

# FOSTERING COMPETITION LAW AND POLICY: A FAÇADE OF TAIWAN'S POLITICAL ECONOMY\*

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## PRELUDE—A MISSED OPPORTUNITY FOR ECONOMIC REFORM

In mid-1984, Premier Yu Kuo-hua of the Republic of China (ROC) on Taiwan was upset. However, he had no reason to be. President Chiang Ching-kuo had just promoted him from the Governor of Taiwan's Central Bank of China (CBC) to become Premier. A thoughtful but low profile conservative, he formerly was a trusted lieutenant of the Chiang Kai-shek family, whose inner circle ran the ROC government through the *Kuomintang* (KMT, or Nationalist Party) then. In his more than ten years at the helm, he turned the CBC into one of the most powerful agencies in Taiwan using foreign exchange control measures authorized under the Statute for Administration of Foreign Exchange (SAFE).<sup>1</sup>

President Chiang Ching-kuo, son of Chiang Kai-shek, hand picked the reserved Premier Yu to serve as Premier in part for his conservatism. Nonetheless, he soon announced an ambitious message in his first policy address in 1984. Henceforth, his economic policy would focus on the three pillars of “internationalization, liberalization, and institutionalization” (ILI). As this Article will discuss, the ILI policy would guide Taiwan's economic development in the decades to come. Difficult as it was to implement, the ILI policy had profound ramifications on the development of competition law and policy in Taiwan.

What upset Premier Yu was that Taiwan was in the middle of one of the worst economic crises in its history when he stepped into his new job. A few months before, the Tenth Credit Cooperative (TCC) had experienced massive runs by depositors concerned with unrecoverable bad

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1. Due to the scarcity of foreign exchange, Taiwan has used foreign exchange controls to allocate resources and prioritize economic development programs since the 1950s. These controls also serve an important political purpose: perceived safety. It therefore is fitting that the foreign exchange statute's acronym is SAFE.

loans to affiliated companies to fund ill-conceived construction and other projects. A bailout organized through government-owned banks proved insufficient. The public severely criticized the Ministry of Finance (MOF) for knowingly failing to react to the documented and chronic transgressions of the TCC. Part of the powerful and lucrative Cathay Insurance Group and controlled by the indigenous Tsai clan, the TCC operated as a maverick in the staid government-controlled financial community, possessing no qualms about skirting the limits of banking regulation.

In the end, the TCC led to the resignation of Minister Li-Teh Hsu of the Ministry of Economic Affairs (MOEA) and Minister Rong-Kang Loh of the MOF. Accounts suggested that Hsu, previously the finance minister, stepped down to shoulder the blame for Premier Yu, who should have made the painful decision to sanction the TCC much earlier.

The TCC incident led to financial and economic crises. Despite the superficial Martial Law, public opinion demanded accountability. In response, Premier Yu convened an Economic Reform Committee (ERC). Composed of senior government officials, scholars, and industry representatives, the ERC aimed to build a consensus to implement the ILI policy in order to strengthen Taiwan's economy and prevent the recurrence of scandals like that involving the TCC. Serious plenary and subgroup meetings of the ERC drew national attention for months and produced tomes of proceedings and recommendations. One of the recommendations advocated expeditious passage of the Fair Trade Law (FTL) bill in order to introduce antitrust laws and rules against unfair competition. Scholars had drafted this bill at the request of the MOEA, which was experiencing surmounting pressure from Taiwan's trading partners to balance trade, including the adoption of more effective mechanisms to prevent unfair competition and combat counterfeiting activities. However, the sense at the time was that the FTL was just another scholarly exercise funded by a government agency to fully utilize its previously allocated budget.

At the end of the ERC deliberations, however, the cabinet (known as the Executive Yuan, or EY) decided to do virtually nothing in 1985. Many suggested later that Premier Yu was too conservative to launch any major economic reforms, and that he possessed little real decision-making authority because the Soviet-trained, populist, and enigmatic President Chiang Ching-kuo made all the important decisions. The Yu administration's failure to act cost Taiwan dearly: Taiwan lost a golden opportunity to open its economy and reform her economic structure. As this Article will show, this reform would have eased the introduction of

definitive competition laws.

