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ENGINES OF ECONOMIC GROWTH

GLOBALIZATION AND CROSS-BORDER M&A

BEST PRACTICES OF THE BEST DEALMAKERS

2015

Introduction by

David Fergusson | Editor

"Globalization as a concept should represent more than just the ever-expanding technological advances in transport and communications. It is instead about decreasing obstacles to international trade and investment, increasing global supply chains and improving macroeconomic coordination among the world's top economic players"

Marcos Prado Troyjo, Columbia University
Co-founder and Co-director
BRICLab, a Forum on Brazil, Russia, India and China

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BEST PRACTICES OF THE BEST DEALMAKERS

Drawing on the experience and expertise of the "best in class" dealmakers, The M&A Advisor (http://www.maadvisor.com), together with the leading provider of virtual deal management services, Merrill DataSite® (http://www.datasite.com), publishes the quintessential dealmakers guide series – The Best Practices of the Best Dealmakers. Profiling the proven strategies and unique experiences of the leading M&A practitioners, this series is distributed in regular installments for M&A industry professionals in both print and interactive electronic media. Previously published features and chapters are also available in the online libraries of Merrill DataSite and The M&A Advisor. We are pleased to present **Engines of Economic Growth: Globalization and Cross-Border M&A.** This installment discusses the evolution of M&A across borders, as well as the rapid changes in global markets during the quarter century since the end of the Cold War, including the growing influence of emerging markets. On the following pages you'll find helpful observations provided by candid interviews with leading dealmakers, including buyers, sellers and advisors, as well as timely insights into the most current trends.

INTRODUCTION

Half a century ago, China was on the brink of a "Cultural Revolution" that was anything but, America's military was mired in Southeast Asia and the Cold War had divided much of the globe into client states of the U.S. and Soviet Union. It was a rarity when businesses invested in, acquired or merged with companies in other countries and what little cross-border M&A that occurred was between the U.S. and Western Europe.

A quarter of a century ago, China was open to trade with the West, the Soviet Union collapsed and the new era of globalization began. Ten years ago Thomas Friedman popularized the concept of globalization in his best-selling book "The World is Flat." New investment and macro-economic terms were coined – emerging markets, frontier markets and BRICS (Brazil, Russia, India, China). Cross-border M&A was spreading well beyond the U.S. and Western Europe, into China, into Russia, into all corners of the world. Though still in its infancy, M&A was fast becoming a fast-track to expanding into new consumer markets and achieving corporate growth.

Then came the global financial crisis of 2008 and subsequent Great Recession, during which the growth of cross-border activity slowed, raising questions about the future of globalization.

In 2015, cross-border M&A has rebounded – recording its highest half-year volume since the second half of 2007. The leading M&A practitioners we interviewed express a consensus view that it will continue to expand over the next decade. Of course there will be bumps in the road – witness the market gyrations during the summer of 2015 precipitated by China's currency devaluation and Shanghai's stock market plunge. Likewise, the emerging markets and other BRIC countries have had their recent issues.

During the Cold War, with nuclear annihilation looming on the tips of missiles pointed between the U.S. and Soviet Union, negotiators from both countries managed to agree on important and lasting treaties that limited nuclear weapon testing and proliferation and made the world a less dangerous place. These treaties did not happen overnight – each party had to embark on "confidence building" measures that led the counterparty to accept its good faith. Likewise, in the world of cross-border M&A, what were once viewed

as formidable international obstacles – technical and cultural – are being overcome by a growing cadre of professional dealmakers with increasing experience in overcoming cross-border issues and building the confidence in both parties to reach a lasting deal.

In this, the inaugural installment of our 4th Edition of the *Best Practices of the Best Dealmakers*, I am appreciative of the opportunity to share with you the wisdom of these global dealmakers whose leadership in cross-border M&A is both enlightening and inspiring.

David Fergusson
Editor
Best Practices of the Best Dealmakers

Engines of Economic Growth: Globalization and Cross-Border M&A

Part I: Tracing the Evolution of Globalization

"I think we do a better job than the diplomats in bringing nations together," – Patrick Zhong, Senior Managing Director, who leads investment in global opportunities at Fosun Group

The consensus modern definition of "globalization" came together in the 1990s after the end of the Cold War, although the concept dates to antiquity and the earliest trade routes. The post-Cold War period of globalization has seen a dramatic rise in cross-border mergers and acquisitions (M&A). In effect, globalization has enabled cross-border M&A, and cross-border M&A has re-shaped the concept of globalization.

But the road has not been straight and smooth. The M&A data provider Dealogic reported that total global M&A volume increased for the fourth consecutive half-year period to $2.28 trillion in the first half of 2015, the second highest half-year volume on record – but eight years behind the record first half of 2007 ($2.59 trillion). Cross-border M&A totaled $759.6 billion, the highest half-year volume since the second half of 2007 ($794.7 billion).

The global financial crisis of 2008 and ensuing "Great Recession," as well as transformative domestic economic developments (particularly in China), have been disruptive to M&A in general and cross-border M&A in particular. Professor Marcos Troyjo is co-founder and co-director of BRICLab, a Forum on Brazil, Russia, India and China at Columbia University, where he teaches international affairs. In an essay on globalization for The M&A Advisor, Professor Troyjo wrote this cautionary note:

> "'L'air du temps' is how the French tradition in the social sciences generally characterizes the 'prevailing atmosphere' of a given historical epoch. As 21st Century capitalism struggles to find a way out of the period of marked uncertainty inaugurated by the 'Great Recession' that broke out in September 2008, it is clear that Globalization as 'l'air du temps' is at a crossroads. The dynamics of freer circulation of goods, capital and people has lost steam. Trade protectionism is on the rise. Multilateral institutions such as the International Monetary Fund, the

> World Bank and the World Trade Organization provide slow and often insufficient responses to contemporary challenges. There are indeed various forces of 'deglobalization' operating around the world today.
>
> Globalization as a concept should represent more than just the ever-expanding technological advances in transport and communications. It is instead about decreasing obstacles to international trade and investment, increasing global supply chains and improving macroeconomic coordination among the world's top economic players, especially those member-countries of the G20. The Globalization of common and shared ways of experiencing the world help interdependence and interconnectedness – the basis for productivity gains on a global scale and the sustained expansion of the world economy over time. All of these different drivers of Globalization now seem to be clearly in check, particularly the globalization of values, the notion of a normative compass found in the 1990s idea that the principles of market economy and representative democracy as a system of government were the best parameters for the organization of societies across the globe."

