¹ At the same time, China's oil, mining, automobile and computer manufacturers/enterprises are going abroad to invest in, to hold stocks of, or even acquire overseas enterprises in recent years.² Moreover, transnational investment has become megatrends. The fifth global acquisition, featured with transnational M&A, took place at the time of China's accession into the WTO. China's economy continues to be further integrated into the global market. At that time, a large amount of foreign capital poured into China, yielding lots of transnational acquisitions in China: For example, Carlyle acquired Xugong; Johnson & Johnson acquired Dabao, let alone other cases. Some well-known domestic brands, such as Meijiajing, Zhonghua, Lebaishi and Xiaohushi, disappeared after acquisitions. Consequently, Chinese worries about the justification of transnational acquisitions. Therefore, foreign M&A attracted great attention of the Chinese society. People are not only wary of foreign M&A, but

¹ Lei Li, 跨国公司在华并购的法律规制研究 (Study on the Legal Regulation of the Multi-National Companies' Acquisition in China), China Procuratorate Publishing House (Beijing), at 32 (2007).

² Particularly in 2008, the oil and mining companies performed well in the overseas investment on M&A. For instance, Chalco has contributed USD 19.5 billion to be one of the shareholders of Rio Tinto; and the Minerals and Valin have completed overseas M&A as well.

also doubt of the Chinese government's losing control over M&A. Meanwhile, due to the international financial crisis, trade protectionism in major countries or regions such as the United States and European Union are rising with more and more distrust and wariness. The strong reaction towards Huiyuan Juice's case both at home and abroad is closely related to this unique international background.

2 Dual Impacts of Foreign M&A on the Domestic Market

The merits and demerits of foreign M&A on the domestic market are as follows.

First, foreign M&A, as a kind of M&A, has positive impacts. Since the time of Adam Smith, hundreds of years' experience has repeatedly proven that market competition is the best way for social resource allocation. This is regarded as a supreme axiom for the effective functioning of any market economy.³ On the one hand, the foreign M&A promotes market competition, for example, when a struggling company is saved by acquisition, or when a company becomes more effective after being merged with other domestic companies. Foreign M&A challenges the existing monopolies of domestic companies as well. On the other hand, foreign M&A may weaken or restrict competition, and the over concentrated power may create a monopoly market,⁴ and even worse, potentially endanger state security.

Second, foreign M&A has both positive and negative impacts on the development of state economy. The advanced technology and managerial experience are introduced into China by foreign investment, which promotes the transformation and development of economic system. However, during the process of foreign investment, especially the foreign M&A over the past years, problems such as excessive dependency on foreign capital, the formation of monopoly in the domestic market or elimination of national brands occur.

2.1 Negative Impacts on the Market

Specifically, the negative impacts of foreign M&A mainly manifests in the following two aspects.

First, foreign capital has entered China's domestic market through acquisitions conducted by leading companies. This is a common approach for foreign investors to invest in China. Many people are worried that foreign

³ Shibing Cao, 反垄断法研究 (Study on Antimonopoly Law), Law Press (Beijing), at 12 (1996).

⁴ Zhile Wang, 2008 跨国公司中国报告 (China Report of Multi-National Companies of 2008), Chinese Economy Press (Beijing), at 233 (2008).

companies, having strong financial support, advanced technology and management, will easily defeat their Chinese competitors and establish a monopoly in the market.⁵ In terms of foreign M&A in China, foreign M&A has features in four aspects since 1990s.

(1) Foreign companies begin to seek dominant positions. For instance, Kodak America holds 70% of the market share of China's film market after its M&A of Chinese companies.

(2) Regional, industry-wide, and group-wide M&As are quite common, especially in automobile and pharmaceutical industries. Foreign companies hold over 51% of outstanding shares of seven companies; and among the largest thirteen companies in China's pharmaceutical industry, foreign companies hold 50% of shares of five companies. Only one of them is a domestic company.

(3) Foreign companies target the most influential Chinese companies in the industry. American Carlyle used 375 million dollars to acquire 85% of Xugong's shares; German Schaeffler spent 1.1 billion dollars to acquire Luozhou Company, and so on. All of these cases targeted domestic leading companies in corresponding fields.⁶ Right now, foreign investors, by acquiring large companies in China, gradually developed an initial market monopoly in some fields.