In late 1985, Chiang decided to turn his attention away from economic policy in order to embrace political reform. As a result, in 1986, the increasingly vocal anti-KMT forces formed the Democratic Progressive Party (DPP) to institutionalize political opposition. In mid-1987, Chiang lifted the Martial Law decree and most of the foreign exchange measures under SAFE except controls over short-term capital movement. Several months before his death in January 1988, Chiang witnessed the precocious and noisy democratization sentiments and public and parliamentary protests (including fist fights!) that came to characterize Taiwan's "peaceful revolution" towards democracy in the 1990s. Taiwan would never be the same.

With political reform came the gradual and haphazard opening of regulated markets in the 1990s. In 1990, Taiwan formally applied to accede to the General Agreement on Tariffs and Trade (GATT), and later the World Trade Organization (WTO), as the independent customs territory of Taiwan and offshore islands. With this bid Taiwan began a long process of bilateral trade consultations to give concessions, including market access, for entry into the most important international agency in which statehood was not a requirement. In 1991, Taiwan enacted the FTL without much serious deliberation. In the frenzy for full political participation, what politician in his or her right mind would oppose legislation billed as being "fair"? The FTL authorized a grace period of one year, during which the Organic Statute for the Fair Trade Commission was enacted. Taiwan established its Fair Trade Commission (TFTC) in 1992. Thus began Taiwan's first decade of formally fostering competition law and policy.

This Article examines Taiwan's experiment with competition law and policy throughout the first ten years of the FTL. I argue that the pressure of globalization fostered general sentiments in favor of competition policy. The FTL reinforced those sentiments, but its first ten years also demonstrate a checkered history of enforcement, which the state of the political economy in Taiwan greatly affected.

To illustrate that the first ten years of the FTL represent a façade of Taiwan's political economy, Part I begins with a review of the general principles and policy context of the FTL. This part discusses Taiwan's economic development insofar as it relates to the resistance and ultimate emergence of competition legislation like the FTL. It also reviews the traditional Chinese view of market regulation and some rudimentary forms of competition law contained in the Tang Code, as well as the small economy phenomenon in Taiwan and the challenges it presents to

transplanting competition rules like the FTL. This is set against the background of the FTL's legislative goals.

A critical review of the TFTC and its work follows, and I review the political constraints on the commission and the commissioners in a rapidly democratizing society like Taiwan. Through the definition of enterprises, I then review the state action doctrine that emerged from early TFTC decisions and interpretations. I also show the challenges brought by state-owned enterprises (SOEs) in enforcing competition rules. Discussion of the regulated industry exemption from the FTL follows, as well as the TFTC's moderately successful competition advocacy program that flows from this exemption. At the end of this section, I introduce the intellectual property exemption in the FTL, and the tautology it demonstrates.

Part II then examines monopoly control. It begins with an introduction to the definition of monopolies and rules against monopolization in the FTL, and then traces the comparative law sources of these rules. Representative cases follow, which illustrate the dangers of taking a light-handed approach to SOEs as well as taking a heavy-handed enforcement approach towards foreign firms. Next, I explore merger control in Taiwan by examining statistics to show the regulatory cost of merger control in Taiwan and describing the few cases in which the TFTC rejected the combination applications. I then describe a major policy study in 2001 leading to an amendment to the FTL in 2002 reforming merger control law in Taiwan, with some emphasis on cross-border combinations that are related to Taiwan.

