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Capitalist Manifesto: The Inadequacy of Antitrust Laws in Preventing the Cannibalism of Competition

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> *In a poker game with unlimited stakes, the player who commands disproportionately large funds is likely to emerge victorious. If I have $100 while my opponents have no more than $5 each, I am likely to win regardless of my ability, my virtue, or my luck. I have the one asset the others lack, the power to bankrupt my rivals.*[1]

I. INTRODUCTION

Analogous to the poker player who commands a disproportionate financial advantage over his opponents and has the capacity to bankrupt his rivals, a monopoly, according to Karl Marx, interferes with the normal expression of value.[2] Marx theorized that capitalism amidst its competitive[3] splendor and glory[4] has a natural tendency to become a

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[1] ESTES KEFAUVER, IN A FEW HANDS: MONOPOLY POWER IN AMERICA 196 (1965) (quoting Professor Walter Adams of Michigan State University).

[2] *See* 3 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 209 (Frederick Engels ed., Ernest Untermann trans., 1909) (stating that monopolies "enable either of the contracting sides to sell commodities above their value or compel others to sell below value").

[3] *See* ROGER D. BLAIR & DAVID L. KASERMAN, ANTITRUST ECONOMICS 3 (1985) ("In economics, the term competition refers to a market structure and the consequent behavior of buyers and sellers in that market").

[4] Although competition is viewed as one of the basic advantages to the capitalist system, Marx did not share this perspective. The usage of "splendor and glory" merely

global monopoly.[5] For Marx, "the overwhelming drive for capital accumulation" is a basic tenet of capitalism.[6] Additionally, "competition [contains] the seed of future centralization,"[7] or rather, competition contains the seed for future capital accumulation that is achieved through "mergers and acquisitions."[8] This capital accumulation then results in the demise "of many small firms," the cannibalism of other competitors, and the ultimate "evolution of monopoly power."[9]

During Marx's time,[10] however, antitrust laws did not exist,[11] and his theory was not premised upon the existence of government regulation that attempted to hamper the formation of monopolies.[12] Considering this,

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emphasizes Karl Marx dislike for competition in general. Tibor Varady, *The Emergence of Competition Law in (Former) Socialist Countries*, 47 AM. J. COMP. L. 229, 229 (1999).

[5] Monopoly is defined as a "a single firm, selling a product for which there are no good substitutes and where entry by other sellers is not likely, will be able to charge a higher price (at reduced sales volume) and earn higher profits than would an otherwise similar competitive group of seller." JOHN E. KWOKA, JR. & LAWRENCE J. WHITE, THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION, AND POLICY 8-9 (3d ed. 1999). This definition of monopoly emphasizes the amount of power that a monopolistic company has over the overall market. A global or international monopoly is not to be misunderstood as one firm controlling the whole world, but rather as a firm that has immense accumulation of capital as a result of the natural tendency of capitalism. EMILE BURNS, A HANDBOOK OF MARXISM 980 (1935) (citing the Programme of the Communist International (1929)); *also* SAMIR AMIN, SPECTRES OF CAPITALISM: A CRITIQUE OF CURRENT INTELLECTUAL FASHIONS 50 (1998) (monopolies have the ability to influence prices in a global or international scale).

[6] THOMAS KARIER, BEYOND COMPETITION: THE ECONOMICS OF MERGERS AND MONOPOLY POWER 11 (1993).

[7] *Id.*

[8] *Id.* (stating that, according to Marx, concentration is accomplished through mergers and acquisitions).

[9] *Id.*

[10] Karl Marx was born 1818 and died 1883. ISAIAH BERLIN, KARL MARX: HIS LIFE AND ENVIRONMENT cover (1848).

[11] The concept of monopoly is quite ancient and can be traced to the civilizations of India and the Roman Empire B.C. The modern statutes controlling cartels and monopolies, however, first appeared in the United States in 1890. D.M. RAYBOULD, COMPARATIVE LAW OF MONOPOLIES 3-4 (E. Susan Singleton ed., 1999).

[12] William Jung, *Banking Mergers and "Line of Commerce" after the Monetary Control Act: A Submarket Approach*, 1982 U. ILL. L. REV. 731, 733 (1982). The "very core of antitrust policy is a belief in the evils of monopoly," and antitrust law exists to eliminate such evils. *Id.*

it is tempting to hastily conclude that Marx's theory is, therefore, no longer applicable to countries that have antitrust laws. Marx's basic premise is that competition results in the "growing accumulation of capital."[13] The inevitable formation of monopolies cannot be discounted, however, and is still applicable even with the existence of antitrust laws. The existence of antitrust laws merely creates a slight twist in Marx's formulation. To put it more precisely, although antitrust laws can curb the formation of monopolies, they are insufficient in preventing the accumulation of power in the hands of a few, or rather, the formation of oligopolies.[14] Antitrust laws fail to prevent competition from cannibalizing itself, because antitrust laws preserve, rather than completely extinguish the competitive process.[15]

The increase in mergers and acquisitions[16] activities around the world in various sectors illustrates this phenomenon.[17] A firm's drive to

[13] 3 MARX, *supra* note 2, at 310.

[14] An oligopoly is a market situation in which there is "a small number of firms producing a homogeneous output." BLAIR & KASERMAN, *supra* note 3, at 192. The concern for the existence of oligopolies is that "small numbers of firms are much more conducive to collusion than large numbers." *Id.*; *also* DAVID MCCORD WRIGHT, CAPITALISM 193 (1951) (explaining oligopolies).

[15] Cannibalism is defined as "the act or practice of weakening or destroying a competitor or rival." WEBSTER'S NEW INTERNATIONAL DICTIONARY 327 (3d ed. 1971). In business, cannibalism is also understood as "the acquisition and absorption of smaller companies by a large corporation [within the same family] or conglomerate." RANDOM HOUSE DICTIONARY 305 (2d ed. 1987). The theory proposed in this paper is that competition eventually leads to its own extinction because as competitors compete, they try to achieve as much power and accumulation of capital in order to destroy other competitors.

[16] There is a fine distinction between a merger and an acquisition. A merger "is the consolidation of the business of two or more companies into a single corporation which may or may not be one of the two original companies" while an acquisition "involves the purchase of the shares in or assets of a company by a second corporation." RAYBOULD, *supra* note 11, at 124. The U.S. Supreme Court, in *U.S. v. Philadelphia National Bank,* 374 U.S. 321 (1963), acknowledged, however, that an acquisition of stocks and assets in a firm may reach the level of merger and its anticompetitive effects even if the acquirer does not receive control of the corporation. *Id.* For the purposes of this paper, the focus will be on mergers wherein two firms decide to consolidate.

[17] Illustrating this trend, in the United States, the value of mergers and acquisitions announced in 1997 was almost $1 trillion. In 1998, the value of mergers and acquisitions was well over $1.6 trillion. The year 1998 signaled the fourth consecutive record year for mergers and acquisitions that resulted in $2.4 trillion in announced transactions for that year alone. ECONOMIC REPORT OF THE PRESIDENT 39 (1999), *at* http://www.gpo.ucop.edu/catalog/erp99.html. *See also* Richard G Parker & David A. Balton, *The Merger Wave: Trends in Merger Enforcement and Litigation*, 55 BUS. LAW. 351, 351 (1999) (stating that the United States is going through an unprecedented merger wave).

attain a competitive edge in a capitalist society, which initially fueled the increase in competition, has led it to combine forces with competitors.[18] Antitrust laws have been inadequate in preventing such consolidation of large firms leading to the concentration of capital in the hands of a few and, eventually, extinguishing competition.

This paper analyzes the inadequacy of antitrust laws in preventing the cannibalism of competition. The paper focuses on the merger and acquisitions activities in the banking industry because of a bank's fundamental role in a country's economy. It examines antitrust laws and their applicability to bank mergers involving two of the largest global players in the world economy, the United States and Japan. Section II examines the philosophy and concepts behind antitrust laws in general and the nature of antitrust laws in the United States and Japan. It also discusses antitrust laws that are applicable in bank mergers. Section III examines the history of bank mergers in both the United States and Japan and discusses the various factors fostering the increase in the current bank mergers and acquisitions. Section IV compares how the United States and Japan apply their antitrust laws to bank mergers by examining two recent mega-mergers both completed in 1996: (1) the Chase Manhattan Corporation and Chemical Banking Corporation merger in the United States and (2) the Mitsubishi Bank and Bank of Tokyo merger in Japan. Section V discusses the reasons why antitrust laws have been inadequate in the prevention of the cannibalism of competition in light of the two mega-mergers discussed in Section IV. Because of Marx's concern for the concentration of power, this section also applies Marx's theory to current

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Compared to the United States, Japan has traditionally faced lesser mergers and acquisitions activities, but even it has followed suit in the merger wave. Eric C. Sibbett, *A Brave New World for M&A of Financial Institutions in Japan: Big Bang Financial Deregulation and the New Environment for Corporate Combinations of Financial Institutions*, 19 U. PA. J. INT'L. ECON. L. 965, 971 (1998). In Japan, the number of merger notification cases increased from 1980, when only 961 merger notices were reported. In 1991, the number of notices peaked at 2,091 cases, and, in 1995, there was another peak at 2,520, a 26% increase from the previous year. In 1996, there was a slight decrease to 2,271 cases, but it was still the second highest ever. The number of acquisition notices also increased from only 680 reported cases 1980 to a peak of 1,266 cases in 1991, to another peak of 1,467, which represented a 16.9% increase from the previous year. In 1996, the reported cases peaked at 1,476. Japan Fair Trade Commission ("JFTC"), *On Recent Investigations*, *at* http://www.jftc.admix.go.jp/e-page/report/9619ic.htm; *Trends in the Notifications Related to Chapter Four of the Antimonopoly Act in Fiscal 1996*, *at* http://www.jftc.admix.go.jp/e-page/199704mb/trends96.htm.

[18] A horizontal merger tends to raise monopoly power, because it reduces substitutes. The firm is, thus, able to benefit from greater profits by employing efficiency in their operations. *See* KARIER, *supra* note 6, at 137, 145.

antitrust laws and trends in bank mergers. This paper then concludes with policy proposals to increase the effectiveness of antitrust laws.

II. ANTITRUST LAWS IN THE UNITED STATES AND JAPAN AND THEIR RELATIONSHIP TO BANK MERGERS AND ACQUISITIONS

A. *Antitrust: Capitalism, Competition, and the Formation of Monopolies*

In light of the importance of competition in Marx's theory of capitalism, an understanding of antitrust laws must begin with a discussion on competition. Proponents of the capitalist philosophy justify the existence of capitalism with the principle of free competition, viewed as the "engine of economic progress."[19] The freedom to compete "is a fundamental premise of the free enterprise system"[20] and "the source of sound economic development."[21] Competition "maximizes total social welfare"[22] and "[generates] beneficial economic behavior and performance."[23] Both sellers and consumers benefit when "effective freedom of exchange is maintained"[24] because the constant fear of being "driven [out] from the field"[25] by other competitors induces business organizations to "allocate resources efficiently, engage in innovation and technological development, and …respond effectively to consumer demand."[26] Essentially, "unrestrained interaction of competitive forces

[19] Dr. T.S. Venkataswami, *For Whom the Bell Tolls*, *in* ADAM SMITH'S WEALTH OF NATIONS: THE BI-CENTENARY 101 (S.C. Joseph & P.G.K. Paniker eds., 1978). *See also* JOHN H. SHENEFIELD & IRWIN M. STELZER, THE ANTITRUST LAWS: A PRIMER 2 (1993) (competition is the engine of free enterprise).

[20] RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 1 cmt. a (1995).

[21] Hiroyuki Tezuka, *Success as the source of Failure? Competition and cooperation in the Japanese Economy*, Address at Sloan Management Review Association (Jan. 1, 1997). *See also* DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 5 (1982) (stating that competition "is central to an appreciation of the market economy").

[22] Tezuka, *supra* note 21.

[23] ARMENTANO, *supra* note 21, at 5.

[24] 1 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 1:3 (4th ed. 1997).

[25] SHENEFIELD & STELZER, *supra* note 19, at 7.

[26] ARMENTANO, *supra* note 21, at 5. *See also* Tezuka, *supra* note 21 (stating that competition maximizes social welfare and forces companies to innovate and to price their goods and services competitively); KEFAUVER, *supra* note 1, at 187 (stating that rivalry between sellers results in the greatest gain for society).

will . . . yield the best allocation of resources, the lowest prices, the highest quality, and a maximum of material progress."[27]

Although "adherence to free enterprise envisages the goal of a self-adjusting, self-regulating market on the principle of choice and competitive rivalries,"[28] the free enterprise system is not perfect, however, and the self-regulation of competition can sometimes fail.[29] This is so because "an expansive tendency of capitalism is that it will reveal an aspect of fiercer and fiercer competition,"[30] and the accumulation of capital becomes a necessary step in order for the company to remain competitive.[31] Failure to participate in this expansion and accumulation process "means quitting the competitive struggle [or] economic death."[32] The accumulation of capital is achieved through mergers and acquisitions,[33] and the "growing accumulation of capital implies its concentration"[34] and the eventual formation of monopolies.[35]

Government intervention becomes necessary,[36] because the existence of monopolies[37] contradicts the essence of free enterprise by

[27] 1 MCCARTHY, *supra* note 24, at § 1:23; *also* 3 MARX, *supra* note 2, at 310. Marx believed that the profit motive drives the introduction of the new methods of production, otherwise "no capitalist voluntarily introduces a new method of production . . . so long as it reduces the rate of profit."

[28] 1 MCCARTHY, *supra* note 24, at § 1:23.

[29] Competition can fail for three reasons. First, the government may choose to hamper the competition by instilling government regulation or suppressing it "by arrogating to itself the power to print money." SHENEFIELD & STELZER, *supra* note 19, at 7. Second, as in the case of utility agencies, "competition extinguishes itself" and creates "the need for government-imposed regulation." *Id.* Third, "private participants in the market subvert competition and thus prevent market forces from operating freely." *Id.* The third reason is most significant for the purposes of this paper, because it applies Karl Marx's theory that competition induces the accumulation of power. In the process of accumulating power, players are slowly being eradicated out of the game.

[30] ROSA LUXEMBURG, THE ACCUMULATION OF CAPITAL 202 (Agnes Schwarzschild trans., 1951).

[31] *See* KARIER, *supra* note 6, at 11.

[32] LUXEMBURG *supra* note 30, at 41-42.

[33] KARIER, *supra* note 6, at 11.

[34] 3 MARX, *supra* note 2, at 310.

[35] 1 MCCARTHY, *supra* note 24, at § 1:23.

[36] *See* 1 MCCARTHY, *supra* note 24, at § 1:23 (stating that unrestricted competition "often yields monopoly" and antitrust law becomes necessary).