(4) Major multi-national companies begin to engage in merging and acquiring domestic companies. At the beginning of China's reform and opening up, in order to occupy the market, multi-national companies merged with and acquired generic companies. However, multi-national companies now turn their eyes on large companies in China in line with their global strategies and to pursue higher profits. According to relevant data, 80% of large supermarket chain stores in China's big cities are held by foreign companies; and some multi-national companies, such as Microsoft and Tetra Pak packaging, even dominate 95% of the relevant market.⁷ Thus, foreign M&A has a substantial impact on the market structure, and it is indeed easy for foreign companies to form a monopoly.

Second, in the long run, foreign-capital M&A may have a negative impact on China's economy by fostering excessive dependency on foreign capital. The report of the Behavior of Limiting Competition by Multi-National Companies in China and the Countermeasures, issued by the State Administration for Industry and Commerce in 2004 demonstrates these negative impacts. At present, the fundamental question is why M&As by multi-national companies affecting

⁵ Xianlin Wang, 在我国入世背景下制定反垄断法的两个问题 (Two Issues of China to Establish Antimonopoly Law in Access to the WTO), (5) 法学评论 (Law Review) 49 (2003).

⁶ Bureau of Fair Trading at State Administration for Commerce and Industry of China, 在华跨国公司限制竞争行为表现及对策 (Restricting Competition of Transnational Corporations in China and Countermeasures), (5) 工商行政管理 (Business Administration) 43 (2004).

⁷ See Wang, *fn.* 4, at 233 (2008).

China's market competition have not been paid enough attention. In industries such as mobile phone, computer, IA servers, network equipment and computer processors, multi-national companies enjoy absolute monopoly status in China's market. In light industry, chemical industry, medicine, machinery, electronics and other industries, multi-national companies take up over one third of China's market shares. This is not good for the layout of China's industrial policy when massive foreign capital undermines China's national industry system, or threatens China's industrial and economic security. Actually, in recent years, there are cases where foreign investors abandon some national brands after the M&A, leading to the disappearance of such brands, which is another main demerit.

2.2 Positive Impacts on the Market

Regardless of the demerits as mentioned above, we should also consider the merits of M&A, balance the pros and cons, and avoid the spread of nationalist sentiment that may cloud our judgment. Only in this way can we deal with foreign-capital M&As in an objective and rational way.

First, M&A is an issue concerning market competition and economic security. According to a survey, the total amount of investment under foreign-capital M&A was less than 5 billion US dollars, which only accounts for 2.5 % of the whole foreign investments in China at the same period. Long Yongtu, the Secretary-General of the Asian Forum in Bo'ao, advocated that the inspection and supervision on international mergers should be enhanced, which would not necessarily cause industry monopoly or harm the economic security. M&As are not supposed to be devils. In fact, foreign investment may break the monopoly of state-owned enterprises in some areas by echoing or collaborating with private enterprises. The state economy will not be more secure when foreign investors are prohibited to engage, or to adopt the exclusion policy in the name of nationalism.⁸ On the contrary, the more reluctant to foreign investments, the more vulnerable the state economy will be. The problems concerning economic security and state security can be solved by a state security review of foreign M&As.

Second, it is an issue concerning the loss of national brands. It is wise to take a more reasonable and objective view towards fallbacks of some national brands after international mergers. As a common practice in market economy, international mergers are transformations of the movable and reallocated capital. Another notable point is that these former national brands are still alive but in

⁸ Wenkui Zhang, 外资危害国家经济安全属无稽之谈 (Nonsense View on Foreign Capital Damaging National Economy Security), (5) 新财经 (New Finance and Economics) 33 (2007).

decadence. They are popular in China, and still produced and distributed by Chinese workers and managers, which greatly help to boost the Chinese job market, and contribute to the economic development in many areas. Meanwhile, we should acknowledge that, some new national brands are emerging while some old ones are fading during international mergers. Reasonably speaking, the process of decreasing and regenerating brands is good for the selection and development of better brands. Despite temporary twists and turns, this process caters for the birth and the growth of increasing desirable economic entities while shedding off the previous problems in business operations. Of course, we should be alert and cautious to the malicious elimination of competitors' brands.