Part III reviews horizontal restraints, vertical restraints, and unfair competition. It begins by explaining how the cartel prohibition rule works in Taiwan, including a description of what types of cartels can be approved and how. I then focus on the TFTC's staff study, which alludes to the empirical results of anti-cartel enforcement and areas where such enforcement is becoming more difficult. Next I review price-related and non-price vertical restraints and discriminatory treatment under the FTL, as well as the doctrinal issues arising from the way these FTL rules work. A description of unfair competition follows, as the FTL provides a strange continuum from antitrust rules to unfair competition in the same chapter. A salient but increasingly troubling feature of this chapter is a catchall rule against deceptive and unconscionable conduct, which is a transplant from Section 5 of the American Federation Trade Commission Act.<sup>2</sup> I go on to show why this transplant has not worked well in the context of different

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2. See 15 U.S.C. § 45(a) (1994).

FTL enforcement mechanisms.

Part IV examines enforcement mechanisms under the FTL. It introduces civil liabilities, criminal sanctions, and administrative enforcement sequentially. I then demonstrate the features of these different enforcement mechanisms, with a view to comparing the advantages and constraints of each enforcement mode. Clearly, after its first decade, the FTL has become a form of administrative law. This phenomenon has important ramifications on the TFTC as an institution, and it affects the case load and case selection, enforcement position, and ultimate effectiveness of the FTL.

Part V shifts the focus somewhat by examining competition policy as opposed to competition law per se. The focus of this section is to illustrate how competition policy can help to change the market structure in Taiwan. I use telecommunications reform as an example of how to foster competition policy in Taiwan by recounting the different phases of Taiwan's telecom reform in an expanded political and economic context. I also look beyond the opening of the telecommunications market and delve somewhat into the challenges of the media convergence in Taiwan and its impact on competition law and policy.

Part VI goes on to review the interactions of the telecommunications laws and competition law rules like the FTL. It advocates the importance of embracing competition principles and agency coordination. It also suggests rethinking FTL rules in the context of a newly deregulated market where there clearly is not a level playing field. This illustrates the need to rethink industry regulation; in the case of telecommunications, leap-frogging technology rapidly makes old regulatory rules obsolete. This part ends with a call for independence, which will be important for the proposed Telecommunications, Information and Broadcasting Commission in Taiwan.

Part VII concludes by offering a brief summary of the performance of competition law and policy in Taiwan. I commend the TFTC on laying a good foundation for public awareness of the FTL and developing case law in important areas of competition law enforcement. However, I also point out the deficiencies of both the FTL and the TFTC. By pointing out the risks of misdirecting the enforcement approach for the FTL, I show the challenges lying ahead for the TFTC and offer some suggestions for improvement. Finally, I stress the importance of faithfully implementing competition policy to change market structure, which makes conduct regulation under the FTL much easier. In sum, I argue that Taiwan's first decade of enforcing competition law has produced relatively good results, compared with experiences elsewhere. I also caution that globalization

forces more challenges on a small economy like Taiwan, and that it needs to embrace competition and market-opening in all forms to remain competitive.

## I. GENERAL PRINCIPLES AND POLICY CONTEXT

### A. *Economic Development, the Traditional View and the Small Economy Phenomenon*

Until its presidential election in May 2000 and the economic slowdown during the subsequent transitional period, some billed Taiwan as a success, or even a miracle, in achieving rapid economic development in a short span of time without suffering a disproportionate distribution of income and wealth.<sup>3</sup> Much like Korea, Taiwan has had an industrial policy that stresses close government-industry consultation (including “moral suasion”), promotion of growth and exports, and forcing firms to be globally competitive. Both countries have long-term planning goals and develop general, broad guidelines on specific industries to build for the future (such as automobiles in Korea and computers in Taiwan).

In the earlier part of its development history, Taiwan suppressed domestic competition. However, its smaller domestic market remains significantly more open than Korea’s, and Taiwan’s industrial policy has not been as *dirigiste* and interventionist. By the 1980s, Taiwan began a serious program to liberalize trade in goods; by the 1990s, it began to open its service industry. However, Taiwan relies more on public enterprises than Korea. Nonetheless, Taiwan’s private sector is clearly at the center stage of its economy.<sup>4</sup> Like other similarly situated economies, Taiwan continually explores ways to upgrade its industries, technologies, and investment environment, aspiring to become a base for regional operations. However, there is one major and interesting distinction: Taiwan is integrating rapidly with mainland China, but strong animosity across the Taiwan Strait and much uncertainty regarding political rapprochement still exist.