"[threatening] the efficiency of markets, [reducing] innovation . . . [slowing] economic growth,"[38] and subjecting society to the will of a "small handful of dominant firms."[39] The government can prevent companies from gaining a monopoly over certain enterprises by creating and enforcing antitrust laws.[40] The purpose of antitrust laws is not to restore perfect competition,[41] however, but to promote enough competition to control the formation of monopolies that may hurt consumers by unfairly extracting wealth from them.[42] Nevertheless, at the heart of antitrust laws is "the promotion of consumer welfare"[43] through the prevention of formation of monopolies.[44]

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[37] Although the discussion thus far has been the prevention of monopolies and the promotion of competition in general, sometimes competition is not necessarily advantageous for society. "Competition is not our universal policy, because some markets cannot support or sustain it. Production at a minimum cost is sometimes possible only on a scale where a few firms or even a single firm satisfies the entire demand. The local distribution of electricity is a clear example." JORDE TEECE, ANTITRUST, INNOVATION, AND COMPETITIVENESS 30 (1992).

[38] Tezuka, *supra* note 21.

[39] KEFAUVER, *supra* note 1, at 190.

[40] *See infra* notes 81-85 and accompanying text (discussing Sherman Antitrust Act); SHENEFIELD & STELZER, *supra* note 19, at 7 (stating that the purpose of antitrust laws is to prevent monopolies).

[41] Perfect competition is not goal of antitrust laws.

> The notion of "perfect competition" has no real use in practical antitrust policy. Perfect competition is said to exist where firms are too small to influence price through changes in output; where there is no product differentiation; where resources are perfectly mobile; and where there is a perfect flow of information between market participants.

TIM FRAZER, MONOPOLY, COMPETITION AND THE LAW: THE REGULATION OF BUSINESS ACTIVITY IN BRITAIN, EUROPE AND AMERICA 6 (1988). Additionally, "[because] perfect competition is neither attainable nor desirable, antitrust policy seeks to promote 'workable' or 'effective' competition, a compromise which takes account of irremovable imperfections, the nature of the market, and that degree of attainable competition which will satisfy public policy." *Id*.

[42] BLAIR & KASERMAN, *supra* note 3, at 55.

[43] *Id.* at 58.

[44] Although Antitrust Laws encompass a large gamut of anticompetitive methods (such as price fixing, joint ventures), for the purposes of this paper, the antitrust analysis will focus on monopolies and their relationship to competition and the possible formation of monopolies through mergers and acquisitions activities.

Although "antitrust laws [are] designed to promote competition and prevent monopoly,"[45] their existence, in effect, creates a paradox wherein "free competitors are preserved at the same time as the effect of their free competition is limited."[46] This is the result of a balance of "some approximation . . . of competition"[47] to create efficiency, but not unlimited competition to yield a monopoly.[48] For example, rather than preventing the accumulation of capital, which could "simultaneously retard expansion"[49] of the overall market, antitrust laws seek to create a regulatory check when the natural "automatic checks of the market"[50] fail. Antitrust laws, therefore, maintain competition through the "active 'enforcement of competition' by government."[51] As a result, there is an "apparent conflict between laissez faire and the [effect of] antitrust laws,"[52] because the essence of free enterprise is a "hands off"[53] approach to business. Accordingly, opponents of antitrust laws argue that the very involvement of government in fact impedes competition and "that competition does not have to be created or protected."[54]

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[45] BLAIR & KASERMAN, *supra* note 3, at 25.

[46] KELVIN JONES, LAW AND ECONOMY: THE LEGAL REGULATION OF CORPORATE CAPITAL 109 (1982).

[47] RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 20 (1976).

[48] *See* 1 MCCARTHY, *supra* note 24, at § 1:23 (unrestricted competition "often yields monopoly" and antitrust law becomes necessary).

[49] DONALD DEWEY, MONOPOLY IN ECONOMICS LAW 66 (1959).

[50] KEFAUVER, *supra* note 1, at 187.

[51] 1 MCCARTHY, *supra* note 24, at § 1:23; *also* Robert Harris & Thomas M. Jorde, *Antitrust Market Definition: An Integrated Approach*, 72 CAL. L. REV. 3, 3 (1984) (stating that antitrust laws were enacted to promote and preserve competition).

[52] 1 MCCARTHY, *supra* note 24, at § 1:23 (unrestricted competition "often yields monopoly" and antitrust law becomes necessary).

[53] *Id*. at § 1:23; *also* Anthony V. Nanni, Consolidation in the Banking Industry: An Antitrust Perspective, Department of Justice Address Before the Federal Reserve Bank of Chicago 32nd Annual Conference on Bank Structure and Competition (May 2, 1996), *in* 1996 WL 1184723, *1 [hereinafter Nanni Address]. Nanni is the chief of the Litigation I Section of the DOJ's Antitrust Division. *Id.* According to Nanni, the role of the DOJ's Antitrust Division is "more like that of a baseball umpire. We call the balls and strikes, but we don't set the rules. Our function is to stay out as much as possible in order to let the game unfold on its own." *Id*.

[54] BENJAMIN A. ROGGE, CAN CAPITALISM SURVIVE? 23 (1979); *also* KARIER, *supra* note 6, at 221 (stating that antitrust is a limited weapon to prevent the accumulation of power); D.T. ARMENTANO, ANTITRUST POLICY: THE CASE FOR REPEAL 74 (1986)

B. *United States and Japan: Fundamental Difference in Philosophy, History, and Government Relationship*

A country's antitrust laws reflect a country's "social, economic, political, and cultural background."[55] Thus, a full appreciation of a country's antitrust law policy and legislation requires an understanding of the country's theory on competition, monopoly, and the government business relationship.[56]

1. *The American perception of competition and concentration of power*

Although Americans and Japanese both value the notion of competition in a free enterprise system, they do not necessarily appreciate the same type of competition or share the same perspective on monopolies.[57] Americans have a "long-standing and well-founded belief in competition."[58] The "early American's fear of too much regulation . . . over economic activities is reflected in their conviction [of the] written constitution," which protects against arbitrary government controls

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(opining that Adam Smith was correct in advocating a hands off approach and government's participation impedes competition).

[55] HIROSHI IYORI, ANTIMONOPOLY LEGISLATION IN JAPAN iii (1969) (quoting Prof. Corwin D. Edwards).

[56] *Id.*

[57] *See generally* Hiroshi Iyori, *A Comparison of U.S.-Japan Antitrust Law: Looking at the International Harmonization of Competition Law*, 4 PAC. RIM L. & POL'Y J. 59 (1995) (explaining the differences between the United States and Japan).

[58] TEECE, *supra* note 37, at 5; *also* Clyde O. Ruggles, *Government Control of Business, in* ANTITRUST, INNOVATION, AND COMPETITIVENESS 349 (Jorde Teece ed., 1992) (stating that the early Americans had such faith and "conviction" on competition that they believed on depending upon competition "to bring about low rates and good services, even in the public services industries); Peter C. Cartensen, *Antitrust in the Twenty-First Century: While Antitrust was out to Lunch: Lessons From the 1980s for the next Century of Enforcement*, 48 SMU L. REV. 1881, 1882 (1995) (stating that competition is the touchstone of American economic policy); Iyori, *supra* note 55, at 62. Colonized in the seventeenth century, the founders

> valued individual freedom and free competition which lay at the foundation of 17th century English common law in "the rule of illegal restraints on trade" and "the rule of illegal monopolies" which were incorporated into U.S. law. By the end of the 19th Century, agreements restraining trade or monopolistic activity had been invalidated under the common law.

Id.

especially in their economic life.[59] In addition to the colonization of the United States under the "Puritan notions of freedom, individualism, and democracy,"[60] Adam Smith's theory of laissez faire in the *Wealth of Nations* highly influenced "early American decisions involving important economic and political issues."[61]

Aside from having a strong conviction in competition,[62] Americans also have a strong fear of the centralization of power, and "[h]atred of monopoly is one of the oldest American political habits."[63] For Americans, a monopoly is economic power, and economic power translates to political power and "political influence."[64] Fear of monopolies was prevalent in the early colonial leaders who believed that a monopoly could infringe on individual rights and the "equal rights of citizens."[65]

2. *The Japanese perception of competition and concentration of power*

In contrast to the United States' philosophy on individual competition and the fear of monopolies, Japan was borne out of a "strong Confucian influence and a tendency to value group harmony and order."[66] It was not until the late nineteenth century, during the Meiji Period, when "the concept of a market economy and economic freedom"[67] was

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[59] RUGGLES, *supra* note 58, at 349; *also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 59 (1966).

[60] Iyori, *supra* note 57, at 62.

[61] RUGGLES, *supra* note 58, at 349.

[62] *Id*.

[63] LETWIN, *supra* note 59, at 59; *also* 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 1 (1999) ("From this country's beginning there has been an abiding and widespread fear of the evils which flow from monopoly, that is, the concentration of economic power in the hands of a few").

[64] TEECE, *supra* note 37, at 5.

[65] LETWIN, *supra* note 59.

[66] Iyori, *supra* note 57, at 63; *also* ELLIOTT J. HAHN, JAPANESE BUSINESS LAW AND THE LEGAL SYSTEM 9-11 (1984); YAMAMOTO SCHICHIHEI, THE SPIRIT OF JAPANESE CAPITALISM AND SELECTED ESSAYS 165 (Lynne E. Riggs & Takechi Manabu trans., 1992) (stating that, in Japan, the individual is part of a communal group).

[67] Iyori, *supra* note 57, at 63 (stating that the Meiji Period lasted between 1867 to 1912); *also* HAHN, *supra* note 66, at 9 (stating that this period is often "what most historians term 'modern' Japan")*;* HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 1-2 (1983) (for more on the Meiji period).

introduced to Japan. After the introduction of the market system, "the idea that free competition would promote the public welfare was widely held by [the Japanese]," but the idea of group harmony, nevertheless, remained imbedded in the Japanese mentality.[68]

The Japanese view of big business and monopolies differed greatly from that of Americans, "given the strong tendency in Japan to think in terms of the group, cartels were considered to benefit the public welfare and were [historically] legalized."[69] In fact, "the very idea of anti-monopoly was contrary to Japan's historical belief that economies of scale would continue indefinitely- that bigger was always better."[70] The existence of *zaibatsu* illustrates the Japanese acceptance of the "concentration of wealth and power."[71]

Another fundamental difference between the Americans and Japanese that may affect their antitrust policy is the relationship with business and government.[72] Because the United States was founded on the belief that "government is the best that governs least," Americans perceive direct government intervention in business as undesirable.[73] The American "reluctance to have the government engage in business"[74] is not shared by the Japanese.[75] Rather, "the Japanese system is a hybrid, unique to Japan, of free market and government involvement."[76] Japan's

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[68] Iyori, *supra* note 57, at 63-64. *See also* IYORI & UESUGI, *supra* note 67, at 1-4.

[69] Alex Y. Seita & Jiro Tamura, *The Historical Background of Japan's Antimonopoly Law*, 1994 U. ILL. L. REV. 115, 122 (1994).

[70] *Id.* at 122. *See also* HAHN, *supra* note 66, at 140 ("One rationale asserted by the Japanese as to why cartels are necessary is their belief that cooperative action among companies is beneficial to promote greater economic growth"); IYORI & UESUGI, *supra* note 67, at 2 (discussing zaibatsu as a concentration of power).

[71] ROBERT L KEARNS, ZAIBATSU AMERICA: HOW JAPANESE FIRMS ARE COLONIZING VITAL U.S. INDUSTRIES 7-8 (1992); *also* TATSURO UCHIN, JAPAN'S POSTWAR ECONOMY: AN INSIDER'S VIEW OF ITS HISTORY AND ITS FUTURE 21-23 (Mark A. Harbison trans., 1978) (further discussing *zaibatsus*).

[72] *See* HAHN, *supra* note 66, at 113-18.

[73] RUGGLES, *supra* note 58, at 350.

[74] *Id.*

[75] *See* HAHN, *supra* note 66, at 113-18.

[76] *Id.; also* Melissa Krasnow, *Corporate Interdependence: The Debt and Equity Financing of Japanese Companies*, 24 CAL. W. INT'L L. J. 55, 55 (1993) ("Corporate interdependence . . . is the fabric of industrial Japan and is manifest in the constant interaction between government authorities and business or organizations, among companies, and within companies themselves").

Administrative Guidance[77] reflects the "close, virtually symbiotic relationship between business and government in Japan."[78]

C. *Antitrust Laws of Each Country*

1. *Origin of the antitrust laws in the United States*[79]

A "widespread fear of the evils which flow from [a] monopoly" as a result of "the concentration of economic power" prompted the United States to be the first country to enact a set of formal antitrust laws.[80] In response to the rising number "of large-scale business enterprise in the post-Civil war period"[81] and the growing number of trusts which "[used] their power to oppress individuals and injure the public,"[82] Congress enacted the Sherman Act[83] of 1890 to "promote and preserve competition."[84] The Act was considered the "Magna Carta" of free

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[77] Administrative Guidance is "the term used to express the means by which agencies of the Japanese government, especially the Ministry of International Trade and Industry" use to "convince business to act in the way the government desires." HAHN, *supra* note 66, at 118. There is "no precise statutory authorization" for Administrative Guidance. *Id.* The Administrative Guidelines are "consultative measures initiated by officials who seek to impose public objectives of individual firms or . . . seek a reconciliation between the two." UCHIN, *supra* note 71, at 21-23. Even with its non-statutory based and voluntary nature, Administrative Guidance is an especially powerful method in which the government imposes its values and policies in how businesses in Japan should be run. *Id. See also* HAHN, *supra* note 66, at 118; IYORI & UESUGI, *supra* note 67, at 20.

[78] HAHN, *supra* note 66, at 113.

[79] This discussion will highlight the various general antitrust laws in both countries; their applicability to banking mergers will be discussed in the following sections.

[80] 54 AM. JUR. 2D, *supra* note 63, § 1. *See also* Iyori, *supra* note 57, at 62-63.

[81] ARMENTANO, *supra* note 21, at 5.

[82] 54 AM. JUR. 2D, *supra* note 63, § 1; *also* Iyori, *supra* note 57, at 62-63.

[83] Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (2000) (originally passed in 1890).

[84] Harris & Jorde, *supra* note 51, at 3. *See also* Johnson v. University Health Servs.,161 F.3d 1334, 1338 (11th. Cir. 1998) (stating that the Sherman Act, which the Supreme Court has called "the Magna Carta of free enterprise," was intended to protect "the economic freedom of participants in the relevant market." Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 538 n.38 (1983) (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972)). Thus, antitrust injuries include only those injuries that result from interference with the freedom to compete. *See* Iyori, *supra* note 57, at 62.

enterprise.[85] In 1914, Congress enacted the Clayton Act[86] to supplement the Sherman Act[87] and "to secure the protection of the public against the evils which are supposed to result from the lessening of competition."[88] In the same year, Congress enacted the Federal Trade Commission Act[89] ("FTCA"), which established a regulatory agency independent from the Antitrust Division of the U.S. Department of Justice, "responsible for enforcing antitrust laws."[90]

2. *Origin of the antitrust laws in Japan*

In the beginning, the three aforementioned United States antitrust laws helped shape Japan's antitrust laws.[91] In 1947[92] and while still under American Occupation, [93] Japan enacted the Law concerning Prohibition of

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[85] *Johnson*, 161 F.3d at 1338 (11th. Cir. 1998) (citing *Associated Gen. Contractors of Cal., Inc.,* 459 U.S. at 538 n.38 (quoting *Topco Assocs., Inc*., 405 U.S. at 610)).