Finally, it is an issue concerning the reform of state-owned enterprises ("SOEs") and the strategic reconstruction of China's state-owned economy. Currently, there are around 400,000 SOEs in China, whose total debts are over RMB 5 billion. At the same time, the strategic reconstruction of SOEs requires that the state-owned capital withdraws from some industries while sticking in the pillar industries. No matter whether the proceeds are assets or equity, there should be buyers for state's withdrawal. However, quite a few non-state-owned enterprises at present have sufficient funds to be competent buyers. Foreign-capital M&As of China's SOEs expanded financing channels of China's state-owned economy and provided funds to SOEs' reform. In addition, foreign investors holding China's SOEs can provide cash on hand rather than the existing state-owned interests, which is a supplementary channel for financing. Therefore, foreign-capital M&A changes the picture that a majority of the listed companies in China are state-owned. Foreign-capital M&A will improve the corporate governance of those listed companies, which helps China's enterprises to adapt to the world.

Nowadays, foreign capitals are invested in China in a variety of ways, such as through a wholly foreign owned enterprise (WFOE), joint ventures and M&A. This creates about 1/3 of China's industrial output, generates about 1/5 of the national revenue and employs more than 20 million people. The National Bureau of Statistics of China always counts foreign companies in the national economic statistics, proving the deep roots of foreign companies in the Chinese economy. The technology introduced by foreign companies accounted for about 50% of China's technology imports whereas the exports of foreign companies accounted for about 60% of total exports, of which high-tech products exported by foreign companies is 88%.⁹ Evidently, foreign companies have greatly strengthened China's international competitiveness. Foreign investments obviously have positive impacts. Generally speaking, the merits outweigh demerits. The key point at present is to take advantages and avoid disadvantages by laws.

⁹ See Wang, fn. 4 at 230–35.

3 Analysis on Foreign M&A in China from the Perspective of the AML

It is important to first look at Chinese scholars' opinions regarding the regulation of the Anti-Monopoly Bureau of the MOFCOM: (1) "completely affirmative theory" proposed by Xiaoye Wang of Chinese Academy of Social Sciences; (2) "basically negative theory" by Jichun Shi of Renmin University of China; and (3) "noncommittal theory." A final conclusion should be made with specific and clear details and reasoning. As mentioned above, scholars should study on the conflicts in the Huiyuan Juice case within the framework of the prior debate.

3.1 Analysis on the Grounds for the Anti-Monopoly Bureau's Regulation

There are three reasons for the Anti-Monopoly Bureau's regulation: two conduction effects (i.e., the conduction of market dominant position from carbonated drinks to juice drinks and the conduction effect under Coca-Cola's brand) and one squeeze effect (i.e., squeeze effect on the small and medium-sized enterprises).

In terms of the two conduction effects, both the MOFCOM and Xiaoye Wang believe that carbonated drinks and fruit drinks are highly substitutable. Coca-Cola has already obtained a dominant position in China's carbonated drinks market. It is quite likely that once Coca-Cola comes into the fruit juice market, it will quickly obtain a dominant position. However, Jichun Shi held that fruit juice market is a fully competitive and diversified market. Huiyuan Juice only occupies 40% market share of the so-called high-concentration and middle-concentration juice market and occupies less than 10% market share of the whole juice market. There are no thresholds such as customary industry standards and legal barriers in the juice market, so Coca-Cola would not be able to restrict market assess.

Regardless of the possible conduction effect, the justification provided by the MOFCOM is ill-founded and lacks of persuasiveness.

As for the squeeze effect, the MOFCOM and Xiaoye Wang believe that if Coca-Cola acquires Huiyuan Juice, Coca-Cola may set a package deal to bundle juice and carbonated drink sales together by using its dominant position in the carbonated drinks market. This may effectively squeeze Huiyuan Juice's major competitors (most of which are small and medium-sized enterprises) out of the juice market. Xiaoye Wang believes that, although the AML is not aimed to protect small and medium-sized enterprises, those enterprises should not be neglected. If they cannot compete in the market, the monopoly will arise.