Thus in 2015, as China's mid-year currency devaluation sparked a major bout of volatility in global financial markets, presents an opportune moment to examine cross-border M&A. In this 4th edition of *Best Practices of the Best Dealmakers*, the M&A Advisor interviewed a cross-section of advisors, bankers, lawyers and investors, seeking to share their wisdom in successfully navigating the dynamic segment of M&A that occurs across international political boundaries.

"I think we do a better job than the diplomats in bringing nations together," said Patrick Zhong, Senior Managing Director who leads investment in global opportunities at Fosun Group, the largest privately held conglomerate in China. "I agree with Patrick and have said for years that cross border business is one of the most integrative functions in global geopolitical life today. It's no coincidence that so-called era of globalization coincides with growth of M&A and the increase of cross-border as a percentage of total M&A, which has been going on for the past two decades," says Marshall Sonenshine, Chairman and Managing Partner of New York investment banking firm Sonenshine Partners, and Professor of Finance and Economics at Columbia University. "We have a modern global financial market now and we have a modern M&A market, and we have modern companies that are able to extract values from a particular form of global trade."

“There is something of a land-grab going on by potential buyers and investors looking to tap into the emergence of young, urban consumers in these growth markets. It’s one of the biggest secular trends of this generation.” – Tom Speechley, Partner at The Abraaj Group

Jonathan Rouner is Head of International M&A at Nomura Securities, which acquired the international M&A business of Lehman Brothers after the financial crisis. He sees globalization as having two primary effects on M&A. First, he says, “It has increased the level of M&A activity as companies have looked abroad for growth and has businesses have become more global. There isn’t a business of consequence today that doesn’t have some global element to it.” And second, “Globalization has changed the nature of M&A activity from domestically-oriented deals to cross-border transactions. As companies have tried to extend their reach globally, they’re increasingly using M&A to achieve that. Globalization has not accelerated in a linear way, but as a broad trend, globalization and cross-border M&A activity will continue to grow.”

Rajiv K. Luthra, is the Founder and Managing Partner of Luthra & Luthra Law Offices – one of the largest law firms in India. He has over 25 years of experience in advising clients on a vast range of complex commercial transactions. Luthra says: “Globalization and M&A represent two aspects of a virtuous cycle, and the overall effect has been to re-emphasize the global nature of capital. Although this has been true to an extent for well over a century, globalization has really made capital mobile.” What this means is the M&A playing field is becoming more level now than in the past. He continues: “Any market which can provide competitive conditions can attract capital, and can be the subject as well as the source of corporate acquisitions. This mobility of capital has spurred M&A activity in markets across the world, and this is further facilitated through the slow process of ensuring that there are certain global ‘rules of the road’ that are respected in most countries, which makes it easier to smoothly and predictably operate in a wide range of countries.”

“The world is much more connected generally, not just at the business level but at the people level. We all travel and communicate across borders a lot more than we used to do,” says Tom Speechley, Partner at The Abraaj Group, a global private equity firm, and Head of Global Markets. He is responsible for stakeholder engagement, capital raising and investor relations. Speechley and

Abraaj eschew the terms "emerging" or "frontier" markets, preferring to classify their investments in "growth markets."

He says globalization has produced a large increase in the number of potential buyers in most businesses, regardless of the size of the country or market. In the growth markets, says Speechley, "There is something of a land-grab going on by potential buyers and investors looking to tap into the emergence of young, urban consumers in these growth markets. It's one of the biggest secular trends of this generation."

Hazem Ben-Gacem, head of Corporate Investment – Europe for Investcorp, a world-leading manager of alternative investments for select individuals and institutions, likens globalization's effect on M&A as a natural evolution. "The business starts with the entrepreneur and the business develops in its local geography," Ben-Gacem says. "Sooner or later, successful businesses reach a natural saturation point in their local market. The next step would be to evolve from where they are into other markets. Today, compared to 100 or 200 years ago, the world is so much more connected and homogenous. The Gap can sell in 160 countries because now everyone is comfortable wearing blue jeans." Ben-Gacem also sees the de facto adoption of English as the international business language as a large enabler of cross border M&A. "In most international businesses, English is at least the second language," he says.

All of the M&A practitioners interviewed for this chapter cited the need for continual growth as the top enabler of cross-border M&A. "In a fast moving world, corporations find it faster and more efficient to acquire their way into the global market than to build a local business," says Ben-Gacem. Gregory Bedrosian, Co-Founder, CEO and Managing Partner of independent investment bank Redwood Capital, has been working for more than 20 years on deals, not only between companies in developed countries but in emerging and frontier markets. "If one is talking about a developed versus emerging deal, one is probably talking about the X million of consumers the developed market company is trying to tap, Bedrosian says, adding that in Africa, the population "may be poorer but much more rapidly growing in terms of purchasing power." Bedrosian notes other drivers of cross-border deals include developed countries seeking access to unique intellectual property (IP) – "A company might be more focused on IP in telecom and media than actual resources in the ground. When you're looking at a tech deal, you're looking for the gene that's created that interesting IP." Likewise, owners of companies in emerging or frontier markets

may see cross-border deals as "a way of diversifying away from political or other risks at home. We do see that as a driver – not a spoken driver but unspoken driver."