[86] Clayton Act, 15 U.S.C. §§ 12-27 & 29 U.S.C. 29 §§ 52-53 (2000) (originally passed in 1914).

[87] *See* 54 AM. JUR. 2D, *supra* note 63, § 155. Section 12(a) of the Clayton Act defines antitrust laws to include " the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety [which is in reference to the Sherman Act] and other acts." Clayton Act, 15 U.S.C. § 12(a). *See also* Iyori, *supra* note 57, at 62.

[88] 54 AM. JUR. 2D, *supra* note 63, § 155. *See also* Iyori, *supra* note 57, at 62. (Clayton Act introduced punitive damages to violations of the antitrust laws).

[89] Federal Trade Commission Act, 15 U.S.C. §§ 41-51 (2000) (establishing the Federal Trade Commission) [hereinafter FTCA].

[90] *See* 15 U.S.C. § 45(a)(2); *also* Iyori, *supra* note 57, at 62. Section 45(a)(2) of the FTCA states in pertinent part: "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings, and loan institutions." § 45(a)(2). Therefore, bank mergers do not fall under the jurisdiction of the Federal Trade Commission. *See also* Gina M. Killian, *Bank Mergers and the Department of Justice's Horizontal Merger Guidelines: A Critique and Proposal*, 69 NOTRE DAME L. REV. 857, 857 n.1 (1984).

[91] *See* IYORI & UESUGI, *supra* note 67, at 11 ("The Act was patterned after the United States antitrust laws, primarily the Sherman Act, the Clayton Act and the Federal Trade Commission Act").

[92] This is more than fifty years after the United States enacted the Sherman Act.

[93] The enactment of the law was a result of the "SCAP Directive Nop. 244 of November 6, 1945 concerning the 'Dissolution of Holding Companies' [requiring] 'such laws as will eliminate and prevent monopoly and restraint of trade . . . .'" IYORI & UESUGI, *supra* note 67, at 10. The main focus of the Allied Forces was the "democratization of the [Japanese] economy" which "included the dissolution of

Private Monopoly and Maintenance of Fair Trade[94] ("Antimonopoly Law") "under the strong influence of [the] United States antirust laws." [95] The purpose of the Antimonopoly Law was to "prohibit private monopolization, unreasonable restraint of trade, and unfair trade practices, by preventing excessive concentration of economic power . . . ."[96] Patterned after the United States, the Japanese Fair Trade Commission administers and implements the antitrust laws.[97] The original 1947 law was stricter than the United States antitrust laws at that time.[98] Throughout the years, however, the Japan Antimonopoly Law has become more relaxed than its original text.[99] Part of the relaxation[100] process has been a result of several amendments that the law has undergone,[101] in particular, the practice of Administrative Guidance by the Ministry of International Trade and Industry[102] and the implementation of exemptions.[103]

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zaibatsu, and elimination of the excessive concentration of economic power." Hiroshi Oda, *An Outline of the Japanese Anti-Monopoly Law*, *in* JAPANESE BANKING, SECURITIES AND ANTI-MONOPOLY LAW 114 (Hiroshi Oda et al. eds., 1983).

[94] Act Concerning Prohibition Of Private Monopolization And Maintenance Of Fair Trade (Act. No. 54 of 14 April 1947) [hereinafter "Japan's Antimonopoly Law"].

[95] Iyori, *supra* note 57, at 61; *See also* IYORI & UESUGI, *supra* note 67, at 11.

[96] Japan's Antimonopoly Law ch. 1, § 1. *See also* CORWIN D. EDWARDS, CONTROL OF CARTELS AND MONOPOLIES: AN INTERNATIONAL COMPARISON 353 (1967).

[97] EDWARDS, *supra* note 96, at 353. *See also* ODA, *supra* note 93, at 114-15; MITSUO MATSUSHITA & THOMAS J. SCHOENBAUM, JAPANESE INTERNATIONAL TRADE AND INVESTMENT LAW 141 (1989) (stating that the FTC is technically part of the Prime Ministers Office, but its decisions "are made independently of the authority of any other administrative body, including the prime minister").

[98] MATSUSHITA & SCHOENBAUM, *supra* note 97, at 139.

[99] IYORI & UESUGI, *supra* note 67, at 10; MATSUSHITA & SCHOENBAUM, *supra* note 97, at 139.

[100] *See* Seita & Tamura, *supra* note 69, at 122-23 (stating that the flaw in the Japan Antimonopoly Law can be attributed partly to "weak remedies").

[101] *See* IYORI & UESUGI, *supra* note 67, at 13-19. Business began to ask for relaxation of the Antimonopoly Law shortly after its enactment and "substantial amendments were made [after] the conclusion of the Peace Treaty" in 1951. *Id*. at 13-14.

[102] *See supra* note 77.

The practice of Administrative Guidance by the Ministry of International Trade Institution ("MITI") has resulted in conflicts between the MITI and the Japanese FTC because of different policies. For example, in the 1960s, "it was the policy of MITI to encourage mergers in order to build up enterprises large enough to compete with those of the United States and Europe, while at the same time the FTC was making an effort to

Before discussing the relevant provisions of United States and Japan antitrust laws, it is important to summarize the main differences that exist between the two countries that may effect the application of their antitrust laws. First, the United States and Japan differ in philosophy in respect to competition, and because antitrust laws[104] are inherently based on competition, differences in the application of their antitrust laws may also arise. Second, the two countries have a different perspective on the concentration of power[105] and the relationship of business and government, which effect their perception of large firms and the amount of government involvement that is acceptable to these firms. Third, unlike the United States who chose on their own to implement their antitrust laws, Japan was forced to implement their antitrust laws by the United States.[106] Also because Japan "lacked both the laws and social attitudes that supported the antitrust mentality that had become so influential in American law after the turn of the nineteenth century,"[107] their application of the antitrust laws will also differ. In essence, "although [United States and Japan antitrust laws] continue to share many fundamental similarities, considerable differences have developed over time,"[108] which may affect the overall objective and thus application of the antitrust laws of both countries.[109]

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control mergers by means of the [Antimonopoly Law]." MATSUSHITA & SCHOENBAUM, *supra* note 97, at 140.

[103] Japan's Antimonopoly Law ch. 6, §§ 21-24. Sections 22, 24-3, 24-4 have been repealed. One example of an exemption is Section 21 (Natural Monopoly such as those businesses engaging in railway, electricity, or gas). *See also* ODA, *supra* note 93, at 125-26 (discussing briefly the seven exemptions of the Antimonopoly Law); 1 JULIAN MAITLAND-WALKER, INTERNATIONAL ANTITRUST LAW 103-04 (1984) (discussing the exemption provision, especially the rationalization cartels during periods of depression); Andrew H. Thorson & Frank Siegfanz, *The 1997 Deregulation of Japan's Holding Companies*, 8 PAC. RIM L. & POL'Y J. 261, 261 (1999) ("In 1997, Japan enacted the Act for Partial Amendment of the AMA which eliminated the absolute prohibition on pure holding companies and relaxed regulations on stockholding by other types of companies").

[104] Depending on the country, antitrust laws can also be called competition laws. *See* HIROSHI IYORI, HIROSHI LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY: AMERICAN AND JAPANESE PERSPECTIVES v (Gary R. Saxonhouse & Kozo Yamamura eds., 1986).

[105] HAHN, *supra* note 66, at 140.

[106] *See* IYORI, *supra* note 104, at 56-82.

[107] Seita & Tamura, *supra* note 69, at 129.

[108] Iyori, *supra* note 57, at 61.

[109] *See* FRAZER, *supra* note 41, at 7.

D. *Banking Mergers and Acquisitions Legislation*

In its broadest scale, antitrust laws encompass many anticompetitive practices.[110] For the purpose of this paper, the focus will be on laws that are pertinent when firms decide to merge, especially banks.

1. *U.S. merger legislation*

United States antitrust enforcement reflects the federal system of the United States government.[111] At the state level, the State Attorney General sues in the name of the State for violations of antitrust provisions.[112] At the Federal level, the Department of Justice (Antitrust Division) and the Federal Trade Commission[113] are the two agencies responsible for overseeing anticompetitive practices. The Department of Justice's analysis for bank mergers is essentially similar to that of other industries.[114] The Federal Trade Commission, on the other hand, is exempted from direct involvement in bank mergers.[115]

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[110] Some examples of other anticompetitive practices aside from mergers are tie-ins and exclusive contracts, boycotts and refusal to deal, and price fixing.

[111] *See* Department of Justice, Antitrust Division, Protocol For Coordination In Merger Investigations Between The Federal Enforcement Agencies And State Attorneys General, *at* http://www.usdoj.gov/atr/public/guidelines/1773.htm. Depending on the type of case, "some mergers and acquisitions may become subject to simultaneous federal and state investigations by either the Antitrust Division of the U.S. Department of Justice ('Antitrust Division') or the Federal Trade Commission ('FTC'), and one or more State Attorneys General." *Id.*

[112] *See* 15 U.S.C. § 15(a)-(c). Section 4(A) of the Clayton Act enables the U.S. government to bring suit "[w]henever the United is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore . . . ." § 15(a). Section 4(C) of the Clayton Act enables State Attorney Generals to "bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State . . . by reason of any violation of sections 1 to 7 of this title." § 15(c)(a)(1).

[113] 54 AM. JUR. 2D, *supra* note 63, § 1152. Originally enacted to "prohibit only unfair methods of competition" and to bolster the Sherman and Clayton Acts, the Federal Trade Commission Act was later amended "to outlaw unfair or deceptive acts or practices in commerce, so that the Commission could undertake affirmatively to protect consumers, rather than remain limited to protecting them indirectly by protecting business competitors." *Id.*

[114] *See also* Nanni Address, *supra* note 53, *in* 1996 WL 1184723, *2. Bank mergers fall under similar analytical framework with other mergers in other industries. *Id.*

[115] 15 U.S.C.S. § 45 (a)(2) ("The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings, and loan

Several merger provisions apply to bank mergers. The first provision is the Sherman Act[116] which makes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce" illegal.[117] It also makes it illegal to "monopolize, or attempt to monopolize, or combine or conspire…to monopolize."[118] Violations of both sections of the Sherman Act result in civil and criminal penalties.[119] The next provision is Section 7 Clayton Act,[120] which prohibits mergers and acquisitions that "may . . . substantially . . . lessen competition, or tend to create a monopoly."[121] The Clayton Act is also applicable to bank mergers[122] and the Justice Department "has frequently challenged bank mergers under Section 7."[123] Because of the existence of

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institutions described in section 18(f)(3) [15 U.S.C.S. § 57a(f)(3), Federal credit unions described in section 18(f)(4) [15 U.S.C.S. 57a(f)(4)]…"); *also* 54 AM. JUR. 2D, *supra* note 63, § 1232 (Limitation of FTC's jurisdiction that does not include banks). *See also* Killian, *supra* note 90, at 857. The Federal Trade Commission is exempted from bank mergers. Henry H Bridgeforth v. Fleet Bank of Connecticut, No. 317612, 1992 Conn. Super. LEXIS 1943, at *4 (Conn. Super. Ct. June 1992).

[116] 15 U.S.C. §§ 1-7 (2000).

[117] 15 U.S.C. § 1.

[118] 15 U.S.C. § 2. *See also* JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW 22 (1986).

[119] Convictions for violations of either Section 1 or 2 of the Sherman Antitrust Act "shall be punished by fine note exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court." 15 U.S.C. § 1-2.

[120] 15 U.S.C. §§ 12-27 and 29 U.S.C. 29 §§ 52-53 (2000).

[121] 15 U.S.C. § 18 (2000); *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321,321 (1963). "The statutory test [of] whether the effect of the merger 'may substantially be substantially to lessen competition' 'in any line of commerce in any section of the country'" was analyzed by the Supreme Court in *Brown Shoe v. United States*, 370 U.S. 294 (1962). *Philadelphia Nat'l Bank*, 374 U.S. at 355.

[122] Section 7 is applicable to bank mergers. *See Philadelphia Nat'l Bank*, 374 U.S. at 354 (holding that "the Bank Merger Act of 1960 does not preclude application of Section 7 of the Clayton Act to bank mergers" and that Section 7 of the Clayton Act is applicable to bank mergers). *See also* United States v. Phillipsburg Natl. Bank & Trust Co., 306 F. Supp. 645, 646 (1969); United States v. Manufacturers Hanover Trust Co., 240 F. Supp. 867, 878 (1965); United States v. Third Nat'l. Bank, Civil Action No. 3849, 1964 U.S. Dist. LEXIS 9773, at *13 (D.Tenn. 1964); Michael A. Greenspan, *Geographic Markets in Bank Mergers: A Potpourri of Issues*, 2 N.C. BANKING INSTITUTE 1, 6 (1998) (discussing issues regarding Department of Justice analysis in bank mergers)

[123] THOMAS W. BRUNNER ET. AL, MERGERS IN THE NEW ANTITRUST ERA 116-117 (1985).

other bank provisions, Section 7's standards have been modified by only prohibiting mergers whose "anticompetitive effects . . . are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served."[124]

The next governing provision to consider in a merger analysis is the Merger Guidelines issued by the Department of Justice and the Federal Trade Commission ("FTC").[125] The Merger Guidelines describe the analytical framework of merger enforcement and provide firms with guidelines in the planning of their mergers.[126] Some of the relevant factors that are examined during a merger analysis are as follows: market definition and concentration; potential adverse anticompetitive effects of mergers; entry analysis; efficiencies; and failure and exiting assets.[127]

United States banks are highly regulated. In addition to the above general mergers provisions, U.S. banks are governed by special Bank Acts.[128] First, the Bank Holding Company Act of 1956[129] authorizes the

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[124] 12 U.S.C. S. § 1828(c)(5)(B) (2000). *See also* BRUNNER, *supra* note 123, at 117.

> Under 12 U.S.C.S. § 1828(c), the public interest is the ultimate test of the validity of a bank merger. Both competition in commercial banking and satisfaction of the 'convenience and needs of the community' are in the 'public interest.' If a merger poses a choice between preserving competition and satisfying the requirements of convenience and need, the injury and benefit are weighed and the decision rests on which alternative better serves the public interest.