Much of Taiwan’s economic reform revolves around the issues of efficiency, fairness (or equality), and the tradeoff between the two. These

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3. See generally KUO-TING LI, THE EVOLUTION OF POLICY BEHIND TAIWAN’S DEVELOPMENT SUCCESS (2d ed. 1995).

4. See U.S. Cong. Office of Tech. Assessment, Competing Economies: America, Europe, and the Pacific Rim, OTA-ITE-498, at 296 (1991).

issues also are at the center of competition laws,<sup>5</sup> although traditional society never explicitly employed competition policies to achieve a proper balance of the two goals. Moreover, as the saying goes in imperial China, “fear not insufficiency, but be concerned with inequality.” Traditionally, fairness has been more important than efficiency considerations.<sup>6</sup> On the other hand, at the beginning of his idealist campaign to modernize China during the first quarter of the twentieth century, Dr. Sun Yat-sen—accepted as the Founding Father by both the People’s Republic of China (PRC) and the ROC—hoped to create a fair and affluent society based on moderate socialism.

The traditional political and economic ideals in a particular culture inform its view of the role of competition laws. Although foreign competition laws significantly influenced the FTL, competition policy is not a foreign import to traditional China. Before the First Emperor unified China, scholars such as Guan Chung already had warned the Prince of the threat posed to the throne, farmers, and small businessmen by merchants owning thousands of gold bullion.<sup>7</sup> The Tang Dynasty saw the first codification of some form of competition policy: the criminal prohibition against cornering the market. Article 33 of the miscellaneous provisions of the Tang Code, enacted in 737 A.D., prohibited any person selling or buying goods from forcibly creating a barrier of entry into the marketplace, fixing the prices of goods they would buy or sell, or misrepresenting the prices of such goods. A violation could lead to eighty floggings and mandatory disgorgement of the offender’s illegal profits.<sup>8</sup>

The imperial Chinese distrust of traders, who ranked behind the intellectuals, farmers and laborers, not only precedes Adam Smith’s<sup>9</sup> but it

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5. See HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 40-54 (1985) (stating that antitrust laws are not free from politics and ideologies).

6. Imperial China did not distinguish between static, allocative, and dynamic efficiencies.

7. See Guan Chung, *Guan Tze*, in *THE LEGALISTS’ THOUGHTS ON ECONOMIC REGULATION BEFORE THE CHING DYNASTY* 50 (Chia-Chu Hou ed., 1985).

8. YEN-HUEI DAI, *A COMMENTARY ON THE SPECIFIC PROVISIONS OF THE TANG CODE* 266-67, cited in *D1 WORLD LAW OF COMPETITION* § 1.01 n.2 (Julian O. von Kalinowski ed., 1987).

9. Adam Smith argued:

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies; much less to render them necessary.

1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 143 (R.H. Campbell et al. eds., 1981), cited in Russell Pittman, *Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe*, 26 *INT’L LAW.* 485, 487 n.4 (1992).

also culminated in price controls and state regulation or ownership of economic resources and production, thereby stifling capitalist tendencies.<sup>10</sup> According to findings collected by Mancur Olson, government efforts proved unsuccessful; toward the end of the Qing Dynasty (i.e., at the turn of the twentieth century), some Chinese guilds relentlessly enforced price fixing and output restrictions. For example, 123 fellow guild members reportedly bit a recalcitrant craftsman to death!<sup>11</sup>

Another salient aspect of Taiwan's economy is that it is a relatively small economy that depends heavily upon international trade. Therefore, one important issue for Taiwan is whether it needs competition laws at all. For example, Taiwan could have adopted a strong competition policy early on, such as an open trade policy and the elimination of all entry barriers to the service sector.<sup>12</sup> If so, Taiwan would have possessed an industrial structure that would have made it extremely difficult for any firm to engage in anticompetitive conduct over the long term. In such a case, Taiwan might not need a competition law, let alone multipurpose legislation like the FTL.