Veteran M&A attorney Selig Sacks, Partner and Co-Chair of the U.S./Greater China Practice at Foley & Lardner LLP in New York, says that "Practitioners everywhere have to be taking a global orientation. An increasing number of investments in the U.S. are originating from outside the U.S. Additionally, U.S. entities are increasingly investing globally as they take stock of their supply chain and markets." China is one of the largest examples because it's now the world's second largest economy. Outbound direct investment (ODI) from China into the U.S. is up 47 percent for the first five months of 2015. Sacks cites statistics showing more than 1,100 transactions by Chinese companies in the U.S. above $1 million since 2000. "Capital outflows from China exceeded $500 billion in the first eight months of this year. With regard to M&A, China's small and medium enterprises are becoming bigger players, as China and other developing countries seek out global markets for their goods and services. This surge in private company investment can be contrasted with the first wave of ODI, which was decidedly led by state owned enterprises and largely focused on natural resources and extractive industries. Even though some of the M&A activity has slowed inside China, as China transforms its economy to make it more consumption and service-oriented, you now have this dynamic of US and other foreign companies with extensive experience in technology, financial services, health care, agriculture, retail and other consumer oriented areas bringing that expertise to China. So there are a lot of trends supporting globalization. However, certain of those industries remain protected in China and other developing countries. So the challenge remains to open those markets to freer and fairer competition.

Sonenshine echoes Sacks' sentiments about China. "I think China has its own internal issues right now which may slow down the progress of its economic development, which I think, has been overstated – too much was expected of it. I think China will be in more cautious growth and potential temporary retrenchment for the next couple of years," Sonenshine says. But, he adds: "You have some enormous companies in China, Ali Baba, JD.com and others with market caps in the $50 billion-plus range and appetites in the global scope of things. So we're going to see an increase from China in the medium to long run, whatever the vicissitudes of the short run."

DEAL NOTES

China's Largest Conglomerate Embarks On Globalization Journey

Where some see "retrenchment," others see "buying opportunity." China's Fosun Group is one of the largest non-government groups in China, with strong holdings in phama, healthcare and real estate. Guo Guangchang, Executive Director and Chairman of Fosun, is often regarded called the Warren Buffett of China. Fosun also invests heavily in international companies. Patrick Zhong heads the investment group that oversees about $40 billion of investments.

"About six years, we embarked on the globalization journey," Zhong says. He helped Fosun's board conclude that the company should play a pivotal role connecting the world with China. "I run the company's global investment, meaning cross-border M&A. We have made about 30 investments in the last six years outside of China and primarily in developed markets – North America, Europe, Southeast Asia, Australia and New Zealand." In six years, Fosun has quickly evolved to become a global investment platform.

"[A] company may or may not need the money, but everyone is looking for growth," Zhong says. "Companies looking at China like to partner with someone with deep and wide resources but not a direct competitor. So we do not do joint ventures – we invest alongside them. We look at [the] intrinsic value of the business and where can you get in at a reasonable valuation. We look at a company we feel can really benefit [by] connecting with the Chinese consumer. We can come in and create more value there."

Case in point: Fosun invested in the French hospitality group Club Med, which runs family-friendly resorts worldwide. "The company was kind of breaking even and its assets were a bit old but in beautiful locations," Zhong says. "We say, 'Gee, this business has a lot of chance to be reinvigorated by upgrading the assets and bringing it into China." Fosun ended up acquiring the entire company in 2015, even buying a stake in Thomas Cook Group plc to foster an important and ongoing cooperation between the UK tour operator and Club Med. Club Med now has three resorts in China – and is attracting huge numbers of the growing Chinese middle-class. "They're all 5-star, nicer than other in parts of world," Zhong says. "Today, people know the brand – there's very high brand awareness."

Zhong notes that the Chinese guests at Club Med now rank just behind the French. With the Club Med and Thomas Cook investments, Fosun helped China become the largest tourism exporter – 119 million trips out of 1 billion in the world. In addition, Chinese consumers are making 3 billion trips inside China annually. "Our strategy is we help the companies with really good products and services and connect them the Chinese consumer," Zhong says.

Part II: Conquering the Frontiers of Cross-Border M&A

"Do your homework, and have good advisors both at the local and global level." – Rajiv K. Luthra

From Prof. Marcos Troyjo's essay on globalization for The M&A Advisor:

> "In the early 1990s, the interplay of different elements brought about an era of 'Deep Globalization' during which the global economy expanded vigorously. The demise of the Soviet Union and the subsequent 'End of History' seemed to allow for renewed international cooperation based upon the pillars – and promise – of democracy and free markets.
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> The US seemed destined to remain a 'hyperpower' in the decades to follow: a new hegemony shaping a 'new American Century'. With increased competition and cooperation with other economic powers notwithstanding, the US would go unchallenged as a geopolitical player and as the country to most vehemently embrace the principles of democracy and free markets.
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> The globe's geo-economic meridian, as far as manufacturing output was concerned, seemed to be shifting towards Asia – and this process was being led by Japan. Regional blocs appeared to be the up-and-coming economic actors – and the success of European integration was seen as paradigmatic. Both the rise of Asia – propelled by Japan and the so-called 'Asian Tigers' – and European integration were compatible with the interests of the United States as a hyperpower, since more democracy and free markets would only deepen globalization.
>
> [Currently], these parameters seem to have shifted and comprise a scenario in which we observe:
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> 1) 'Multiplatform' conflicts and tensions (viral terrorism, across-the-board criticism of the West and its liberal political and economic order, cyber-vandalism). Instead of the 'End of History', the emergence of 'multi-histories'.
>
> 2) The US in serious doubt as to its role in global affairs as it weighs the impact of the Great Recession of 2008, the heavy legacy of the 'War on Terror' and the costly military interventions in Iraq and Afghanistan. As a consequence, the US seems more inclined to focus on its domestic

issues and more reticent to play the part of leading global force for what it perceives as democracy and free markets.

3) The rise of Asia led by China.

4) A slower – and less deep – pace in regional integration and the revival of the nation-state as the leading player in global economic relations."