Id. 54 AM. JUR. 2D, *supra* note 63, § 255.

[125] DEP'T OF JUST., *Merger Guidelines 1992* (with April 8, 1997, revisions to Sec. 4 on Efficiencies), 4 Trade Reg. Rep. (CCH) ¶ 13,104, at 20,569-74 (Apr. 7, 1997) *available at* 1992 FTC LEXIS 176 [hereinafter *Merger Guidelines*].

The 1992 Guidelines marks the first time when both the U.S. Department of Justice and the FTC have issued joint guidelines. Both agencies have antitrust enforcement jurisdiction. This is why, even though, in theory, Section 18 exempts the FTC during bank mergers, the FTC is able to have an indirect role in mergers, in terms of the antitrust policy that is being promoted during that period. This latest collaboration between the Department of Justice and the FTC reflects the collaborative relationship between these two governing bodies. *Id.*

[126] *Id.* The Merger Guidelines can be applied to other industries aside from banking. *Id.* at 1.

[127] *Id.* at 5. The applicability of these factors will be discussed in Section IV.A of this paper, which analyses the Chase Manhattan Bank and Chemical Bank merger. *Id.*

[128] Killian, *supra* note 90, at 857.

> [T]he Federal Reserve Board ("Fed") and the Department of Justice ("DOJ") are two agencies with regulatory jurisdiction over bank

Federal Reserve Board, in conjunction with the Department of Justice, "to regulate the formation, merger, and consolidation of bank holding companies."[130] Second, the Bank Mergers Act of 1966[131] permits bank mergers "even if they tend to lessen competition in the relevant market."[132] Before any approval of the merger is granted, a competition factors report must be obtained "from the Attorney-General and the two [pertinent] banking agencies."[133] This Act also governs any challenge of a

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> mergers. Both agencies are required by law to review the competitive impact of proposed merger transactions. Tension exists between these federal agencies because at times they disagree on the presence of anticompetitive effects in the post-merger environment.

Id. *See also* RAYBOULD, *supra* note 11 at 127. In the United States, "bank mergers are treated in a different way from the generality of industrial and commercial mergers." *Id.*

[129] Bank Holding Company Act, 12 U.S.C. §§ 1841-1859, 1971-1978 (1994) (1845 repealed). Violation of this provision carries stiff criminal and civil penalty. 12 U.S.C. § 1847 (a), (b).

[130] BRUNNER, *supra* note 123, at 115.

> The legislative history of the Bank Holding Company Act (the Act) indicates that it was enacted to accomplish two primary objectives. First, it was designed to prevent the concentration of banking resources in the hands of a few financial giants; and second, it was intended to implement a congressional policy against control of banking and nonbanking enterprises by a single business entity.

Annotation, *Denial by Board of Governors of Federal Reserve System of Application for Bank Merger, Consolidation, or Acquisition on Anticompetitive Grounds under § 3(c) of Bank Holding Company Act of* 1956, 71 A.L.R. FED. 438, § 2(a) (2001).

[131] Bank Holding Company Act, 12 U.S.C.S § 1828(c)(2) (2000) (stating that "no insured depository institution shall merge or consolidate with any other insured institution…except with the prior written approval of the responsible agency"). Depending on the bank, the additional agencies involved are the following: (1) "the Comptroller of the Currency if the acquiring , assuming, or resulting bank is to be a national bank or a District bank," § 1828 (c)(2)(A); (2) "the Board of governors of the Federal Reserve System if the acquiring, assuming or resulting bank is to be a State member bank (except a District bank)," § 1828 (c)(2)(B); and (3) "the Corporation if the acquiring, assuming, or resulting bank is to be a State nonmember insured bank (except a District bank or a savings bank supervised by the Director of the Office of Thrift Supervision)," § 1828 (c)(2)(C).

[132] 54 AM. JUR. 2D, *supra* note 63, § 251. The purpose of the Bank Mergers Act of 1966 is to permit certain bank mergers, even though they tend to lessen competition in the relevant market. Congress believed that the role of banks in a community's economic life is such that a bank merger may sometimes serve the public interest, even though the merger lessens competition. *Id. See also* RAYBOULD, *supra* note 11, at 127. The thirty days provision is waived if there is a specified emergency. *Id.*

[133] 12 U.S.C.S. § 1828(c)(4) (2000); RAYBOULD, *supra* note 11, at 127.

proposed merger under Section 7 of the Clayton Act that must be commenced within a thirty-day waiting period.[134] Last, the Change of Bank Control Act[135] applies if the two aforementioned bank acts do not apply and "25% or more of the shares of an insured bank are transferred."[136]

2. *Japan merger legislation*

Unlike the United States, which has several anti-competitive statutes applicable to mergers and acquisitions analysis, Japan has one main governing provision, the Law Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade [hereinafter "Japan's Antimonopoly Law"].[137] The purpose of the law is to prohibit the formation of private monopolies "by preventing excessive concentration of economic power . . . thereby . . . promot[ing] the democratic and wholesome development of the national economy as well as assur[ing] the interests of consumers in general."[138] Chapter Two[139] of the statute

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[134] 12 U.S.C.S. § 1828 (2000); RAYBOULD, *supra* note 11, at 127. Unless the Court so orders, the challenge creates an automatic stay to the merger's consummation. *Id*.; 12 U.S.C.S. § 1849(b)(1) (2000). *See also* BRUNNER *supra* note 123, at 116. Neither the government nor any private party, however, may challenge a bank merger under Section 7 of the Act once the ban merger goes through. *Id*.; 12 U.S.C.S. § 1849(b)(1).

[135] 12 U.S.C.S. § 1817 (2000).

[136] BRUNNER, *supra* note 123, at 116.

[137] Japan's Antimonopoly Act § 1. *See* MAITLAND-WALKER, *supra* note 103, at 109-13.

[138] Japan's Antimonopoly Act defines the Purpose of the law as

> prohibiting private monopolisation, unreasonable restraint of trade and unfair business practices, by preventing the excessive concentration of economic power and by eliminating unreasonable restraint of production, sale, price, technology, and the like, and all other undue restriction of business activities through combinations, agreements and otherwise, aims to promote free and fair competition, to stimulate the initiative of undertakings, to encourage business activities of undertakings, to heighten the level of employment and people'' real income, and thereby to promote the democratic and wholesome development of the national economy as well as to assure the interests of consumers in general.

Japan's Antimonopoly Act ch. I, § 1.

[139] Japan's Antimonopoly Act ch. II, § 7. Section 7, Measures Against Private Monopolisation, Restraint Of Trade And International Agreements, provides:

prohibits private monopolization or unreasonable restraint of trade, and Chapter Three[140] addresses monopolistic situations.[141] Private monopolization means "business activity, individual or by combination or conspiracy, that excludes or controls the business activity of others."[142] Chapter Four of the Act deals with the mergers and acquisitions activities in Japan. Of particular concern to proposed mergers is the possibility of

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> (1) Where there exists any act in violation of the provisions of section 3, or paragraph (1) or (2) of the preceding section, the Fair Trade Commission may, in accordance with the procedure as provided for in division II, chapter VIII, order the undertaking concerned to file reports, or to cease and desist from such acts, to transfer a part of his business, or to take any other measures necessary to eliminate such acts in violation of the said provisions.
>
> (2) The Fair Trade Commission may, when it deems particularly necessary, even when an act in violation of the provisions of section 3 hereof has already ceased to exist, order the undertaking concerned, in accordance with the procedure as provided for in division II, chapter VOOO, to take measures to publicize that the said act has been discontinued and order any other measures necessary to ensure elimination of the said act: provided that the foregoing shall not apply to cases where one year has elapsed since the date of discontinuation of the said act without recommendation being given to the entrepreneur concerned or a proceeding being initiated.

Id.

[140] *Id.* ch. III, § 8-4. Section 8-4 provides, in pertinent part:

> (1) When there exists a monopolistic situation, the Fair Trade Commission may order the entrepreneur concerned, in accordance with the procedures…to transfer a part of his business or to take any other measures necessary to restore competition with respect to such goods or services: provided, that the foregoing shall not apply to cases where the Commission finds that such measures may reduce the scale required for the supply of good or services which such entrepreneur supplies will rise sharply, undermines its financial position and make it difficult for the entrepreneur to maintain its international competitiveness, or where other alternative measures may be taken which the Commission finds sufficient to restore competition with respect to such goods or services.

Id.

[141] *Id.* ch. II, §§ 3- 7.2.

[142] *Id.* ch. I, § 2(5); EDWARDS, *supra* note 96, at 353.

excessive concentration of economic power that may occur as a result of the merger.[143]

The Japanese Federal Trade Commission ("JFTC") functions similarly to the United States Federal Trade Commission.[144] The JFTC implements the Antimonopoly Law of the country,[145] and the acts

[143] Japan's Antimonopoly Act ch. IV, § 9(5). Section 9(5) provides:

> The term excessive concentration of economic power shall mean a situation in which the extreme largeness of the overall business scale over a significant number of fields of business of a holding company and its subsidiaries and other domestic companies whose business activities are controlled by the holding company by means of a holding of stock, the remarkably large influence of the said companies on other entrepreneurs due to transactions relating to finance or the occupancy of influential positions over a significant number of mutually related fields of business by the said companies has a large effect on the national economy and impedes promotion of free and fair competition.

Id.

[144] Another government body to consider aside from the JFTC, especially in bank mergers, is the Ministry of Finance ("MOF"), which is the primary government agency that oversees and regulates Japan's financial system. The MOF has seven bureaus: the Banking Bureau; International Finance Bureau; Securities Bureau; Budget Bureau; Tax Bureau; Finance Bureau, "which administers the central government's borrowing and issuance of government bonds and short-term government bills;" and Customs Tariff Bureau. MATSUSHITA & SCHOENBAUM, *supra* note 97, at 176. Given that the banking system is "a market where the Ministry of Finance pulls the strings" and Japan's Administrative Guidance policy, the MOF plays an integral role in bank merger activities. Brian Bremner, *After the Coverup, the Mop-Up: Daiwa may be sold-and other Japanese banks may follow*, BUSINESSWEEK, Nov. 20, 1995 at 70. *See* HAHN, *supra* note 66, at 134.

[145] The JFTC is an independent governmental agency that is authorized to

> (i) investigate violations of the AMA,
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> (ii) initiate and preside over quasi-judicial hearings
>
> (iii) order violating businesses or trade associations to cease and desist from illegal activities,
>
> (iv) order cartel participants to pay surcharges,
>
> (v) receive filings and reports from companies on mergers, stock-holding, etc. required by the laws,
>
> (vi) conduct researches and surveys in business activities necessary to regulate anti-competitive conduct, and,
>
> (vii) negotiate with other ministries and agencies on laws and regulations concerning economic activities.

undertaken by the Commission are "subject only to judicial review by the Tokyo High Court."[146] Investigations conducted by the JFTC originate in one of three ways: first, a complaint by a private person; second, reports from the Procurator General; or third, JFTC staff investigations.[147] "Every company in Japan . . . desirous of becoming a party to a merger,"[148] is required to file a merger notification with the JFTC, but exceptions are permitted.[149] Parties interested in a merger can informally consult with the JFTC before they turn in their application formally for consideration.[150] Additionally, through Administrative Guidance, the Ministry on

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Akinori Yamada, Competition Law and Policy in Japan, Address Before the Global Economic Development and Competition Policy Conference, pt. III.C.1 (March 3, 1997), *at* http//www.jftc.admix.go.jp/e-page/speech/970303.htm.

[146] Sibbett, *supra* note 17, at 1000-01.

[147] HAHN, *supra* note 66, at 134.

[148] Japan's Antimonopoly Law ch. IV, § 15, para. 2. *See also* Sibbett, *supra* note 17, at 1001.

[149] According to the JFTC Guidelines, there are certain cases where the merger is "not regarded as formation or strengthening of a joint relationship," and "thus these mergers are not to be examined in impact on competition. *Guidelines For Interpretation On The Stipulation That "The Effect May Be Substantially To Restrain Competition In A Particular Field Of Trade" Concerning M&A's*, pt. 1.C. (Dec. 21, 1998), *available at* http:www.jftc.admix.go.jp/e-page/guideli/maguid/zindez.htm [hereinafter *Guidelines For Interpretation*]. Examples of such cases include:

> 1. Mergers between a parent company and its subsidiary (where one party holds more than 50 percent of the total outstanding stocks of each of the other parties)[;]
>
> 2. Mergers between the sister companies (where an identical company holds more than 50 percent of the total outstanding stocks of each of the parties)[; and]
>
> 3. Mergers effected solely for the purpose of conversion of an ordinary partnership, limited partnership, or limited liability company to a joint stock company; conversion of a joint stock company to a limited liability company' conversion of a limited partnership to an ordinary partnership[.]

Id. *See also* Japan's Antimonopoly Act ch. IV, § 15, art. 2.

[150] Japan's Antimonopoly Law ch. IV, §§ 3, 4, 5, 15. *See also* Sibbett, *supra* note 17, at 1001. During this period, parties are able to ascertain whether or not their proposed mergers will face any major problems. After the merger notification is filed, subject to JFTC discretion to shorten or extend the period, the parties must wait thirty days "before the proposed merger or acquisition may take place." The JFTC is "empowered to prohibit" planned merger or acquisition that violates the Antimonopoly Law by substantially restricting competition. *Id*.

International Trade may also have an indirect role in the country's merger policies.[151]

Similar to the United States, Japan has special provisions that specifically govern bank and other financial institution mergers. Unlike the United States, however, which has separate bank acts, Japan's special provisions are in Chapter 4 of the Antimonopoly Law, which governs mergers in general.[152] Section 9 of the Antimonopoly Law was recently amended to redefine holding companies.[153] Section 11 of the Antimonopoly Law limits the merging or acquiring financial institution or bank holding company from obtaining more than 5% of the outstanding stock in any particular company.[154] Section 10 prohibits acquisitions, and Section 15 prohibits mergers of holding companies or financial institutions that may "substantially . . . restrain competition in a particular field of trade."[155]

III. THE UNITED STATES AND JAPAN BANKING SYSTEMS AND MERGERS AND ACQUISITION ACTIVITIES

A. *Special Concern for Bank Mergers*

Despite all the general and bank specific merger laws highlighted above, the banking sector has not been exempt from the consolidation trend,[156] and in recent years, much attention has been given to the influx of mergers and acquisitions of banks. Banks are a pivotal part of a country's national economy;[157] they serve "as intermediaries between net savers and borrowers in our society," and influence other sectors of the economy.[158]

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[151] *See supra* note 77 and accompanying text. IYORI & UESUGI, *supra* note 67, at 20 (for discussion on Administrative Guidance and MITI).

[152] Japan's Antimonopoly Act ch IV. *See also* Sibbett, *supra* note 17, at 1000-12.