Economic literature is replete with discussions of the optimal competition policy for small market economies.<sup>13</sup> Taiwan's smaller size and its export dependence would make transplanting competition laws from large jurisdictions like the United States, Germany, European Union, and Japan problematic. This would be the case despite the "learning externalities" of transplanting competition law from these larger jurisdictions. Such learning externalities include "a ready basis for the law and a large body of comprehensive case law and commentary."<sup>14</sup> Taiwan's smaller size would create particular issues in merger and monopoly control policy, and practical difficulties in gauging market dominance through often-used market share ratios or other rules of thumb.<sup>15</sup> As the

10. Teh-kang Tang, *Antitrust Began with the Regulation of Iron*, MING PAO YUE KAN [MING PAO MONTHLY], Aug. 1991, at 5.

11. MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 148-50 (1982).

12. This policy is essentially what Hong Kong and Singapore practiced, except that both possessed strong domestic service sector competition. Both Hong Kong and Singapore, of course, possess even smaller economies than Taiwan.

13. See generally Michal S. Gal, *Market Conditions Under The Magnifying Glass: General Prescriptions for Optimal Competition Policy For Small Market Economies* (N.Y.U. Ctr. for Law & Bus., Working Paper No. CLB-01-004, 2001), available at <http://www.stern.nyu.edu/clb/01-004.pdf>.

14. *Id.* at 65.

15. According to Gal,

Small size affects the policy towards mergers by placing much more emphasis on efficiency considerations and less reliance on structural variables alone. It affects the optimal policy in monopolistic markets by requiring less reliance on market forces to erode market power and



text below will show, these kinds of issues typify those challenging the FTFC in the first decade following enactment of the FTL.

*B. Legislative History and Fundamental Goals of the FTL*

It is always important to ponder why and how a society adopted a particular legal rule. In the case of the FTL, the driving force was globalization, as indicated by Premier Yu's ILI initiative back in the mid-1980s. Reactionary forces, however, led to the enactment of the FTL. As I will show later in this Article, they affected the fundamental goals of this important legislation.

The last decade of the twentieth century became more competitive. The evidence is clear: the ongoing transformation of the former socialist countries into market economies is unleashing market forces previously considered to be anathemas. Multilateral and regional trade negotiations, such as the WTO and the formation of the North American Free Trade Area (NAFTA), have impacted global trade tremendously. Replacing the Cold War ideological confrontations are a sense of pragmatism and a preoccupation with economic development. Financial innovation and deregulation facilitate the integration of national economies into the global economic community. Technological advances shrink the domain of natural monopolies, even forcing the convergence of several industries—such as telephony, communications, computing, publishing, and entertainment—into one.<sup>16</sup>

Market opening quite often finds its companion in the passage or amendment of competition statutes to safeguard competition. Competition policies and laws are gaining practice and prominence in, for example, both former Soviet and Eastern Bloc countries.<sup>17</sup> Improvement of the Japanese Antimonopoly Law and its enforcement was an important topic of the United States-Japan Structural Impediments Initiative (SII) trade negotiations in the early 1990s.<sup>18</sup> Despite changes in its administration,

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by placing more emphasis on direct regulation by competition authorities. It also necessitates a stricter and a more strongly enforced competition policy towards oligopolies. In addition, small size affects the accuracy of many of the rules-of-thumb and indicators of market dominance and anti-competitive conduct used in large economies.

*Id.* at 66.

16. See generally PETER W. HUBER ET AL., FEDERAL TELECOMMUNICATIONS LAW (2d ed. 1999 & Supp. 2002).

17. See, e.g., Pittman, *supra* note 9, at 485-503; Michael Reynolds, *Antitrust Comes to Eastern Europe*, INT'L FIN. L. REV., Aug. 1991, at 11, 12.