However, scholars holding the negation theory believe that this merger may bring opportunities to small and medium-sized enterprises. The current juice

market has a low-level of repetitive competition. M&A can upgrade China's juice market, introduce more standardized competition, and create a more reasonable competition structure. The industrial supply chain of Coca-Cola may be superior to Huiyuan Juice's. All of these provide opportunities to small and medium-sized enterprises.

Instead of focusing on small and medium-sized enterprises, the AML should pay more attention to market competition and consumers, and let small and medium-sized enterprises be supported by industrial policies.¹⁰

3.2 Goals of the Anti-Monopoly Regulation on Foreign M&A

The AML does not aim to protect the interests of a particular enterprise, but to protect market competition (rivals' competitive rights) and consumers' interests.

The AML is not a panacea and cannot bear too many responsibilities. Except competition, it cannot solve issues concerning national brands, foreign capital policy, the national economic security, and so on.¹¹ These issues are addressed by other laws. We cannot expect the immature AML to solve a series of problems like maintaining national brands, attracting foreign investments or stipulating industrial policies. The main purpose to investigate M&A is to prevent monopolistic acts. This investigation does not intend to regulate the abuse of dominant positions or conducts of a cartel, or to grant penalties. The reviewers can reject the market concentration only if there is any abuse of dominant position, like bundle sales after increased market concentration, and when harm outweighs benefits. Therefore, regulations concerning market concentration need not care whether there is an abuse of dominant position after the market concentration.

3.3 Review of the Nature of Acquisition and the Definition of Relevant Market

Different agencies calculate Huiyuan Juice's market share in different ways. According to the data provided by Coca-Cola, the combined share of Huiyuan Juice and Coca-Cola would have been less than 20% in non-carbonated drinks market in China after the acquisition. However, according to a calculation carried out by Beijing Orient Agribusiness Consultant Ltd., among 134 beverage enterprises with a size over a designated limit, the sales of Huiyuan Juice only

¹⁰ Jin Sun, 反垄断法适用除外制度构建与政策性垄断的合理界定 (Defining the Exemption Regime Applied in Antimonopoly Law and Policy Monopoly), (3) 法学评论 (Law Review) 56 (2003).

¹¹ Xianlin Wang, 论反垄断法实施中的相关市场界定 (Discuss on the Definition of Relevant Market in the Implementation of Anti-Monopoly Law), (1) 法律科学 (Legal Science) 125 (2008).

reach as high as 13.95% in China's domestic market. In addition, according to the data from AC Nielsen, Huiyuan Juice's market share in China's domestic market of pure fruit juice is as high as 46%. The reason why different institutions come to different conclusions on the market share of Huiyuan Juice is that such definitions of relevant market adopted are different. In other words, some agencies define non-carbonated beverage market as a relevant market whereas others define pure fruit juice market as a relevant market.

Some scholars hold that there is only a small possibility of substituting non-carbonated beverage with pure fruit juice, so the acquisition would have resulted in mixed M&A. However, it is quite possible to substitute carbonated drinks with fruit juice drinks, or vice versa. In addition, the competition between Coca-Cola and Huiyuan Juice has already existed, since Coca-Cola has a fruit juice brand: Minute Maid. Therefore, this acquisition should be viewed as a horizontal M&A. Anti-monopoly regulation is always more stringent on the horizontal M&A rather than mixed M&A. Mixed M&A is usually encouraged because it generally optimizes the allocation of resources and the entities concerned are inter-complementary.¹²

In terms of this acquisition case, the uniqueness of fruit juice market is that highly diversified products can still be fully substituted. Therefore, the whole fruit juice market is a relevant market. However, since the MOFCOM has not disclosed sufficient details of this case, we are unable to determine how it defines a relevant market. With a reference to published information, the MOFCOM declared judicially that there was no significant substitution effect but a strong correlation and certain substitutability between the fruit juice market and the carbonated drinks market.

3.4 Relationship between the Decision of the MOFCOM and the National Brand Protection, Industrial Policy and Economic Security

This case attracts widespread attention in China due to media's irresponsible speculation and misleading coverage. According to online statistics, 82% people oppose this acquisition.