[153] Japan's Antimonopoly Act ch. IV, § 9. *See also*, Sibbett, *supra* note 17, at 1002-06.

[154] Japan's Antimonopoly Act ch. IV, § 11, art. 1. *See also* Sibbett, *supra* note 17, at 1006-07. Before 1998, bank holding companies were not even allowed to obtain a 5% share. *Id.* at 1006-07.

[155] Japan's Antimonopoly Act ch. IV, § 15, art. 1(I); § 10, art. 1. *See also* Sibbett, *supra* note 17, at 1009.

[156] *See supra* note 17.

[157] WILLIAM M. TSUTSUI, BANKING POLICY IN JAPAN 38 (1988). *See also* Jung, *supra* note 12, at 733.

[158] Jung, *supra* note 12, at 734-35.

Because "banking is clearly an industry whose financial soundness and competitive structure are essential to the fulfillment of [a] nation's economic potential,"[159] huge accumulation or concentration of capital in one bank can affect to the whole country.[160] It is, therefore, important to examine the consolidation trend that is occurring in this industry. Before doing so, however, a brief review of the past bank merger philosophy in these two countries should be undertaken.

B. *History of Mergers of Financial Institutions*

1. *The United States' historical hostility to bank mergers*

The United States has "a rich . . . history of political hostility toward large financial institution" which has resulted in various legislative and regulatory limits on banking.[161] The fear that "large national banks [will] dominate the entire banking industry" with unfettered control over interest rates and credit can be traced to "the early days of the nation."[162] This early fear spurred a highly regulated and fragmented financial institution system with a comparatively "weak central bank system" compared to that of other nations.[163] Aside from general antitrust provisions,[164] the United States has been vigilant in enforcing their statutes that prevent financial institutions from accumulating too much power.[165] The Glass Steagall Act of 1933[166] and interstate branching statutes[167] are

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[159] Nanni Address, *supra* note 53.

[160] Jung, *supra* note 12, at 731 ("Unregulated accumulation or concentration [of banks] poses difficulties for a pluralistic society").

[161] Don Allen Resnikoff, *Financial Institution Merger Enforcement: the Historical Context*, 10 LOY. CONSUMER L. REP. 296, 302 (1998).

[162] KARIER, *supra* note 6, at 176-177. *See also* Carl Felsenfield, *The Bank Holding Company Act: Has It Lived Its Life?*, 38 VILL. L. REV. 1, 6 (1993) ("From the time of the American Revolution, the large bank has been the bad boy of American banking").

[163] Resnikoff, *supra* note 161, at 301.

[164] *See supra* Section II.A.

[165] Resnikoff, *supra* note 161, at 296.

[166] The Glass-Steagall Act or the Banking Act of 1933, 12 U.S.C.S. § 377 (repealed on Nov. 12, 1999, P.L. 106-102, Title I, Subtitle A, § 101(a), 113 Stat. 1341). The Glass-Stegall Act separated commercial and investment banking. *See also* KERRY COOPER & DONALD R. FRASER, BANKING DEREGULATION AND THE NEW COMPETITION IN FINANCIAL SERVICES 51 (1984); LOWELL L. BRYAN, BREAKING UP THE BANK: RETHINKING AN INDUSTRY UNDER SIEGE 4 (1988).

just two of the examples of this past vigilance. The recent mergers and acquisitions trend in the financial sector seems to counter this past vigilance and regulation embedded in the United States banking system.[168]

2. *Japan's historical promotion of bank mergers*

U.S. and Japanese[169] Banking and Finance Systems contain similarities,[170] but they are distinct in two respects. First, unlike the United States, Japan has a rich history of merger activities throughout its formal history and has utilized mergers as a way to trim the inefficiencies of some of its banks.[171] Historically, mergers have helped reduce the number of banks in Japan, especially in the rural areas, beginning in the early 1900s and were utilized after the financial crisis in 1927.[172] Second, unlike the United States, Japan has a strong history of demonstrating a concentration of power in the financial system.[173] In fact, when the United

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[167] Interstate banking statutes imposed geographic barriers to doing business by creating branching restrictions and prohibitions on interstate banking. BRYAN, *supra* note 166, at 4. The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C.S. §§ 1811, 1835(a) (2000), opened the doors to interstate banking. *Id*.

[168] *See* KARIER, *supra* note 6, at 177.

[169] COOPER & FRASER, *supra* note 166, at 89

> The structure of the Japanese banking system has been shaped by regulations that separate short-term and longer-term financing and force institutional specialization along functional and economic-sector lines. Government financial intermediaries play a major role in the allocation of credit in the Japanese economy. The allocation and cost of credit is further influenced by interest rate controls, financing-source restrictions on financial institutions, and various activity and portfolio constraints on the country's financial entities.
>
> Commercial banks and other private financial institutions are regulated by the Ministry of Finance, which has extensive explicit powers to direct their activities. The ministry sets the level of regulated rates and ceilings and reviews applications by banks for approval of numerous domestic and foreign activities. Further, the ministry has a great deal of implicit, informal regulatory power over bank portfolios and activities. The Bank of Japan generally limits its role to monetary policy and foreign exchange market operations.

Id.

[170] KAZUO TATEWAKI, BANKING AND FINANCE IN JAPAN 8 (1991).

[171] *See id.*

[172] *See id.*

[173] *See* TSUTSUI, *supra* note 157, at 6-7.

States occupied Japan and implemented antitrust policies, one of the central focuses of this decentralization process was the financial sector.[174] Americans especially frowned upon the *zaibatsu*[175] because of its concentration of power.[176] Eventually, the American Occupiers were able to get rid of the *zaibatsus*, but the effects of the centralization of power still linger in the Japanese economic system.[177]

C. *Recent Wave of Bank Mergers and its Causes*

"The banking industry has experienced a marked trend toward concentration" as illustrated in the "substantial increase in the number of mergers and acquisitions"[178] in both the United States and Japan. As the mergers and acquisitions activities continue,[179] it is important to understand the predominant factors that have fueled such activities.

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[174] Japan's modern banking system began during the Meiji period when Western practices and institutions were introduced to the country and even though, the Japanese banking system contained many similarities to the American and European systems, the Occupiers were still determined to make transformations in the system. *Id*. at 1.

[175] *Zaibatsu's* are "vast horizontal conglomerates, presided over by the semi-feudal family dynasties, each with a holding company (honsha), trading firm and bank at the center of an extended group of concerns encompassing numerous sectors of industry, commerce and finance." *Id*. at 5.

Likened to the heart of the zaibatsu, the bank allowed the "circulation of funds through the organization and the coordinating operations by the allocation of credit. Although the zaibatsu held an immense amount of power, they were not oliogopolistic." *Id.* at 6.

[176] "The zaibatsu had no place in the American vision of a reformed Japan. To the occupiers, the combines were semi-feudal institutions whose vast economic power and political influence had stifled democracy and freedom in prewar Japan." *Id.* at 39.

[177] *Id*. at 38-67.

[178] Robert F. Roach, *Bank Mergers and the Antitrust Laws: The Case for Dual State and Federal Enforcement*, 36 WM. & MARY L. REV. 95, 96 (1994).

[179] Edward Herlihy et al., *Financial Institutions—Mergers and Acquisitions 1996: Another Successful Round of Consolidation and Capital Management*, 973 PRACT. L. INST./CORP. L. & PRACT. 251, 267 (1997). There is no sign that bank mergers will end soon. To the contrary, "[b]y all indications, significant pressure for further consolidation remains" and "the nation's largest financial institutions can be expected to continue on-going, large-scale transformations as they attempt to adapt to an ever-changing environment." *Id*.

1. *Deregulation*

Legal barriers that previously prevented banks from participating in the mergers and acquisitions waves have been lifted in both the United States[180] and Japan.[181] As deregulation occurs, it "engenders structural change and more competition."[182] "Deregulation also facilitates market entry across traditional industry lines [as more] regulatory constraints" are lifted.[183] In the United States, the Riegle-Neal Interstate Banking and Branching Efficiency Act[184] removed the barriers to interstate banking and "[established] a blueprint for unrestricted nationwide banking" through interstate banking mergers and acquisitions.[185] The repeal of the Glass-Steagall Act of 1933[186] also fostered an opportunity for banks to link up with other commercial and investment institutions.[187] In Japan, deregulation[188] has also fostered banks to look beyond their borders.[189]

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[180] The United States is in "the midst of an ongoing process of bank consolidation." Terry Calvani & W. Todd Miller, *Antitrust Analysis of Banker Mergers: Recent Developments*, 9 REV. BANKING & FIN. SERV., July 1, 1993, *available at* 1993 WL 2446072. What has spurned such activity is "deregulation, competition, the desire to improve bank capital ratios, the S & L crisis, [and] a perception that we have too many banks." *Id.*

[181] Global deregulation of financial institutions in other countries, aside from the United States and Japan, has resulted in mergers and acquisitions in other countries as well. Michael Blanden & Anthony Rowley, *Urge to Merge*, BANKER, July 1995, at 97.

[182] Parker & Balton, *supra* note 17, at 354.

[183] *Id.*

[184] *See also* Mark D. Rollinger, *Interstate Banking and Branching Under the Riegle-Neal Act of 1994*, 33 HARV. L.J. ON LEGIS. 183 (1996) (discussing the effects and implications of the Riegle-Neal Act); The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, 12 U.S.C.S. § 1835(a), opened the doors to interstate banking. *Id. See also supra* note 167.

[185] Arthur E. Wilmarth, Jr., *Too Good to be True? The Unfulfilled Promises Behind Big Bank Mergers*, 2 STAND J.L. BUS. & FIN. 1, 1 (1995).

[186] Brian Smith & Mark Ryan, *The Changing Nature of Antitrust Enforcement in Banking's New Era. A Special Issue: Antitrust and Banking*, ANTITRUST BULLETIN, June 22, 1996, at 481. The new law abolishing the Glass-Steagall Act of 1933 was signed by Clinton on Nov. 13, 1999. *Id.* The Act had divided up the banking, insurance, and securities industries. With the abolishment, these sectors are now likely to consolidate forces. The Glass-Steagall Act or the Banking Act of 1933, 12 U.S.C.S. § 377 (repealed on Nov. 12, 1999). See *supra* note 166 for a brief discussion on Glass-Steagall.

[187] *See The New American Universal Bank*, HARV. L. REV. 1310 (1997) (discussing the legal limitations of banks and bank holding companies).

[188] In the 1980s, for example, "the Foreign Exchange and Foreign Trade Control Law (Law No. 228 of 1949) was completely revised and cross-border transactions

Moreover, deregulation led to decreased government assistance and forced Japanese banks to rethink their overall strategy.[190] Deregulation in the financial sector may have also resulted from the "internationalization of the financial system" to promote for more competition.[191]

2. *Globalization*

In addition to deregulation, the globalization[192] of business activities is another factor promoting the mergers and acquisitions activities. "The increase in globalization" has led to "a growth in mergers that have a significant foreign component"[193] and an increased awareness by the regulators of those mergers.[194] "The role of [the] national government during this period is particularly important"[195] because it is

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became entirely free, in principle. This deregulation further encouraged rapid growth in the international flow of funds." TATEWAKI, *supra* note 170, at 20-21.

[189] One consequence of the deregulation in Japan is that the large Japanese banks are seeking new markets especially in Asia, which is an increasingly growing market. James Leung, *Rough Ride In Japan*, ASIAN BUS., June 1995, at 58.

[190] *Id*. at 59.

> Since the end of the World War II, the Japanese government has collaborated closely with the country's leading banks in engineering the economic miracle that catapulted Japan to the forefront of world economic power. The partnership was responsible for channeling capital to nourish selected enterprise in various industries. But in recent years Japanese banks have watched as their role as sole financiers of the country's major corporations has been eroded.

Id.

> In the long term, deregulation will have the effect of pruning Japan's overcrowded banking sector. The successful Japanese banks will be those that restructure themselves to become universal banks to compete freely with each other on quality of service and diversity of product.

Id. at 60.

[191] TATEWAKI, *supra* note 170, at 55.

[192] *See generally* Blanden & Rowley, *supra* note 181, at 96.

[193] Parker & Balton, *supra* note 17, at 354.

[194] Dep't of Justice Guide/Rep., *Opening Markets and Protecting Competition For America's Businesses and Consumers: Goals and Achievements of the Antitrust Division U.S. Department of Justice Fiscal Year 1993 Through March 1996* (March 27, 1996), *available at* 1996 WL 149352, at *2-*3. The Justice Department is well aware of the globalization and acknowledges in its analysis. *Id*.

[195] KARIER, *supra* note 6, at 190.

called to create measures that foster competitiveness of their domestic companies. International business participation not only creates more interdependence, but also increases the pressure to be more competitive.[196] Global competition results in even graver competition and increases, the desire and need for more "corporate expansion and the accumulation of power."[197] Banks are not exempted from this phenomenon, and "[d]eregulation and internationalization of the financial system will have important influences on the banking industry."[198] Banks competing in the international arena increasingly face the pressure to participate in mergers because it "enhance[s] a firm's ability to compete in foreign markets"[199] as there is a genuine perception that a bigger bank is a fiercer bank.[200]

3. *Efficiency and economies of scale*

Related to globalization is the desire to take advantage of efficiencies and economies of scale.[201] As banks consolidate, they eliminate overlapping systems and networks.[202] Larger banks "have the ability to make large loans to a single borrower"[203] and to offer more services to larger and more sophisticated firms. Because mergers have a great potential to "create synergetic gains if the production, administrative, and marketing costs of the merged firms" are less than "the sum of these costs for the two individual firms before their merger," a merger can result in increased profit.[204] Moreover, as banks consolidate, they also benefit

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[196] Marian N. Whitman, *Global Competition and the Changing role of the American Corporation*, WASH. Q., Mar. 22, 1999, under heading *Increased Competition in Product Markets*, *available at* 1999 WL 12844066 ("In the minds of most Americans, foreign competition certainly heads the list of explanations for share increases in competitive pressures").

[197] KARIER, *supra* note 6, at 189.

[198] TATEWAKI, *supra* note 170, at 55.

[199] Parker & Balton, *supra* note 17, at 354.

[200] *See generally* Blanden & Rowley, *supra* note 181, at 97.

[201] *See* GABRIEL HAWAWINI & ITZHAK SWARY, MERGERS AND ACQUISITIONS IN THE U.S. BANKING INDUSTRY: EVIDENCE FROM THE CAPITAL MARKETS 23 (1990).

[202] There is quest for economies of scale for banks to consolidate. "Meanwhile, the big bank mergers have prompted an increase in retail services by smaller, niche-oriented banks." Guy Halverson, *Banks Keep Merging, And Adding Services*, CHRISTIAN SCI. MONITOR, Sept. 9, 1996, at 9.

[203] HAWAWINI & SWARY, *supra* note 201, at 4.