18. See, e.g., Kozo Yamamura, *Introduction*, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE? 2-3 (Kozo Yamamura ed., 1990); John O. Haley, *Weak Law, Strong Competition, and Trade*

which affect the focus of antitrust enforcement, the United States always has pursued a vigorous enforcement program.<sup>19</sup> American trade negotiators also have sought to use competition laws to pry open Japan's domestic market.<sup>20</sup> In addition, significant evidence exists of the proliferation of competition laws elsewhere.<sup>21</sup> Taiwan's enactment of the FTL was part of this strong and persistent global trend that began in the early 1990s. For example, after the parliamentary election in the United Kingdom in mid-2001, the Labour Party government showed a renewed interest and developed a definitive program to enforce competition law more vigorously.<sup>22</sup>

The legislative history of the FTL clearly suggests a strong emphasis on efficiency. According to the official statement of the MOEA in explaining the FTL bill, the FTL should protect competition, not competitors, and certainly not inefficient competitors.<sup>23</sup> This is a literal copy of statements made by the U. S. Supreme Court in its opinion in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (regarding antitrust injury).<sup>24</sup> However, after the lifting of the Martial Law decree in mid-1987, Taiwan soon became preoccupied with fairness-related issues. The titling of the bill as a *fair* trade law also shadows the original intent of the MOEA. However, this is not a unique phenomenon. Similar laws in Japan, Korea, and China always have possessed a fairness or propriety label!

*Barriers: Competitiveness as a Disincentive to Foreign Entry into Japanese Markets, in JAPAN'S ECONOMIC STRUCTURE: SHOULD IT CHANGE?*, *supra*, at 203-36.

19. Interview: Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, ANTITRUST, Fall 1993, at 8 (quoting Ms. Bingaman as stating, "In the international area, we hope to continue what Jim [Rill, her predecessor in the Bush administration] started by urging other countries to enforce their own laws more vigorously.").

20. See Mark K. Morita, *Structural Impediments Initiative: Is It An Effective Correction of Japan's Antimonopoly Policy?*, 12 U. PA. J. INT'L BUS. L. 777 (1991).

21. For example, competition laws were recently either adopted or amended in Ireland, Belgium, Russia, and Greece. See, e.g., Tony O'Connor, *Irish Competition Act, 1991*, 12 EUROPEAN COMPETITION L. REV. Supp. 6:1-16 (1991); *Belgium: Protection of Economic Competition Act 1991*, 13 EUROPEAN COMPETITION L. REV. Supp. 3:1-8 (1992); *EEA Competition Law*, 14 EUROPEAN COMPETITION L. REV. Supp. 1:1-28 (1993); *The Russian Soviet Federal Socialist Republic (RSFSR): Law on Competition and the Restriction of Monopolies in the Commodity Markets*, 14 EUROPEAN COMPETITION L. REV. Supp. 2:1-8 (1993); *The Greek Act on the Control of Monopolies and Oligopolies and on the Protection of Free Competition*, 14 EUROPEAN COMPETITION L. REV. Supp. 5:1-12 (1993).

22. For a firsthand description of the Labour Party's plan, see Gordon Brown, *New Labour: Making Europe More Productive*, ASIAN WALL ST. J., June 20, 2001, at 6, available at 2001 WL-WSJA 22051383. One feature of this proposal includes criminal punishment of cartel activities.

23. See Minister Ta-hai Lee's remarks in introducing the FTL to Taiwan's Legislative Yuan for the bill's first reading by the Judiciary and Economic Affairs committees on June 26, 1986. See LEGISLATIVE YUAN, 75 OFFICIAL GAZETTE, Issue 1978, at 2-3 (Sept. 20, 1986).

24. 429 U.S. 477 (1977).