The vast majority of scholars believe that the decision of the MOFCOM has nothing to do with national brand protection, industrial policy or economic security, nor has the decision been affected by nationalistic sentiment. However, the over-exaggeration of media and the fuzzy position of the MOFCOM offer a vague excuse for the public. It seems suspicious that the decision of the MOFCOM was surprisingly similar to Chinese public opinions.

¹² Ernest Gellhorn & William E. Kovacic, *反垄断法与经济学* (Antitrust Law and Economics), Law Press (Beijing), at 135 (2009)

3.5 Negative Impacts of the MOFCOM's Decision to Reject the Acquisition under the Background of Financial Crisis

Even if the acquisition of Huiyuan Juice by Coca-Cola was not rejected, the AML still represents a serious challenge for Chinese companies conducting businesses overseas. Chinese agencies should treat multi-national companies equally while protecting Chinese national brands. They should ensure that Chinese companies can perform well and be treated fairly in international markets. The AML, as a rule on competition, should be equally applicable to SOEs, private enterprises, domestic enterprises, and multi-national companies. Furthermore, under financial crisis, there is still a possibility that the regulators may be manipulated by those being regulated.

3.6 Improvements on the Anti-Monopoly Review

The AML needs to be more sophisticated and its enforcement more stringent. The implementation measures, procedures and guidelines of the AML are under urgent needs for legislation. The MOFCOM should closely watch at least four regulations: *Regulation on Application for Enterprises Concentration*, *Regulation on the Review and Approval of Enterprises Concentration*, *Regulation on Investigation and Treatments Regarding Unregistered Enterprises Concentration*, *Interim Measures of Investigation and Regulations about Enterprises Not Complied with Declared Standards and with Suspicion of Monopoly*, which are equivalent to Merger Guidelines in the United States, Australia and other countries. The application procedures should be more transparent, so as to allow applicants to clearly know what kind of materials should be submitted at different stages of the application process.¹³ For example, what information should be provided at the initial application? What information should be adequate, sufficient, and necessary at the following stages of the application process? Through these guidelines, the agencies will get more sufficient information.

In any case, the MOFCOM's rejection of Coca-Cola's acquisition of Huiyuan Juice is a landmark in the implementation of the AML. The MOFCOM's decision popularizes a culture which is unfamiliar to the Chinese society, and promotes the AML to the world.

4 Rational Attitude towards Foreign M&As

Competition and cooperation is both common in the market economy. China

¹³ Xiaoye Wang, 竞争法 (Competition Law), China Social Sciences Documentation Publishing House, at 89 (2009).

should have an open mind, and all the Chinese people should have the courage to face and accept market competition. Under economic globalization and market competition, China must pay special attention to nationalist sentiment, to avoid national bias or laissez-faire economic nationalism; otherwise, it may cause the international community, especially foreign investors, to mistrust Chinese economic environment, thus endangering China's economic development. As market economy is governed by the rule of law, we should deal with foreign M&A rationally according to relevant laws under the context of internationalization, rather than protecting domestic enterprises and suppressing normal market competition in the name of nationalism. In this Huiyuan Juice case, the over-reaction of the public in China shows that people pay more attention to domestic companies. In addition, it indicates that people tend to have excessive nationalism and irrational catharsis towards foreign M&As. It also demonstrates that people overlook laws, and their emotional over-reaction and irrational catharsis outweigh the social value of the law. In this case, few people handle legal issues under the rule of law. On the contrary, the so-called public opinion prevails. Strictly speaking, it contradicts the tenet of the rule of law. Therefore, China's lawmakers should seriously consider how to reasonably balance public opinions and the legal rules when dealing with foreign M&As. Only in this way will the law be well enforced in this regard and will the voice of the public in connection with China's healthy economic development, consumer benefits and win-win M&A situation will be heard.