[204] *Id.* at 31.

from the cost-cutting potential in a low-growth environment that results in "substantial cuts in staff" and reduction in the number of branches.[205] The temptation to find a compatible partner to create an economy of scale becomes more tempting as banks try to achieve that global reach.[206] This desire to consolidate, however, also results in grave social impacts that result when employees are terminated and branches are closed.[207]

4. *Technology*

Another factor driving the merger and acquisition wave is technology. The "technological change . . . appears to be an increasingly important force driving mergers" because "economic progress is often driven by innovation."[208] "When faced with an overwhelming new technology," a firm has the choice of becoming "part of the technology" or "letting [technology] run [it] over."[209] Technology has driven the desire to consolidate in the financial sector in two respects.[210] First, the impact of technology has infused more nontraditional types of competition "in the form of other financial service companies, non-bank entities, technology, and software companies."[211] Second, technology has made it simpler to connect networks and information systems to reach individuals and businesses of any size.[212]

5. *Bank failures*

Additionally, the increase in mergers, as a result of the aforementioned factors have left weaker banks with no choice but to be

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[205] Michael Blanden et al., *More Weddings*, BANKER, Oct. 1995, at 22.

[206] *See* Blanden & Rowley, *supra* note 181, at 96.

[207] *See* David Kleinbar, *Despite Fears Of- Higher Fees, Fewer Branches, Lawmakers And Regulators See Adequate Competition*, AUSTIN AM.-STATESMAN, Aug. 29, 1995, at C1.

[208] Parker & Balton, *supra* note 17, at 355.

[209] Bryan, *supra* note 166, at 139.

[210] *See* Richard L. Field, *The Electronic Future of Cash: Survey: 1996 Survey of the Year's Developments in Electronic Cash Flow and the Laws Affecting Electronic Banking in the United States*, 46 AM. U. L. REV. 967, 969 (1997). As any industry, financial institutions "seek to develop new markets, to satisfy consumer desires, and to boost profitability by providing improved products and services and by lowering costs." *Id.* "[F]or banks, however, new technologies have a more fundamental impact." *Id.*

[211] Smith & Ryan, *supra* note 186, at 481.

[212] *Id.*

saved by another bank in order to survive.[213] With diminishing profit margins and growing competition, the incidence of failure [will] rise, and, as a result of the other factors, sometimes banks do not have a choice, but to consolidate in order to remain in the game. [214] Rather than governments supporting a failing bank, as in the past, another bank is now more likely to save a failing bank because of the advantages of mergers.[215] One such advantage is the resulting increase in the value of a banks stock. For a bank in financial difficulty, this could be a saving grace for its stockholders.[216]

The above merely highlights some of the predominant factors that have propelled recent bank mergers and acquisitions. These factors drive banks to be competitive, and this increase in competition (or this competitive atmosphere) induces banks to make themselves even more competitive than before. This trend has no sign of stopping.[217]

IV. U.S. AND JAPAN BANK MERGER CASE STUDIES

An effective way to compare how the United States and Japan have implemented and enforced their antitrust policies (at least with regards to bank mergers) is to examine two recent mega-mergers that have occurred in these two countries: (1) the merger between the Chase-Manhattan Banking Corporation and the Chemical Banking Corporation in the United States and (2) the merger between the Mitsubishi Bank and Bank of Tokyo in Japan. The mergers of these four institutions illustrate the increased intensity of financial institution mergers. These mergers further demonstrate how both countries have permitted more concentration of power in the financial sector. In both mergers, former number ones (in the United States and in the world) were ousted as a result of the transaction, yet these mergers garnered minimal opposition.

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[213] Wilmarth, *supra* note 185, at 1.

[214] COOPER & FRASER, *supra* note 166, at 27.

[215] *See* Blanden & Rowley, *supra* note 181, at 102.

[216] The stocks usually rise from the announcements of mergers. This may be a result of "improved balance sheets and new emphasis on shareholder value are pushing money-center bank stocks way up." Richard D. Hylton, *Merger Mania and Fat Profits make the Big Banks Look Good*, FORTUNE, Aug. 7, 1995, at 259.

[217] Malcolm Hughes, *Seize the Day*, BANKER, Jan. 1, 1996, at 27. "At a strategic level, the basis for such criticism is clear-cut. Worldwide, the key sector trend towards consolidation by leading banks is generating a continuing series of announcements of 'mega-mergers.'" *Id*.

A. *The Chase-Manhattan Banking Corporation and The Chemical Banking Corporation: Nationwide Dominance*

1. *History of the merging banks*

Considered as a merger of equals, both Chemical Banking Corporation and Chase Manhattan Banking Corporation share a rich history of previous mergers and acquisitions activities.[218] The Chase Manhattan Banking Corporation was the result of a merger between Manhattan Corporation (chartered in 1799) and Chase National Bank (established in 1877).[219] Together with its branches around the world (which reflect its international presence) and several other acquisitions of other major national banks, Chase Manhattan ensured its position as one of the top banks in the nation.[220] At the time of the recent merger, Chase Manhattan was the sixth largest bank in the nation.[221]

Established in 1968 as Manufacturers Hanover Limited, Chemical Banking Corporation is a new comer compared to its partner.[222] Even with such a short existence, it still shares its partner's merger experience. Chemical Banking Corporation is a result of a merger in 1992 with Manufacturers Hanover Limited and Chemical Bank Limited.[223] At the time of the recent merger, Chemical Bank was the fourth-largest banking company in the nation.[224]

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[218] *See generally* 13 INTERNATIONAL DIRECTORY OF COMPANY HISTORIES 145-148 (1996) [hereinafter 13 INT'L DIRECTORY].

[219] *See id.* at 145.

[220] Joseph Radigan, *Will Bigger be Better at Chase*, USBANKER, Oct. 1995, at 28. "The post-merger Chase will have perhaps 70% of the middle-market lending business in New York, a market share that will allow it to increase prices." *Id.* "'There is definitely an oligopolistic opportunity to raise prices that is huge,' according to one analyst." *Id.* *See* 13 INT'L DIRECTORY, *supra* note 218.

[221] *See id.*

[222] *See id.* at 101.

[223] Critics were critical of the Manufacturers Hanover Corporation and Chemical Banking Corporation merger believing that "joining two accident-prone money centers would merely create one giant institution with the same deadly inclination." *A Second Act for Walter Shipley*, USBANKER, Mar. 1994, at 24. The merger, however, resulted in Chemical becoming a "much different and better bank than either of its predecessor institutions." *Id.*

[224] *See* 13 INT'L DIRECTORY, *supra* note 218, at 147.

2. *Scope and Purpose of the Merger*

Chase Manhattan Corporation and Chemical Banking Corporation consummated its merger in 1996 and became the largest United States financial institution at that time.[225] Although Chemical Bank was the larger bank, the Chase Manhattan name was retained for its worldwide name recognition.[226] According to analysts, the consolidation was a necessary step for both banks to undertake in order to remain competitive in the global arena.[227] Additionally, both banks faced growing concerns over their revenues and earnings,[228] and streamlining was a predominant factor in the merger.[229] It is estimated that the merger will result in a $1.5 billion savings in three years due to the consolidation of operations and downsizing of around twelve thousand employees, mainly from the New York area.[230]

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[225] Robert Stowe England, *A Company with a Pedigree*, MORTGAGE BANKING, Feb. 1, 1997, at 28.

This merger has been analogized to a big fish eating another big fish, doubling its size, and adopting the swallowed fish's feature. *Id.* With a 1996 combined asset of $323 billion, the merger edged out the long-time number one, Citicorp in the United States. *Id.* This pales in comparison though to Bank of Tokyo and Mitsubishi combined assets of $700 billion. *Id.*

[226] *See* 13 INT'L DIRECTORY, *supra* note 218, at 147.

[227] Kate Fitzgerald, *Chase-Chemical Merger Banks on Cutting Costs*, ADVERTISING AGE, Sept. 4, 1996, at 4. "Analysts say the banks had to merger to survive ongoing brutal competition in the rapidly consolidating banking industry, which is being undermined by non-bank competitors." *Id.*

[228] *Id*. Further, "they had to merge because their revenues weren't growing and now their earnings will go up because of the cost savings" that will be realized with the combined forces. *Id.*

[229] Edward Herlihy et al., *Mergers and Acquisitions of Financial Institutions 1995: An Unprecedented Year of Consolidation. An Annual Review of Leading Developments*, 922 PRACT. L. INST./CORP. L. & PRACT. 279, 297 (1996). "In 1995, Heine Securities announced a sizable position in Chase Manhattan and filed a Schedule 13-D, aggressively instigating for change. Chase subsequently agreed to merge with Chemical in one of 1995's largest merger transactions." *Id.*

[230] Michael B. Goodfried, *Mergers and Acquisitions/Antitrust*, 15 ANN. REV. OF BANKING L. 147, 148 (1996). The downsizing alone will result in a 16% reduction in operating expenses. *Id.*

3. *Chase Manhattan Bank and Chemical Bank Merger analysis*

Despite the immense concentration of assets that resulted, the merger between Chase Manhattan Bank and Chemical Bank did not face many obstacles from antitrust regulators. [231] Rather, the only opposition came from consumer and community groups.[232] The consumer group complained that the merger might result in higher costs in bank services. [233] They also complained of the immense layoff as a result of the consolidation of branches and networks. [234] The community groups brought suit[235] against the Federal Trade Commission ("FTC"), the Federal Reserve Board, and the two banks and its holding companies for possible anticompetitive violations in one of the areas where the bank was located.[236] Additionally, this latter group specifically complained that the Board had misanalyzed and miscalculated the full impact of the merger.[237]

a) *Market definition,[238] measurement, and concentration*

An important factor in a merger analysis is ascertaining the market definition, measurement, and concentration of the new bank resulting from

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[231] *First Quarter Approvals Feature Foreign Bank Rulings, Varied Protests*, 15 BANKING POL'Y REP., May 6, 1996, at 12 [hereinafter *First Quarter Approvals*]. "For the most part, neither the Fed nor the Justice Department raised insurmountable concerns about the antitrust implications of the Chase-Chemical or the Mitsubishi-Bank of Tokyo mergers or other transactions involving major banking organizations." *Id.*

[232] *See* Kleinbar, *supra* note 207, at C1.

[233] *See id.*

[234] *See id.*

[235] *See* Fitzgerald, *supra* note 227, at 4. In addition, a community group brought a claim in the second circuit against the Board of Governors and those who approved of the merger. Aside from the standing issue, the petitioners challenged the Board's anticompetitive analysis of the merger and its possible effects in the Bronx and wanted the Bronx as a separate banking community. The Court held the Board had the discretion to determine the concentration of the market, and "[evaluate] the competitive structure of the areas involved [in] its comprehensive analysis." Matthew Lee v. Board of Governors of the Federal Reserve, 118 F.3d 905, 917 (1996).

[236] *See Activists are challenging bank expansion on much more than CRA performance*, 16 BANKING POL'Y REP., Feb. 3, 1997, at 9.

[237] *See id.*

[238] Harris & Jorde, *supra* note 51, at 4 ("The purpose of defining a market is to help measure a firm's power over price and output, or its power to foreclose markets").

the proposed merger. According to the Merger Guidelines,[239] the objective of defining and measuring the market is to enable a proper analysis of the merger's potential market concentration and the possible anticompetitive effects that concentration may have.[240] With the merger, the new Chase Manhattan has a formidable national and international presence "in thirty-nine states and fifty-one countries."[241] Both banks are involved in the "same-businesses- mortgages, credit cards, small business lending, securities trading, corporate banking, and international banking."[242] As a result of the merger, the new Chase Manhattan became the nation's leading lender to large corporations and the "leader in securities processing," and "[has] the largest trading revenue."[243] In addition, it also became the "fourth-largest provider of credit cards," the "third-largest originator of new mortgages," and the number one "servicer of existing mortgages." [244] Aside from such nation-wide dominance, the new bank also achieved state dominance by having the "most consumer deposits" and became "the leading lender to medium-sized businesses" in New York. [245]

Despite the accumulation of power and the nation-wide and state-wide dominance that resulted from the merger, antitrust regulators approved the merger.[246] This approval demonstrates how the market concentration power analysis has moved a long way from twenty years ago in *United States v. Philadelphia National Bank*.[247] In that case, the United States Supreme Court acknowledged that, in the determination of the relevant product market and the potential for concentration, the impact

[239] *Merger Guidelines, supra* note 125.

[240] *Id.*

[241] *See* Goodfried, *supra* note 230, at 147-48.

[242] *Chase, Chemical Bank Agree To Merge; Deal Creating New No. 1 U.S. Banking Company Will Forces 12,000 Job Cuts*, BUFF. NEWS, Aug. 28, 1995, at D7 [hereinafter *Chase, Chemical Bank Agree*].

[243] Saul Hansell, *Banking's New Giant: The Deal; Chase and Chemical Agree to Merge in $10 Billion Deal Creating Largest U.S. Bank*, N.Y. TIMES, Aug. 29, 1995, at A1.

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *See generally* United States v. Philadelphia National Bank, 374 U.S. 321 (1963). This case also set precedent that section 7 of the Clayton Act was applicable in bank mergers. *See id*. at 344.

on competition that a merger might have nationally, regionally, and locally must be weighed.[248] The present merger would fail under the standards set in *Philadelphia National Bank*. In *Philadelphia National Bank*, the Court rejected a merger that would result in a "30 percent control of commercial bank business in the four-county Philadelphia area,"[249] because this merger results in the new bank attaining product market dominance in various regions especially New York. Moreover, because this merger results in dominance in various levels, national, state, and regional,[250] the merger results in substantial concentration that could impede competition.

b) *The potential adverse competitive effects of mergers*

The next factor to consider in the merger analysis is determining the potential adverse competitive effects of the merger. The aforementioned dominance that the new bank will have over several markets[251] could result in adverse competitive effects. The object of determining the competitive effects is to assess "whether the suppliers will, as a result of the merger, be able to coordinate on terms of business, or whether the merged firm will gain unilateral power to raise prices."[252] A potential adverse competitive effect occurs "where market concentration [falls] outside the safe harbor regions"[253] and where the new firm is able to raise prices. Here, the two former banks were competitors in the same areas (mortgages, credit cards, small business lending, securities trading, corporate banking, and international banking areas).[254] The likelihood of the new firm being able to increase prices, therefore, is great because of the "closeness of the products of the merging firms."[255]

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[248] *Id*. at 361-62.

[249] *Id*.

[250] *See* Hansell, *supra* note 243, at A1.

[251] *See id*.

[252] MATHEW BENDER, CORPORATE ACQUISITIONS AND MERGERS § 18.05 *Antitrust Analysis: Regulated Industry Mergers That May Not Be Immunized* (Dec. 1993).

[253] *Merger Guidelines*, *supra* note 125, at § 2.211.

[254] *Chase, Chemical Agree To Merge*, *supra* note 242, at D7.