There are two salient features in the FTL: antitrust law and unfair competition law. Taiwan's trading partners (particularly the United States) demanded for years that Taiwan expeditiously adopt unfair competition laws in order to enhance its anti-counterfeiting enforcement program. Taiwan had experienced piracy in the domestic market since the 1960s. However, by the late 1970s, counterfeiters in Taiwan already occupied a rather competitive position to export knockoffs. Interestingly, globalization and Taiwan's success to meet the challenge of piracy actually made counterfeiting a bigger problem for Taiwan. Therefore, the American trade negotiators were keen to halt a new but increasingly rampant trend in its incipiency. Nonetheless, these negotiators were indifferent regarding enactment of antitrust rules in Taiwan. Such antitrust rules actually may have concerned them out of a fear the rules would become anti-trade regulatory measures! However, conflicting sentiments already existed in Taiwan in the early 1980s: some academics zealously supported the transplant of German-style competition legislation. Indeed, the FTL draft was the result of an MOEA-commissioned academic study by the German-worshipping Law Faculty of National Taiwan University.

These two forces, namely, the appeasement of trading partners and aspirations to transplant competition law as an elegant and egalitarian institution, resulted in making the FTL a bundled product: love unfair competition rules, love antitrust laws! From a comparative law perspective, the integration of antitrust rules and unfair competition rules within the same statute is highly unusual. Despite their purported efficiency-enhancing goals, one easily can confuse the antitrust rules in the FTL as enforced by the TFTC (particularly those involving large-firm conduct and vertical restraints) with fair competition principles. One example concerns the treatment of vertical restraints and the licensing of exclusionary practices in Chapter III of the FTL, which addresses unfair competition issues like passing off and false advertising.<sup>25</sup>

Academic politics also affected the FTL's antitrust rules, which form the core of competition law in Taiwan. Since the Nationalist government's adoption of Roman Civil Law through Germanic codes in the 1930s in mainland China, the Civil Law influence has prevailed in postwar Taiwan. Taiwanese legal scholars studied mostly in Germany. The rigor and logic of codified German competition law made it the model of European competition law. Therefore, it seemed natural for Taiwan to follow the

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25. See Kung Ping Jiau Yih Fa [Fair Trade Law] arts. 18, 19 (1991) (amended 2000), available at <http://www.ftc.gov.tw> [hereinafter FTL].

Germanic rather than the American model of competition law. In addition, with its common law approach and disarray of inaccessible, difficult-to-digest, and often conflicting court decisions, how could any country effectively transplant American antitrust law?

In contrast to academic lawyers, Taiwanese economists received most of their training or influence from the United States. Economic studies focus primarily on functions and results, and care much less about the forms and styles of borrowed legal rules. Worse still was the fact that Taiwanese economists approached antitrust issues through the lens of American textbooks on industrial organization, and were much more familiar with American antitrust case law than German-style competition code. Taiwanese economists also were bitter over their exclusion from the FTL drafting process. They argued that academic lawyers could not understand antitrust economics, a point clearly evidenced by the fact that the law professor from National Taiwan University who drafted the first FTL bill confused the output of domestic manufacturers with their market share in a much publicized so-called empirical study during the ERC debates!

Taiwan has a practice of stating the legislative goals of a regulatory law in its first provision, presumably to offer guidance and minimize future interpretive confusion. Korea's Fair Trade Law and Japan's Antimonopoly Law follow the same practice, whereas the U.S. Sherman Antitrust Act and the German *Gesetz gegen Wettbewerbschränkungen* (GWB) and *Gesetz gegen den unlauteren Wettbewerb* (UWG) do not contain such specific clauses.<sup>26</sup> However, even when one can find the legislative goals in secondary sources such as legislative materials, competition laws' policy contents serve as fertile ground for contentions that could last more than a century.<sup>27</sup> "Buzz words" in the FTL probably will not fare any differently.