Leading practitioners of cross-border M&A who were interviewed for this chapter of Best Practices of the Best Dealmakers struck a similar chord in discussing the considerable hurdles to be overcome in cross border deals. And the hurdles are many – cultural differences, language barriers, accounting and regulatory disparities, currency differences, labor relations, treatment of Intellectual Property, trademarks and copyright issues – just to name a few. Yet, as US Army General George S. Patton reportedly said: "If mountain ranges and oceans can be overcome, then anything built by man can be overcome." Professional dealmakers often feel the same way.

Gregory Bedrosian of Redwood Capital likes to divide the hurdles into two categories. The first is technical hurdles, which include regulatory, accounting and currency matters. He says these are routinely dispatched through professional advisors – lawyers, accountants and consultants. "The other hurdles I feel are larger…cultural differences, work norms [hours or style of work], language, and other barriers along those lines." Bedrosian also says there is a "growing cadre of professional advisors" who can best address the technical hurdles leading up to the deal. But when it comes to making the deal work, he says, "The acquiring company needs to remember who they will live with for the duration of the time they own the business. In those cases it is extremely important to have experience within the firm. If you're a US company with an executive team that has experience in closing transactions cross-border, then you're well on your way to gaining mastery. But if you're a US company that has never done it, and none on your senior team have done it, or nobody speaks French or German, or has a rep office where you're acquiring the company – the hurdle is a lot higher. This is not something that an advisor or legal counsel can necessarily help the company with."

"Yes, hurdles exist, but they are neither ubiquitous nor insurmountable," says Marshall Sonenshine. "Cross border M&A is relatively predictable, vibrant and comfortable today in deals between companies in the US and Europe. Today it is routine for foreign companies to buy into the US. It's more complicated to

do deals in countries where the legal culture is less predictable. Some Latin American countries, and India, have made it difficult buy companies. So you have to be country specific when you talk about legal or regulatory. Yes, that work is more the province of lawyers and bankers. It's certainly true that all the major law firms are global firms and many have very important offices, particularly in China. Deal makers in law firms and banks are key to taming the beast of divergent business and legal cultures in cross border M&A. The work of lawyers in China is pretty damned important for American companies to buy businesses, and sometimes for Chinese companies to make acquisitions outside the country."

A practicing attorney for more than 40 years, Foley & Lardner's Selig Sacks says: "The predominance of what I do today is cross-border," with a heavy emphasis on China. In the past 10 years, Sacks has seen a big surge in cross-border deals, particularly inbound to the US. "And we are only at the beginning of this process – as companies become more familiar with the US market. They see peer companies of theirs – as well as practitioners – becoming far more sophisticated in approaching foreign markets." Sacks also sees certain government policies becoming more supportive of cross-border M&A, especially in light of the recently announced framework for the Trans-Pacific Partnership, which encompasses 40 percent of global GDP. "It's a good step on the road to the homogenization of product standards and an increase in the standard of living for workers globally," Sacks says. "We're seeing the elimination of a lot of layers of governmental involvement, which allows for new markets, pipelines and access to new technology."

From the perspective of India, attorney Rajiv K. Luthra says the key to overcoming cross-border M&A hurdles is "to do your homework, and have good advisers both at the local and global level." Venturing into a new jurisdiction where the acquiring company has no a presence on the ground is risky. "Make sure that you have an adviser there you can trust implicitly, whose interests are clearly aligned with yours." Luthra also sees companies and deal teams evolving and learning from experience. "The average deal team today is far more culturally diverse than those from 10 years ago. This really helps – if your internal deal team is comfortable with and aware of local culture and regulatory systems, they are obviously going to function more effectively and deliver better results."

Sometimes the greatest hurdles can be tied to the greatest rewards. Nomura's Jonathan Rouner cites finding suitable partners and acquisition targets as the toughest assignment for companies seeking to grow through cross-border M&A. "Structuring these deals involves differences in legal systems, accounting standards, and management compensation structures," Rouner says. "There are different securities laws and regulatory frameworks for the approval of deals. Cross-border deals not only require different knowledge, but also involve risks that don't exist in domestic transactions. In China, for example, the regulation of M&A is relatively new and more politicized than in this country. And the last hurdle is the challenge of integrating the management, keeping the management teams in place, and getting a foreign business to fit with the acquiring company."

"If there's a need, companies will develop an expertise in overcoming these hurdles. This is capitalism at work," Rouner emphasizes. "We see it in our business, where there is strong demand for bankers with extensive experience in advising domestic and foreign clients. The same is true with other members of deal community. You will also find this among our clients – as companies have pursued more cross-border M&A, they have built up their internal staffs."

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Patrick Zhong sits on the boards of companies where Fosun has investments in seven countries – the US, Canada, China, Italy, Germany, Belgium and France. "You don't learn this from the books; you learn this from doing it for real." For instance, he notes that unions have seats on boards in Germany. And while the Euro has made currency adjustments easier in the Eurozone, tax laws are becoming more complicated. "One thing that really has helped in the availability of technology," Zhong says, citing his frequent need to check in with his home office or the companies on whose boards he sits. He relies on WeCHAT, a Chinese mobile app similar to iMessage or WhatsAPP. "We used to email and you send it to a group of people and you don't know if they're going to reply and they can be very lengthy emails. Now we have a corporate WeCHAT with firewalls and everything, and in one hour I can talk to 20

"If things are going too smoothly that's when you should be the most worried, and I say that in all seriousness." – Gregory Bedrosian, Redwood Capital

different groups about 20 different projects. This is tremendous because cross-border and cross-time zone I can drop my messages into this group and when people wake up I expect them to give me feedback and I can manage a dozen deals in different parts of the world. Five years ago I couldn't do that."