[255] *Merger Guidelines*, *supra* note 125, at § 2.211.

c) *Entry Analysis*

Entry analysis is another factor used in a merger analysis. "Entry is often a very critical issue in merger litigation,"[256] and the issue is whether entry of new competitors will likely "deter an anticompetitive merger in its incipiency, or deter or counteract the competitive effects."[257] In *Philadelphia National Bank*,[258] the Supreme Court was not convinced of "the defendant's reassurance that customers have other banks," [259] reasoning that a merger resulting in substantial concentration necessarily reduces a customer's alternatives. Here, the new Chase Manhattan maintained that the existence of numerous other competitors providing the same types of services would prevent them from achieving a concentration of the market.[260] Because of the extent of the mergers' substantial concentration, that would result in a restraint of trade[261] and discourage the entrance of other competitors.[262]

[256] Parker & Balton, *supra* note 17, at 361.

[257] *Merger Guidelines*, *supra* note 125, at § 3.0.

[258] *See generally Philadelphia National Bank*, 374 U.S. at 321.

[259] In *United States v. Central State Bank*, No. C82-72CA, 1988 U.S. Dist. LEXIS 16437, at *10 (D. Mich. Dec. 30, 1988) the application of the Merger Guidelines revealed that a merger "intensified the market concentration of" a county's "transaction accounts and business loans" which the Court concluded to have "restrained trade." *Id.* at *11. In *Philadelphia Nat'l Bank*, the Supreme Court held that a merger that would "result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area" would substantially lessen competition. *Philadelphia Nat'l* Bank, 374 U.S. at 364-65. The Court further concluded that the defendant's reassurance that customers have other banks is not a justification, because "[i]n every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending Section 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger . . . ." *Id.* at 367.

[260] *Id.* at 366.

[261] *See id.* The application of the Merger Guidelines revealed that a merger "intensified the market concentration of" a county's "transaction accounts and business loans" which the Court concluded to have "restrained trade." *Central State Bank*, 1988 U.S. Dist. LEXIS 16437, at *11.

[262] *See* James Calderwood, *Merger Mania; Antitrust Laws Affecting Mergers, Legislative Issues*, CERAMIC INDUS., July 1998, at 14.

d) *Efficiencies*

Efficiency is another important factor in a merger analysis. Because mergers usually result in efficiencies,[263] the revised Merger Guidelines states that only efficiencies "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or other" alternatives will be considered.[264] The whole objective of the Chase Manhattan merger was to consolidate the overlapping services that the two banks shared.[265] As a consequence to such cost- cutting consolidation, however, twelve thousand jobs were jeopardized.[266] This demonstrates how the efficiency analysis of merger guidelines should also include the social cost that results in a merger with regard to employment.

e) *Observations*

In sum, the Department of Justice and the Board may have overlooked the full anticompetitive impact of the merger between Chase Manhattan and Chemical. The magnitude of financial market dominance in both the nation and the state of New York should have raised grave concern for the regulators. Additionally, the failure to fully consider the consumer and community groups' concerns illustrate how the present antitrust laws do not foster consumer and community participation in the antitrust law process. Essentially, this recent merger illustrates three trends occurring in the United States antitrust law application and enforcement process. First, it illustrates the growing leniency in merger standards. Second, it demonstrates the lack of consumer focus in the antitrust law enforcement and application process. Third, it reflects how

[263] *See* Robert M. Vernail, *One Step Forward, One Step Back: How the Pass-On Requirement for Efficiencies Benefits in FTC v. Staples Undermines the Revisions to the Horizontal Merger Guidelines Efficiencies Section*, 7 GEO. MASON L. REV. 133, 135-136 (1998). "Efficiencies may result from achieving economies of scale, combining production plants, integrating procurement, transportation and distribution facilities, and pooling research and development resources. Other efficiencies can result from improving managerial practices, increasing capital-raising abilities, and coordinating promotional efforts." *Id*. at 134-35.

[264] *Merger Guidelines, supra* note 125. The efficiency section was recently revised. The new revision occurred in 1997, however, and this merger was proposed in 1995. Under the old efficiency guideline, efficiency is not a heavily disputed issue in the overall merger analysis. The new Guidelines sets forth a more merger-specific efficiency standard. *See id*.

[265] *See Chase, Chemical Bank Agree To Merge*, *supra* note 242, at 7D.

[266] *Id*.

the current merger guidelines do not take into consideration the social costs.

B. *Bank of Tokyo and Mitsubishi Bank- World-Wide Dominance*

1. *History of the merging banks*

Bank of Tokyo and Mitsubishi Bank are integral historical fixtures in the banking industry in Japan.[267] Both Bank of Tokyo and Mitsubishi Bank are classified as commercial banks in Japan.[268] Successor of the Yokohama Specie Bank, Bank of Tokyo was the only bank given a specialized exchange bank status under the Foreign Exchange Bank Law of 1954.[269] As the only specialized exchange bank in Japan, Bank of Tokyo enjoyed certain privileges that other exchange banks do not have.[270] As a result, it became Japan's leading foreign exchange bank with formidable international ties.[271]

Compared to Bank of Tokyo's strength in overseas banking and finance, Mitsubishi Bank specialized in domestic retail and corporate banking.[272] Originally part of the Mitsubishi trading conglomerate (*zaibatsu*), Mitsubishi Bank became one of Japan's most solid financial

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[267] *See* TATEWAKI, *supra* note 170, at 106. Both Bank of Tokyo and Mitsubishi Bank are considered city banks:

> [C]ity banks have been at the centre of the private financial institutions in Japan ever since the 1870's. Today they hold 20 per cent of the total deposits of all depository institutions and 50 per cent of the deposits of all banks…in the private sector. They also provide about 20 per cent of the credit needs of corporate businesses, and, thus have an extremely large influence on the nation's economy.

Id. at 107.

[268] *Id*. at 106. The commercial banks have two functions. The first is to act as financial intermediaries by accepting deposits from the public and investing these funds either in loans or securities. The second is to perform the function of handling current accounts and thus to perform a function of settlement payments. The commercial banks also have an important influence over the business activities through the credit creation function. The banks' performance of these functions makes them indeed the pillar of the financial system. *Id*.

[269] *See id*. at 11.

[270] *See id.* at 104.

[271] *See* 13 INT'L DIRECTORY, *supra* note 222, at 42-43.

[272] *See id*. at 42.

institutions.[273] Aside from its Bank of California subsidiary, it also had several branches around the world.[274]

2. *Scope and effect of the merger*

As a result of this merger, the Bank of Tokyo-Mitsubishi has become the largest bank in the world.[275] Unlike most mergers whose main impetus to consolidate is strategical, this merger has been considered a "white knight" [276] for the Japanese banking system.[277] As a "white knight," the new merged bank's objective would be to save other Japanese financial institutions especially the smaller weaker ones who are in trouble.[278] This objective explains the reason why the Ministry of Finance readily supported and was a catalyst for this marriage.[279] If analysts are correct in this "white knight" theory, then the merger of the two banks illustrate how enforcement of Japanese antitrust laws is only secondary to the otherwise strong historical ties and relationships with big business and the government in Japan.[280]

The banks' presidents have reasoned that the marriage would create a formidable bank that could sustain competitiveness in the global marketplace.[281] At the time of the merger, both banks were healthy and

[273] *See id.* at 41-43.

[274] *See id.* at 42.

[275] *The Next Godzilla?*, BUS. ASIA, June 3, 1996, at 3. To emphasize the immense size of this bank: as of 1996, with the combined assets of $700 billion, the two banks (exclusive of the Hong Kong Bank) have a $100 billion excess of the 1994 combined asset total of all banks in the Philippines, Indonesia, Malaysia, Singapore, and Hong Kong. In addition, as of the merger proposal period, the new bank was five times greater than Citibank, the biggest United States Bank at that time. *Could Do Better*, EUROMONEY, Apr. 1995, at 5. *Id.*

[276] ALLEN MICHEL & ISRAEL SHAKED, TAKEOVER MADNESS: CORPORATE AMERICA FIGHTS BACK 388 (1986) (defining a White Knight as "[a] corporation that comes to the aid of the target in a takeover battle").

[277] Neil Martin, *The Next Wave: Mitsubishi Merger with Bank of Tokyo may mark the beginning of a messy trend*, BARRONS, Apr. 3, 1995, at 12. Analysts suspect that this new bank is viewed as a "white knight" that will help bail out the ailing financial institutions in Japan and that the Government has been encouraging such a relationship. *Id.*

[278] *Id*.

[279] *Id.*

[280] *Mitsui on Deck*, CHEMICAL WEEK, Nov. 29, 1995, at 29.

[281] *See* Martin, *supra* note 277, at 7.

did not face the financial difficulties plaguing other banks in Japan.[282] Unlike mergers in other countries where size is an objective, "sheer size is not an objective that usually motivates banking mergers in Japan."[283] From a purely strategic perspective, however, this merger of two healthy banks with equal synergy makes good strategic and business sense.[284]

C. *Bank of Tokyo and Mitsubishi Bank Merger Analysis*

Despite the sheer size and magnitude of the merger between the two giant banks, the possibility of creating a monopoly was not an issue in this consolidation.[285] Part of the reason why the merger did not have much trouble is because the banks were highly specialized in different areas. Even the United States Federal Reserve Board participated in this merger process and approved the merger plan regarding the two subsidiaries in California that was affected by the merger.[286] Unlike the Chase Manhattan and Chemical Bank merger, the employment loss as a result of this merger was not quite clear.[287]

1. *Relevant field of trade*[288]

In determining the relevant field of trade of the two banks, the Japan Federal Trade Commission ("JFTC") distinguished between city

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[282] *See* Blanden, *supra* note 205; *also …or the World's Greatest Bank?*, EUROMONEY, May 1996, at 31.

[283] Blanden, *supra* note 205, at 22.

[284] *…or the World's Greatest Bank?*, *supra* note 282, at 31.

[285] *FTC says no problems concerning bank merger*, JAPAN ECON. NEWSWIRE, Mar. 28, 1995. The Fair Trade Commission officials did not see problems with the merger and "said it is unthinkable that the merger will result in the monopoly of the market by the two banks." *Id.*

[286] *First Quarter Approvals*, *supra* note 231, at 14.

[287] Edward Iwata, *Spate Of Bank Deals Spawn Giants: First Interstate, Mitsubishi, Wells Fargo Among Those In Job-Killing Pacts.*, S.F. EXAMINER, Apr. 1, 1996, at D-1. The Bank of Tokyo and Mitsubishi Bank Merger would also bring unspecified job cuts especially in both their subsidiaries. *Id.*

[288] *Guidelines for Interpretation on the Stipulation that 'The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade" Concerning M&A's* pt. 1.D.2, at http://www.jftc.admix.go.jp/e-age/guideli/maguid/ zmaguid.html#c2 [hereinafter Interpretation Guidelines] ("A particular field of trade may be called a market. Every market will be defined where the business activities of all the companies whose joint relationships are formed, maintained, or strengthened by M&A's…take place, and the impact on competition in each market . . .").

banks from "long-term-credit banks" and "trust banks" based on client base.[289] Since both Bank of Tokyo and Mitsubishi Bank are city banks,[290] they clearly gained a benefit from such a distinction because it removes two types of banks from the competitive analysis that otherwise, may have hindered the merger. This distinction created by the JFTC, however, creates several problems. First, creation of distinctions on a case by case basis prevents uniformity in the relevant product analysis. Second, it sets precedents for other exceptions to occur in the future.

The JFTC also distinguished city banks from "regional banks" and "second-tiered regional banks" based on regional concentration.[291] Despite noting that the three banks' "financing targets are becoming similar," the JFTC justified its action on the premise that the regional banks are headquartered in their respective prefectures.[292] Again this distinction made by the JFTC is faulty because it emphasizes that the place of headquarters is a more important indication in the competitive analysis rather than the shared target market. Moreover, it does not acknowledge the impact of technology, which makes the place of a business's headquarters an antiquated consideration in choosing financial services.

In sum, by creating two key fine distinctions in their particular field of trade analysis of Bank of Tokyo and Mitsubishi Bank's potential competitive impact, the JFTC did not fully assess the merger's possible hindrance to competition amongst these banks. More importantly, it did not include in its analysis the effects that such a sizeable merger may have; that is, it ignores any disadvantage that a competitor may face when compared to the big bank.

2. *Post-merger market share of relevant field of trade*

For this particular analysis, the JFTC used Form No. 9 in guiding them.[293] Because the JFTC distinguished city banks from credit and trust

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[289] Sibbett, *supra* note 17, at 1012-13.

[290] TATEWAKI, *supra* note 170, at 107.

[291] Sibbett, *supra* note 17, at 1013.

[292] *Id.*

[293] The five parameters that a post-merger company must fall under are

(i) a market share over 25%;

(ii) the largest market share, and holding 15% or more of the total market share;

(iii) the largest market share, plus the difference between the market share of the top-ranked company and the second or banks, the post-merger market share included only city banks in the determination of the market share.[294] The JFTC concluded that the "proposed merger would not necessarily lead to a substantial restriction on competition in the relevant market"[295] because the proposed merger fell within the acceptable range of the parameter outlined in Form 9.[296]

The JFTC's conclusion that the merger fell within the parameters is incorrect because it overlooked certain key elements. First, it overlooked the combined banks' gross business profits of 32 percent from overseas operations in terms of the other eleven city banks.[297] That figure is "nearly double" the market share of Fuji bank, which is the number 2

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third largest company must be more than a quarter of the market share of the top-ranked company;

(iv) within the top three companies, and the total market share of the top three companies is 50% or more; and

(v) the number of competitors of the post-merger company in whatever market the reporting company competes in (and in the case where the merging companies are in the same market, the post merger company's market) is seven or less;

Sibbet, *supra* note 17, at 1010.

[294] *See Major Cases of Corporate Combinations in Fiscal 1995*, under heading *Case #8: Merger Between the Mitsubishi Bank and the Bank of Tokyo, Ltd*., *at* http//www.jftc.admix.go.jp/e-page/report/9610mccc/trendscc.htm [hereinafter 1995 Corporate Combinations]; *also* Sibbett, *supra* note 17, at 1013-14.

[295] *See* Sibbett, *supra* note 17, at 1013-14.

[296] According to the JFTC, the proposed merger fell within the following market share:

(i) deposits market share 14.2%; lending market share 14.7%; the number three competitor was only 2% away;

(ii) no extraordinary increase in a specific geographical area;

(iii) in terms of inter-bank transactions and customers transactions, foreign exchange business market share was less than 15%;

(iv) the competition between banks would be expected to increase in the ratio of loans from banks procured by corporations and the deregulation and abolition of competition-restricting regulations; and

(v) the share of loans to large scale business would be 19.1%, but is only 2.6% difference from the second largest bank.

Id.