First, the law and public opinions are associated. The laws are legislated according to public opinions. Having the supreme power of enforcement, law is defined to reflect public opinions. If the majority of people think that a certain law does not represent public opinions and it is necessary to be amended or repealed, then this law should be further revised through legal procedures, rather than in the way of public opinion kidnapping laws. Law is used to solve real social problems, although that is not the only role of law. Similarly, when the courts apply laws or the agencies enforce laws, the laws may not necessarily reflect public opinions. Yet, it is against the rule of law to be constantly kidnapped by public opinions.¹⁴

Second, it is necessary to distinguish between public opinions and the interests of certain groups. Laws should reflect public opinions provided that such opinions are irrelevant to narrow nationalism sentiments. Most importantly, public opinions cannot be taken as an excuse for self-protection. Moreover, Chinese lawmakers should prevent public opinions from being kidnapped by special interest groups who intend to seek their own interests. Law enforcement agencies should keep a clear mind and be rational towards foreign M&As. The

¹⁴ See Sun, fn. 10 at 57.

nature of relevant market behaviors should be assessed by laws other than by the public opinions. To review M&As in view of national economic security arouses suspicion that some competitive enterprises or industries may seek asylum from authorities so as to avoid competition.

Finally, the legislation, judicature and enforcement of the AML require profound professional knowledge. Accordingly, only professionals with profound theoretical legal knowledge and rich legal practices are able to make judgments. It is neither serious nor scientific to determine the legality of market behaviors only by intuitive senses. When determining the legality of a cross-border M&A, ordinary people usually come to a conclusion based on their own intuitive feelings or being implicit to public opinions under which they have no opinions but passively adopt the prevailing public opinions. Such conclusion is not reliable for the legality of a behavior. More importantly, the agencies should not be influenced by public opinions when making a decision. As a matter of fact, the replacement or suppression of law by public opinions violates the rule of law. China in this century can no longer repeat the historical tragedy of 1960s and 1970s in the 20th century.

5 Conclusion

Besides the impact of national sentiment, another key reason for the sensation of this abortive case is that there is no specific implementation procedure under China's anti-monopoly laws and regulations. It stresses the needs to control the discretion of law enforcement agencies and to reduce the uncertainty of the law enforcement.¹⁵ Although the AML became effective on August 1, 2008, the application procedures, review procedures, standards thereof and other relevant issues are still unclear. There is a need for more detailed and supplementary implementing rules, under which a more transparent review decision will be made.

There are continuing concerns about foreign M&As in China. The regulation of foreign M&As is not solely a legal issue, but also relates to economic implication, national industrial policies and economic security. However, it is by no means a simple catharsis of nationalist sentiment. The case about Coca-Cola and Huiyuan Juice, which led to a wide range of emotional expression as being stirred and speculated by some domestic media, is taken by the international world as an excuse to challenge the impartiality of the AML enforcement. In the developing world, Coca-Cola's acquisition of Huiyuan Juice is neither the beginning, nor the ending. Foreign M&A of China's companies, as well as

¹⁵ DuoJun Qi, *经济法基础理论 (第四版)* [Basic Theory of Economic Law (4th edition)], Law Press (Beijing), at 178 (2008)

China-funded M&A of foreign companies, are the outcomes of economic globalization.¹⁶ However, this kind of phenomenon needs to be regulated by laws of various countries concerned, particularly anti-monopoly laws. Therefore, regarding foreign investment, China should keep an impartial attitude and make an objective assessment of foreign M&A cases. China should rely on current laws and review foreign M&A from a legal perspective. Chinese lawmakers should not rely on subjective opinions or oppose foreign M&A without discretion, assuming that the entry of foreign capital will inherently endanger China's economic security. Otherwise, China's market economy can hardly be trusted by the international community, which may hinder the foreign investment and M&A. In this way, some nationalist sentiment may be relieved by temporarily shedding some companies from competition, but at the expense of China's economic development and consolidation of the rule of law.

Finally and most importantly, the international community should not over-react towards China's decision on this antimonopoly case. Instead, this case should be viewed as a single case, which is not a representative of the entire AML or future cases. Ming Shang, Secretary of the Anti-Monopoly Bureau of MOFCOM, once said that the Anti-Monopoly Bureau is still like a baby (so being patient for babies to become mature), and the AML, the baby's mother, is also quite young. If one takes this as a reason to implement protectionist policies, it is really an excuse.

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¹⁶ Zhiwu Chen, a professor of economics from Yale University, publicly stated in October, 2008 that perhaps it is a good time for China's companies to buy a large number of greatly shrunken US stocks in the financial crisis.