What are the "red flags" to look out for in cross-border deals? Several interviewees cite local corruption (India was cited frequently), and countries with a weak record of enforcing contracts (for instance, Russia). "To use the poker analogy, if you don't know who the sucker is, it's probably you," says Redwood's Bedrosian. "A lot of that happens in cross-border M&A – they think they're playing cards correctly and end up being the sucker because the technical or softer hurdles. If things are going too smoothly, that's when you should be the most worried and I say that in all seriousness. On soft hurdle side, if it's [an] entrepreneurial-run business, there really needs to be an understanding of why they are selling. There may be trouble with customers, employees, contracts expiring – those are red flags to really try understand why some of that behavior is there. They're the same kinds of red flags as in non-cross border deal."

Investcorp's Hazem Ben-Gacem says having local advisors is critical to detecting red flags and overcoming in-country hurdles. "From our observations, those execution-type resources are very readily available and trustworthy. Take any large law firm or accountancy firm in the US, you can bet they will have a local partnership in any single area in the world – and legal and accountancy are the bulk of the concerns. Financial advisors who understand the local culture are key – and in any country in the world there is an investment advisor, either a boutique or a large firm. The big risk is integration – operational M&A. If they are doing their homework and have the best advisors there will still be risk but it will be mitigated."

The benefits of experience cannot be overstated, says Abraaj Group's Tom Speechley. "Since we're a firm that invests exclusively in these growth markets, we've got a fairly unique perspective on the transactions. We know how

difficult it is to get deals done. But despite that we do a lot of cross-border M&A; in the order of twenty-plus deals each year these days, either investing or exiting." Speechley says Abraaj, which has been investing in Africa for almost 15 years, uses a combination of local firms but also major global advisors, law firms and accountants. "We'll use the best firms and best talent globally, but dovetailed with the best locally. I'm not saying nothing surprises us, but we're built to overcome the hurdles you find in growth markets," he says. "Cultural hurdles are not insignificant and it helps to have a truly local footprint. In each of our markets, our people have more than 20 years of commercial experience operating in the market. I'm not overstating when I say we are pioneers in many markets."

Foley & Lardner's Selig Sacks notes that red flag complications had arisen in a number of areas, including in capital markets. The reverse-takeovers of US public companies by China-based companies, which peaked in 2010, was followed by the exposure of accounting and other frauds. And the lack of enforcement of judgements treaties between the US and China has made it very difficult to hold parties responsible. From that experience, however, acquirers of companies and practitioners have learned many lessons, including the depth of due diligence needed and the increasing need for transparency. A prime objective of the U.S. in the current negotiation of the Bilateral Investment Treaty with China is for China to commit to a very limited negative list. However it should be noted that with respect to investing in China, in addition to the national list of prohibited and restricted categories, there are provincial and local regulations which may materially impact investing. A recently study commissioned by the EU identified some 1,500 regulations at the provincial and local level that could, depending on the nature of the acquisition or project, impact its viability. So one needs to know the regulatory environment. As more and more deals get done, practitioners will become increasingly familiar with these regulations and processes. It's all part of the comfort factor in doing cross-border deals."

Part III. The Risk of De-Globalization – Is It Real?

"Yes there's a hiatus and we see companies not used to dealing with Russia or China overreacting and saying they'll never do another deal. Over the long term these things have a way of working themselves out. And this could be a buying opportunity." – Gregory Bedrosian, Redwood Capital

From Prof. Marcos Troyjo's essay on globalization for The M&A Advisor:

> "Over 25 years we have left a period of 'Deep Globalization'. We have moved closer to the 'risk of deglobalization'. In this context, international relations (understood here as relations involving nation-states) have resurfaced powerfully. It is not necessarily a world of renewed nationalisms, but rather a global juncture in which nation-states are particularly selfish, individualistic, acting according to an 'every nation for itself' mode.
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> And as deglobalization gains ground, a strong trend shows its face in the world economy. Against a backdrop of great uncertainty, countries increasingly adopt industrial and trade policies based on a 'Doctrine of Local Content'; a notion we could call 'local-contentism'.
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> Many confuse local-contentism with defensive trade measures erected against artificial exchange-rate stratagems that boost the attractiveness of a country's exports. There are clear differences however between Local-Contentism and old-school protectionism. While the latter is essentially about import quotas and tariff barriers set up to protect what is 'national', the former idolizes foreign direct investment and makes extensive use of government procurements as bait. After all, by its very definition, Local-Contentism is all about being 'local', not necessarily 'national'.
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> From the US to France, from Brazil to China, Local-Contentism can be easily identified in the way state-owned enterprises, official banks, municipalities, states, provinces and central governments interpret and implement a country's interests in the global economy. Today, Local-Contentism is one of the top parameters of how governments indirectly protect domestic companies from foreign competition, foster the creation of jobs and go about procurements.
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> The practice is becoming the most recurrent tool in bulking up a nation's capacity to compete in world trade and attract investment. But it carries a heavy price tag. In Brazil, for example, since 2003 the Federal Government only allows Petrobras (the state-owned oil company) to buy oil tankers that have been built with at least 65% of local content. As a consequence of such requirements, Petrobras ends up paying a premium of 100% on top of the average international price for any large oil-

> transporting vessel.
>
> In Latin America, successful local-content policies enacted by Colombia and Peru, for example, have parted ways with traditional forms of xenophobic protectionism that plagued the region during much of the twentieth century. The economic translation of 'Bolivarianism', for example, means basically the nationalization of industrial assets, as if wealth resided in possessing physical facilities, not in people's talents or knowledge-intensive processes."

M&A practitioners interviewed for this chapter of *Best Practices of the Best Dealmakers* are generally optimistic about the steady march toward more global standards and fungible regulations that will enable more cross-border M&A, particularly between developed and emerging and frontier markets. Certainly, country-specific actions in recent times – such as Russia's interference in neighboring countries or China's unilateral currency devaluation – rate large, scary headlines. But the fact remains that M&A activity, and cross-border M&A in particular, has steadily increased since the 2008 financial crisis, which sparked most of the speculation about a coming "de-globalization."