[297] Joshua Ogawa, *In Global Arena, Restructuring and Profit Gains Seen,* NIKKEI WEEKLY, Apr. 3, 1995, at 11.

bank.[298] Second, the JFTC did not consider the post-merger asset difference.[299] When the Bank of Tokyo and Mitsubishi Bank consummated their merger in April 1996, they had a combined asset portfolio of 72 trillion yen (U.S. 701.4 billion), "40 percent more than its nearest rival."[300] In addition, it did not consider the possible ramifications this asset concentration may have among other world banks.[301] These factors that were overlooked illustrate just some of the flaws that exist in the current merger analysis scheme.

3. *Observations*

The JFTC's analysis of the bank merger demonstrates the relaxed enforcement of antitrust laws in Japan. The JFTC analysis was heavily influenced by the purpose of the merger, which was to strengthen the new bank's "ability to compete internationally . . . through the reinforcement of key domestic and international strength in both banks."[302] For example, the JFTC concluded that the share of the new bank in foreign exchange was acceptable in the domestic market because the JFTC considered other factors such as "development of information communication" which would "thereby increas[e] global competition."[303] Moreover, the JFTC emphasized the recent "abolition of competition-restricting regulations" and the expected increase of competition between banks.[304] The emphasis on such factors helped justify the JFTC's decision that a 19.1% share of the new bank's "loans to large-scale business" was still acceptable.[305]

[298] *See id.*

[299] *See* 1995 Corporate Combinations, *supra* note 294, under heading *Case #8* (not addressing post-merger asset difference in their analysis of the merger between the Mitsubishi Bank and the Bank of Tokyo, Ltd.).

[300] *See* 13 INT'L DIRECTORY, *supra* note 218, at 43.

[301] *See* 1995 Corporate Combinations, *supra* note 294, under heading *Case #8* (not considering possible ramifications that asset concentration may have among other world banks).

[302] *Id.* under heading *Case #8*, pt. I.

[303] *Id*. under heading *Case #8*, pt. III.B.5.

[304] *Id*. at case 8, pt. III.B.3.

[305] *Id.*

V. PUTTING KARL MARX'S THEORY IN PERSPECTIVE

Focusing on antitrust laws and applying Marx's theory on competition reveals three reasons for antitrust laws' ineffectiveness in preventing the accumulation of power and the cannibalism of competition that can be extracted from the recent mega-mergers.

First, antitrust law is a regulation imposed by government, and regulatory failure occurs when "regulators tend to be primarily concerned with the welfare of those they regulate"[306] rather than carrying out the purpose of the regulation. In the process of regulating competitors and helping them remain competitive, antitrust law regulators have lost sight of the purpose behind antitrust laws, which is to protect consumers[307] through the promotion of competition.[308] The regulators cannot be fully blamed for such oversight, however, because the current antitrust provisions are pragmatically inadequate in the area of protecting consumer welfare. Consider, for example, the two main guides used in the recent bank mergers, the United States Merger Guidelines[309] and Japan Form 9,[310] the focus of which is on competitive effects and the possibility of concentration as a result of the merger. In practical effect, however, when analyzing the potential anticompetitive effects of the mergers, the regulators are able to exercise considerable discretion in weighing other

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[306] RICHARD SCHMALENSEE, THE CONTROL OF NATURAL MONOPOLIES 11 (1976).

[307] *See* David W. Barnes, *Revolutionary Antitrust: Efficiency, Ideology, and Democracy*, 58 U. CIN. L. REV. 59, 60-61 (1989).

> The legislative history of the antitrust laws and their interpretation by courts declare their purpose to be the satisfaction of consumers' material desires for goods traded in economic markets and the satisfaction of intangible aspirations, for an appropriate distribution of wealth, for economic opportunity, security, and choice, and for political freedom.

Id. *See also* Kazuo Nukazawa, *Trade with the U.S.: The View From Japan*, ASIAN WALL ST. J., Jul. 15, 1992, at 6 ("[t]he basic purpose of competition law is to protect consumers").

[308] *See* Harry S. Gerla, *Restoring Rivalry As A Central Concept in Antitrust Law,* 75 NEB. L. REV. 209 (1996) (stating that a proposition that commands universal allegiance is that "antitrust laws protect competition"); *also* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 24 HASTINGS L.J. 65, 67 (1992) ("[i]t is unanimously agreed that Congress enacted [antitrust] laws to encourage competition . . .").

[309] *Merger Guidelines, supra* note 126.

[310] Whitman, *supra* note 196.

factors that can possibly lessen the overall anticompetitive effects. In the Bank of Tokyo-Mitsubishi Bank merger, for example, the JFTC gave considerable weight to other factors that could increase competition, such as recent deregulation and international competition,[311] even though the new bank resulted in domination in several relevant product areas. As a result, the JFTC redefined some of those product areas so that the new bank would fall under acceptable limits.[312]

Second, antitrust law is only one part of a bigger whole in a country's economic policy.[313] By virtue, "antitrust, when unsupported or nullified by other public policies which shape the economic structure, is a limited and ineffective weapon against the concentration of economic power."[314] Because of the increase in global competition, antitrust regulators, together with the policy makers of their country, have fostered an environment wherein national firms that compete internationally are given more opportunities for further expansion.[315] Under this formulation, domestically focused companies face a clear disadvantage[316] when seeking approval for a merger and when competing directly with the stronger bigger national firm.

Consider, for example, the recent Chase Manhattan and Chemical merger, resulting in the new bank attaining substantial market share (corporate and mortgage products) in key regions of the United States, like

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[311] Ogawa, *supra* note 297, at 11.

[312] *Id*.

[313] William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1149 (1989) ("Deconcentration ebbs and flows with the tides of politics" and "[w]hen the political environment changes, there will be an inventory of theories that policymakers can use to purse new monopolization initiatives").

[314] KARIER, *supra* note 6, at 221.

[315] *See* JANUSZ A. ORDOVER & ROBERT D. WILLIG, PERSPECTIVES ON MERGERS AND WORLD COMPETITION *in* ANTITRUST AND REGULATION 201, 201-18 (Ronald E. Grieson ed., 1986) ("There is growing awareness among antitrust policymakers, scholars, and judges of the increasing importance of foreign firms, products, and technology in maintaining competition . . . ."); MICHEL & SHAKED, *supra* note 276, at 372 (stating that in the minds of regulators and policymakers is the theory of "invisible threat" of "foreign competition"). As one commentator noted: "Thus companies in industries that face stiff foreign competition will be treated sympathetically when they want to merge with domestic rivals, but firms in purely domestic economic sectors—like retailing—will undergo tougher scrutiny." James Risen, *Insight: View From Washington; Busting the idea of Antitrust Enforcement*, L.A. TIMES, July 13, 1997, at D-4.

[316] *See generally* Peter Passell, *Economic Scene; A Sea Change in Policy by the TrustBusters*, N.Y. TIMES, Mar. 20, 1997, at D-1.

New York, and the negative impact such concentration may have on the other smaller domestic banks around those areas. In achieving all the advantages to a merger (increased profitability through efficiency and job layoffs), the new bank enjoys dominance over those small banks and can potentially control price in order to oust the competitors. Part of the reason why antitrust regulators in the United States have allowed such a mega merger to occur, despite its substantial anticompetitive effects, is because the current economic policy in the United States supports it. For example, previous deregulation activities in United States banking have made it possible for big banks that provide a vast array of financial services to exist.[317] Such openness to strengthening national banks to compete in the international arena can be traced to the policymakers' recognition[318] that the United States has lagged in this area and is now lifting the barriers it placed before. This phenomenon in the United States also explains how antitrust laws in Japan, in light of the Japanese openness to big firms, has not impeded Japanese firms from expanding. In some respects, therefore, the factors that have influenced United States policy makers before, such as the fear of the concentration of power have been mitigated by nationalism and global competition.

Third, Marx was correct in theorizing that competition contains the seed of concentration in a capitalist society.[319] The advantages that capitalism purports to promote such as innovation and efficiency, also promotes further expansion and accumulation of capital to stay in the game[320] and to eliminate other competitors.[321] At first, consumers are

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[317] *See infra* Section III.C.1.

[318] *See* Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy,* 81 GEO. L. J. 195, 245 (1992). "In many foreign countries, an antitrust enforcement approach to improve the ability of local firms to compete abroad is to allow an 'offset defense' to mergers…" *Id.* In effect, "a transaction that has clear anticompetitive effects in one area (say, England, Germany, or Canada) can be defended on grounds that it would improve the ability of the combined firms to compete in the United States." *Id.*

[319] *See* KARIER, *supra* note 6, at 11 (discussing how Marx "outlined the fundamental relationship between competition and the evolution of monopoly power").

[320] *See* LUXEMBURG, *supra* note 30, at 40. "Expansion becomes in truth a coercive law, an economic condition of existence for the individual capitalist." *Id.*

[321] Arthur Austin, *Antitrust Reaction the Merger Wave: The Revolution vs. The Counterrevolution*, 66 N.C.L. REV. 931, 933 (1988); R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT 45 (1962). Hofstadter quotes Rockefeller as stating the following:

> The growth of a large business is merely a survival of the fittest . . . . The American Beauty Rose can be produced in the splendor and fragrance which bring cheer to its beholder only by sacrificing the early

able to benefit from the competition fervor through better and cheaper products, but as the competition lessens, the benefits slowly disappear. The very nature of competition creates a cycle where the acts of one firm will ultimately induce action by another firm, thus causing a domino effect.[322] Essentially, the very nature of competition does not promote camaraderie with other competitors because the goal is to attain as much power as possible,[323] unless, of course, a consolidation or collusion is planned. Rather than preventing the concentration of power, the current antitrust laws allow for the concentration of power to occur in the hands of few firms. For example, it would only make practical sense in a capitalist system that the recent mega mergers of the two large banks will result in consequent mergers by competing banks, and as long as other competitors exist (even if few), current antitrust provisions allow such mergers to occur. Eventually, such high concentration of power in the hands of a few (oligopolies) will still result in the extinction of true competition, and consumers will no longer face the benefits that competition first brought.[324]

> buds which grow up around it. This is not an evil tendency in business. It is merely the working of a law of nature and a law of God.

Id.

[322] "A 'domino' theory of mergers suggests that a successful horizontal merger in an industry could spawn other mergers," which would ultimately weaken market competition. Subsequent mergers occur to compete with previous "corporate combinations." ARMENTANO, *supra* note 21, at 233.

[323] *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945). *See also* Pitofsky, *supra* note 318, at 195). Many people believe that possession of unchallenged economic power deadens initiative, discourages thrift and depresses energy; that immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress; that the spur of constant stress is necessary to counteract an inevitable disposition to let well enough alone. *Id.*

[324] *See* WRIGHT, *supra* note 14, at 193 (stating that oligopolies seem inevitable in the present antitrust formulation); PAOLO SYLOS-LABINI, OLIGOPOLY AND TECHNICAL PROGRESS 51-52 (Elizabeth Henderson trans., 1962). The danger in a monopoly and oligopoly can still be inherently the same and "the reason is that in a situation of oligopoly the main purpose of large firms, which control the price, is to keep new firms out." *Id.* In addition, "under competition," profits are transitory, but under oligopoly, "they are structural and permanent." *Id.*; *also* M.L. GREENHUT & BRUCE BENSON, AMERICAN ANTITRUST LAWS IN THEORY AND IN PRACTICE 7 (1989) (stating that "[o]ligopoly in general signifies interdependent pricing" among the few firms).

VI. CAPITALIST MANIFESTO: POLICY AND THE NEED FOR CHANGE OF PERSPECTIVE

At its current state, antitrust laws are ineffective in preventing the cannibalism of competition. Thus, although monopolies are not necessarily formed, the continued formation of oligopolies continues to impede competition.[325] For antitrust laws to be effective, regulators and policy makers need to redefine the present framework of the laws and foster a better system for their implementation. Effective antitrust laws can be achieved by adopting the following proposals.[326]

The first proposal suggests supporting antitrust laws with other economic and political policies that foster consumer welfare because consistency is fundamental to the successful implementation of regulation.[327] If antitrust regulators are to include foreign competition in their analysis, for instance, then rather than allowing a large firm to merge, other government policies should be implemented instead to lessen the impact of foreign competitors. Because harmonization of antitrust laws among the countries seems unlikely due to the nature of the laws[328] then successful antitrust laws must be focused at home.

The second proposal is to redefine the language and analytical scheme of the current merger guidelines. A consumer-oriented law, such as antitrust, should clearly spell out, in the merger guidelines, that a proposed transaction should be balanced in light of social effects, such as: job losses that can occur because of the consolidation (and the impact that may have on the economy overall); a determination as to whether consumers truly have other alternatives in their markets; and measurement of the strength of other competitors (and whether or not they can really be considered competitors in light of their size and resources). Moreover, the merger analysis process should allow greater consumer participation, especially if it directly impacts their community. Those that will be

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[325] Judge Learned Hand said, "[W]e have been speaking only of the economic reasons which forbid monopoly, but, as we have already implied, there are other, based on the belief that great industrial consolidations are inherently undesirable, regardless of their economic results." *Grinnell Corp., v. United States*, 384 U.S. 563, 570-571 (1966).

[326] KARIER, *supra* note 6, at 196 ("The important question is: What are we going to do about it?").

[327] ROBERT BORK: THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 53 (1978) ("A consumer-oriented law must employ basic economic theory to judge which market structures and practices are harmful and which beneficial").

[328] Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1548 (1988) (" . . . the prospects for antitrust policy harmonization are not good" and part of the reason is that "the noncooperative global regime is the result of forces that are too difficult to overcome").

affected as a result of a merger should be given a greater voice in those transactions.

The third proposal suggests centralizing antitrust regulation. With banks, in particular, the merger process involves numerous other agencies, and, as a result, numerous goals are being promoted. Although various government agencies will help foster the policy, this new agency alone should have the sole responsibility of handling the merger process. This will not only result in greater consistency in the merger analysis, but also, create accountability to the public. With the present U.S. scheme, no one agency can be held responsible for the failure of antitrust laws. As a consumer-focused agency, this new single body should primarily be fostering the interest of consumers (as this was the essence of antitrust laws to begin with) as they should be held accountable to the consumers they serve.

Karl Marx recognized the power of banks when he described their role as "the general managers of the money-capital."[329] In effect, banks "concentrate the borrowers against all lenders, and borrow for the entire world of commerce."[330] Given Marx's concern about the accumulation of capital by businesses,[331] he would be especially troubled with the present consolidation of banks on such a global scale. The potential for abuse that can occur when power belongs only in the hands of a few firms are just as dangerous as if it were just one firm. Unless changes are made in the present formulation and implementation of antitrust laws, consumers will suffer, as they will yield to the few power firms who dominate because they were successful in cannibalizing up their competitors.

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[329] 3 MARX, *supra* note 2, at 473.

[330] *Id.* at 310.

[331] *Id.*

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