"These are most definitely not early days," says Rajiv K. Luthra, the Indian attorney who works on deals between developed and emerging markets. "The activity has reached a point of near-normalcy, excepting the odd speed bump." Business processes and regulations in the major emerging markets are largely in line with global practices now, Luthra says, ranging from basic company incorporation to complex anti-trust issues. "There is still work to be done on making the regulatory regime more predictable in some emerging markets, but that too is improving steadily. Buyers are treading cautiously and that is helping them avoid pitfalls." Adds Luthra: "If there is one thing that any businessperson hates, it is not knowing what the rules of the road are, or having goalposts shifted. That is something that can reduce the most hard-nosed, globetrotting businessman to tears, because it can negate so much hard work and careful planning. Secondly, anti-corruption legislation in many developed jurisdictions, while having a useful and important objective, can inadvertently become a hurdle in situations where it leads to over-cautiousness or a lack of trust."

The globe-trotting Patrick Zhong of Fosun Group says he doesn't care about "definitions," whether one market is developed, emerging or whatever. "Is

"The old narrative is being challenged in that some mature economies may re-emerge and some emerging economies may stagnate for some period of time – Russia and Brazil for example." – Prof Marcos Troyjo

China a developed or an emerging market? I don't care about these definitions. To me it's where the megatrend is shaping up. I go where it makes sense. If I can size up the opportunity and control the risk, there I go." In Germany, shortly after the Chinese currency devaluation and associated financial market volatility, Zhong says a taxi driver asked him about the Chinese stock market. "I thought, 'Oh gee, this is very important to the world.' But I don't see any correlation of the Chinese stock market with the Chinese economy. The Chinese stock market is – because currency doesn't find its way outside of the country – it's become very retail driven. Eighty percent is retail – that explains the volatility." He notes that in America the risk of the subprime lending market 10 years ago has long been replaced by other market risks, and that every 10 years about 25 percent of gross domestic product (GDP) in the US is produced by new companies. "If you look at the Chinese economy, it's like every other economy – it goes through cycles. There will be some soft cycles. I'm not an economist; I'm an investor. I look for good companies with good value. But life has improved so much in 30 years in China."

Redwood's Gregory Bedrosian noted that he a recent deal he has been involved in was affected by the Chinese devaluation and stock market volatility. "It's a near-term thing," he says. "The strategic imperative remains, but ability to pay is hampered. Some companies have taken a break from [cross-border] M&A because of this and will look at it again in three to six months. Opportunities may be permanently lost." The same holds true in Russia and Eastern Europe after the ruble was devalued dramatically, Bedrosian says. "Yes, there's a hiatus and we see companies not used to dealing with Russia or China overreacting and saying they'll never do another deal. Over the long term these things have a way of working themselves out. And this could be a buying opportunity."

Notwithstanding his own concerns about de-globalization, Marcos Troyjo sees a continuing maturation of cross-border M&A. "I think it's going to go on but in a different format than 15 years ago. We've gotten used to the narrative that there's a big grouping of mature and emerging economies." He said the world got used to the narrative that developed countries will have growth

DEAL NOTES

Wind of change in Chinese trademark disputes

The following is excerpted from an article in the August 31, 2015 issue of Intellectual Property Magazine titled "Wind of change in Chinese trademark disputes" by Robert Weisbein, Selig Sacks, and Janina Gorbach, Foley & Lardner law firm, New York.

Well-known menswear designer Michael Bastian has successfully opposed a trademark registration for the mark MICHAEL BASTIAN by a PRC trademark squatter. It is the first time a non-Chinese individual has won a trademark opposition dispute in China based on bad faith of the trademark registrant and his use of improper means in obtaining the registration.

Historically, it has been extremely difficult for a western entity to successfully challenge in China a trademark registration owned by a Chinese national that is identical or similar to a well known mark outside China. Unlike the US based schema, China's first to file system rewards whoever gets first to the trademark office and obtains a registration. Consequently, a registrant is able to block subsequent users of the mark from registration and use in China… Registration by squatters of famous trademarks has become a lucrative business in China. Because the application fee is insignificant relative to a payment that a registrant may extort from the rightful owner of the mark, a trademark squatter culture has flourished in China. Owners of famous marks are routinely targets of trademark squatters in China and they threaten trademark infringement lawsuits, unless the famous mark owners make multimillion dollar payments in return for receiving their marks back….

Proliferation of trademark squatting and the inability of the Chinese trademark law and the administrative bodies to adequately protect foreign entities against trademark squatters, have been a concern and focus of discussions in the US/Chinese bilateral dialogue. As a result of these discussions, China has committed to improve the IPR landscape in China and started a process of amending its trademark law. The amended trademark law took its final shape in August 2013 and came into effect in May 2014.

A major accomplishment of the amended law is the addition of a provision in Article 7 requiring good faith registration and use. Article 7 appears to create a basis for trademark cancellation based on bad faith alone. In addition, a new Article 64 directly targets bad faith registrations providing that no damages will be awarded if the mark is not in use. This provision attempts to discourage trademark squatting.

The amended law also attempts to enhance the protection for well known marks, including those that have not been registered in China. Under Article 58, owners of well-known trademarks, regardless of whether the mark is registered in China, may prevent others from using the mark on similar and dissimilar goods, as long as such use would likely confuse the public. To show that the mark has achieved the well known status, its owner has to apply for the well known status as part of the administrative or litigation proceeding, submit proof of the continuous use of the mark for three years if the mark has been registered or five years if the mark is unregistered, and submit evidence showing the mark has achieved recognition among consumers.

Practice pointers:

If you intend to manufacture and/or sell goods or services in China, immediately apply to register your mark in multiple classes covering your key product and service categories. Consider registering not only in English letters, but also in Chinese transliteration and in corresponding Chinese characters. The help of a local attorney in devising the Chinese version of the mark and identifying the classes and subclasses in which the mark should be registered is critically important.

If your mark has already been registered by a local entity or individual, conduct a thorough investigation to see whether the mark is in use and whether the registrant has registrations for other famous marks. In the Michael Bastian case, using a local private investigator was instrumental in obtaining evidence showing that the registrant was in fact a squatter who registered marks solely for the purpose of selling them to the rightful owners.

If your trademark search reveals registrations for your mark in China, decide whether you want to negotiate with the owner or pursue litigation. Should litigation be the chosen strategy, build a record of the mark's prior use and publicity in China by collecting evidence originating from Chinese sources and dating prior to the other side's registration date. Internet use or searches by Chinese consumers are helpful in addition to traditional media.

rates stall because of aging population demographics, with less drive toward innovation, and the futures belonged to the emerging market countries. "That narrative is not false but it has changed," Troyjo says. "An economy like the US, while definitely mature, may very well grow north of 3 percent year-after-year given the productivity of workers, research and development, the business climate and becoming energy sufficient. Brazil, once thought to be on an automatic growth track, may stagnate for years. It's not doing enough in terms of education, science, technology. The old narrative is being challenged in that some mature economies may re-emerge and some emerging economies may stagnate for some period of time – Russia and Brazil, for example."

Foley & Lardner's Selig Sacks also sees recent progress toward protection of Intellectual Property (IP) as a bright spot for cross-border M&A. Whereas brazen theft of IP was once and may still be the norm in some countries, Sacks notes that the protection of IP in developing countries is becoming an important issue for local companies not just for U.S. and other foreign companies. "A critical component will be developments that are made in IP protection and enforcement, both in patents and trademarks and copyrights generally. It has been a big issue with China. As China moves up the value chain, and as it is encouraging more internal research and development, it needs to become more effective in IP protection and enforcement. Otherwise it won't advance down the path that China is seeking in encouraging R&D and innovation within China. Ultimately, developing countries want to develop that IP. The Trans Pacific Partnership is an important piece of this puzzle as the protection of IP is a key criteria to joining TPP."

Part IV: A Look at the Future of Cross-Border M&A

"Most firms in these markets … want to adopt best practices, improve governance, and create robust systems. They want to apply all of the management science that's been learned in developed markets." – Tom Speechley, Abraaj Group

From Prof. Marcos Troyjo's essay on globalization for The M&A Advisor:

> "Throughout deep globalization and deglobalization, 'BRICS 1.0' was about showing the world the growth market potential of Brazil, Russia, India, and China, as well as the scale of their geo-economics relevance. It emphasized strengths, such as the size of their territories and populations, that could outline the future of the global economy.

> Many advances have been made since the BRICS acronym first appeared in 2001. The concept has evolved a great deal in the last 14 years. It was originally little more than a profitable group of assets or a promising trade partnership with the world's largest emerging markets. But today, BRICS stands for an increasingly important tool, which is helping to enhance global governance and, consequently, to further consolidate a multicolor world. We should therefore talk about 'BRICS 2.0.'
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> These emerging giants needed to join forces and act as a group in order to allow for greater internal and external policy cohesion, and to exert a greater influence in the international sphere. To make progress, the alliance needed to become more than just a set of nations that shared similar geographical, social, and economic statistics. They all had vast territories, large populations, big economies, and the potential to play constructive or fragmentary roles in their geopolitical regions and in the global economy. In addition, they needed to build articulate views and take actions in pursuit of their interests and in understanding – and shaping – how the world should work.
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> Unfair and outdated as they may be, the so-called Bretton Woods institutions should not represent a 'fixation' on the part of BRICS as it strives for a stronger voice and more clout with those agencies. The BRICS will waste a lot of energy if they concentrate too much on denouncing the inadequate power structure of those multilateral financial agencies.
>
> For the BRICS countries, the essential point is that the areas in which their interests coincide – such as development financing, improving global economic governance, and building a more equitable world order – should coexist pragmatically with their differences in economic clout, political agenda, and worldview. If that is the case, the coming phase of Reglobalization will definitely set the stage for BRICS 2.0 to definitely take off."

This chapter of *Best Practices of the Best Dealmakers* was being written during a period of great uncertainty over the direction of global markets in the wake of China's abrupt currency devaluation, along weakness in the emerging market economies, falling commodity prices and confusion over the US Fed's interest rate policy. As M&A practitioners interviewed for this chapter previously noted, this uncertainty may have the effect of slowing activity in

cross-border M&A during the short term. But these practitioners see the pace of globalization and cross-border M&A as inexorable in the longer term as demographic trends around the world trump short-term market volatility and even geo-political risks.

"It's still in its infancy in my view," says Abraaj Group's Tom Speechley of cross-border M&A. "The basic underlying trends in demographics and urbanization across the planet are secular in nature. You've got growth markets providing more than half of global GDP already – and nearly two-thirds of GDP growth so that share is only going to increase. Businesses are going to have to deploy more capital and more activity into these growth markets just to maintain market share. And given the young age profile, consumption in particular is set to rise almost exponentially."

The current problems in the emerging economies differ by country – in the BRICs, Russia and Brazil are struggling with low commodity prices among other woes, while China and India are wrestling with domestic demographic changes. "My prediction for the next year is more manufacturing M&A in India, and some other parts of Asia, Latin America and Africa," says Indian M&A attorney Rajiv K. Luthra. "With a longer term outlook, I think we will slowly start to see major conglomerates from emerging markets becoming bigger players in all markets, including developed economies. This in turn will have a knock-on effect on M&A culture in general." What specific advice would Luthra offer investors in these markets? "Follow the value, not the trends," he says. "Spend time evaluating the asset and business partners. Find good advisers. Have patience. These are really the only certain ways of ensuring that your deals are successful."

Investors like Fosun's Patrick Zhong see all of this as a time to size up the landscape for new investments. As for the Chinese economy, Zhong says the focus should not be so much on the percentage of growth declining but the coming changes and reforms that will open new opportunities inside China. "I see that there are many levers that can be pulled long-term to drive the Chinese economy," Zhong says. "Until about two years ago, Chinese people were making about $8,000 and Americans making more like $35,000. If you look at the Japanese, Koreans – they are making three or four [times] more than the Chinese. The Chinese work as hard if not harder than everybody else. I don't see why this needs to stop here. There's still a lot of upside."

"There will always be hurdles, always adventure in these deals but I do think they will become more and more part of M&A mainstream in coming decades." – Gregory Bedrosian, Redwood Capital

Zhong says to look to the Chinese government to implement reforms that will open the economy to smaller businesses. "Look, our financial services sector is predominantly controlled by the state-owned companies and that's wrong. That's going to change. When that changes, the banks are going to lend more to the smaller companies. So there are tremendous structural opportunities for the future… If everyone is so pessimistic about it, this is the time we should become active, looking for investment opportunities. China five years from now will still be a very strong economy. And it's the same deal with America – what's the true strength of America? It's not the 'financial market' – it's the ability of the country to re-invent itself."

Developing global standards that overcome cultural differences will also give traction to cross-border M&A growth for the long term, says Tom Speechley of Abraaj Group. "There are different ways of operating but one of the things that multi-national acquirers can do is to bring best-in-class business practices honed over the last 50 years into new growth markets," Speechley says. "Most firms in these markets are very open to that because they want to institutionalize, they want to adopt best practices, improve governance, and create robust systems. They want to apply all of the management science that's been learned in developed markets." Speechley's advice to companies looking at acquisitions cross-border: "The single most important thing is picking your partners well. You have to partner with a local and you have to partner with someone who you know to be the best available partner. By being on the ground for 20 years, like we have, we know who to deal with and who not to deal with."

Nomura's Jonathan Rouner expects business cycles to continue and to create some reduction in big cross-border deals as a result. "The decline will come in very large transactions in the final stages of industry consolidation - telecom and media for example," Rouner says. "But cross-border M&A will continue to grow as a proportion of the overall M&A business, as companies are forced to look internationally for growth. Cross-borderwill take a larger and larger portion of M&A." Rouner's advice: "As companies expand across borders they

will need to bring on people with the expertise that they lack. If a company is largely domestic, it should find advisors with extensive international experience and have their own staff develop international experience." "Even at the board level – as companies become more global, they need to look to outside for board members that have connections and experience in international markets."

"It is a global market for talent, growth and startup talent and acquisitions," adds Redwood's Greg Bedrosian. "Cross-border transactions will be an increasing part of the norm over the next decade. There will be growing cadre of executives and advisors who have to have it as a core skill-set. Cross-border M&A won't be viewed as dramatically different from a domestic transaction. There will be a larger universe of more skilled players. And being CEO a big company will require some of that experience." Bedrosian adds: "There will always be hurdles, always adventure in these deals but I do think they will become more and more part of M&A mainstream in coming decades."

Cross-border M&A "will be accepted as part of everyday business," agrees Hazem Ben-Gacem of Investcorp. "Global reach is a must. If a company is first in a market, they have a significant advantage. Globalization is not an option, it's a must." How to do it, he says? "Have your ears close to the ground. Either develop your own resources or find local advisors who have deep relationships. Global expansion is a must. I have not seen a business that has not successful staying local."

Selig Sacks of Foley & Lardner concurs that the amount of investment globally will continue to expand in the coming decade. "The amount by Asia in the Americas will continue to expand," Sacks says. "Markets will go to those environments that have a greater sense of predictability and transparency in terms of the regulatory environment. India is courting mobile devices and cloud-computing companies in the U.S. on the assumption that the methods of doing business that rules and transparency will be supportive. So capital will ultimately go to those markets where companies can build a presence and be treated on a fair and equal basis."

"When I started in 1985-86 at Salomon Brothers, they had a department called International," Marshall Sonenshine notes whimsically. "Nobody has that anymore. Everybody now thinks internationally. Almost every time you think about buying you make a global shopping list, and every time you think

of selling you make a global buyers list. Now we are all internationalists." Sonenshine says he hopes to see "Japan reawaken from its two-decade slumber" in the new future. "Japan has largely been missing from global M&A, and it's an important actor." He also sees China's economic issues as short-term, which "will not lead to geo-instability but will look like a speed-bump, not the end of growth or progress." He believes that Western Europe will have rebuilt its economic base in the coming decade. "My hope is that the Eurozone, which is roughly the size of the American economy, will again function on all cylinders." Finally, Sonenshine views the emerging markets as "not the BRICs bricks that they were marketed as five years ago. They're more unstable and more stubbornly stuck in a boom-bust cycle. But that doesn't mean it will always be the case – if Brazil rebuilds, if Russia ever becomes stable – I don't count on that – and if India will ever seriously deal with the problems of corruption, education and poverty." Sonenshine adds that "this is a good time to have dollars. Enjoy the strong dollar. From an acquisition perspective, it's a pretty good time to be acquiring abroad."

Conclusion

Despite significant challenges, cross-border M&A has staged a dramatic comeback since the 2008 global financial crisis. Globalization continues to have a strong affect on M&A as companies have huge incentives to look beyond their own borders for growth. Changing demographics in the emerging and frontier markets is creating a larger consumer base that will only grow in the coming decade. Current economic issues in the BRIC countries differ by region, but even Prof. Marcos Troyjo, who has pointed out these difficulties, says that cross-border M&A is going to increase dramatically. "This was essentially firms in US and Europe buying everyone else. Now, given abundant capital reserves in countries like China and India, companies in these markets are going to be buying more and more in Europe and US." Cultural differences and other hurdles to cross-border deals will always be present, but there is a large and growing cadre of M&A professionals who are gaining more experience in surmounting the challenges with every deal. Thus conclude the experts in cross-border M&A who were interviewed for this introductory chapter of *Best Practices of the Best Dealmakers*, 4th edition. In the coming chapters we will hear from more leading dealmakers in this ever-growing pool of talent. They will discuss the specific strategies involved in

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