The FTL sets forth as its primary purposes the development of a market economy, maintenance of fair competition, and protection of consumer welfare,<sup>28</sup> but its legislative purposes clause fails to mention the protection of the lawful interest of business operators. However, Article 1 of the FTL

26. See Hoil Yoon, *Regulation of International Contracts under the New Fair Trade Law*, E. ASIAN EXEC. REP., Nov. 1980, at 18-20; Sang-Hyun Song, *Experimenting with Antitrust Law*, E. ASIAN EXEC. REP., July 1981, at 3, 14-18; The Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade, Act No. 54 of 1947, reprinted in HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN app. A, at 387 (1994).

27. See generally THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS (E. Thomas Sullivan ed., 1991).

28. FTL art. 1.

implies such protection by stressing economic stability and prosperity. The choice of words in the FTL, including “enhancing the stability and prosperity of the economy,” appears to be more neutral. The FTL nevertheless contains vague legislative goals in Article 1, including “maintaining orderly conditions for trade.”<sup>29</sup>

Economists do not discuss how orderly the market behaves, and terms such as “orderly marketing agreements” connote protectionism under international trade laws. However, Friedrich A. Hayek provides a lucid and convincing explanation of market order: it must be a “spontaneous order representing an equilibrium set up from within, rather than a made order.”<sup>30</sup> This illustration should be instructive in interpreting the antitrust provisions of the FTL; the government should allow market forces to work without artificial, distortive arrangements, regardless of whether the government or conspiring traders create them. Insofar as an act of unfair competition wrongfully exploits the commercial goodwill of another enterprise or releases inaccurate information into the market, Hayek’s spontaneity test also could explain well the order-maintenance purpose of Taiwan’s competition laws.

The first several years of FTL enforcement generated an emerging body of decisions by the TFTC interpreting its purposes and all contemplated conduct. Some such interpretations are mutually inconsistent. They highlight tensions within the TFTC, which has groped for the proper legislative goals of the FTL since day one. For example, the TFTC cited both the avoidance of congestion in the harbor and inland transportation and the compatibility with domestic economic, trade, and agricultural policies as reasons for approving a joint importation of grains by competitors.<sup>31</sup> It also used the welfare of employees of agricultural cooperatives in Taiwan, the need for leisure, and social customs to justify upholding the uniform day of market closure.<sup>32</sup>

The TFTC held that government subsidies proposed by the Environmental Protection Administration (EPA) to offer to water supply

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29. *Id.*

30. See 1 F. A. HAYEK, LAW, LEGISLATION AND LIBERTY 36-42 (1973).

31. See Fair Trade Comm’n, *Approval No. 81-Kung-Lien-001*, 1 GAZETTE OF THE FAIR TRADE COMM’N, July 1992, at 14 (stating that thirty-six members of Taiwan’s trade association for flour-related firms and their affiliates approved the joint importation of wheat until the end of 1994, provided that following June 1, 1993, no restrictions on the eligibility of joint importers could exist). The TFTC published two volumes of selected cases, guidelines, and interpretations in English. See Fair Trade Comm’n, CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA, Vol. 1 (1999) and Vol. 2 (2000).

32. See Fair Trade Comm’n, *Interpretation No. Kung-Yen-011*, 1 GAZETTE OF THE FAIR TRADE COMM’N, July 1992, at 23.

companies, which are public utilities, to produce better bottled drinking water for sale at a price close to cost violated the FTL. The TFTC recognized the need for a purer water supply, but remained concerned with the unfair advantage subsidized firms might obtain in the marketplace.<sup>33</sup> However, in an earlier TFTC interpretation requested by the association of private hospitals, the TFTC stated that the government could provide budgeted funds to public hospitals for policy reasons. Such conduct, it asserted, would not constitute a violation of the FTL because an agency performing an official government function was responsible for the conduct, rather than an enterprise engaging in profit-seeking activities.<sup>34</sup>

The TFTC approved the merger of two affiliated shipping lines primarily because, in addition to increased efficiencies, the merger would enhance the competitiveness of Taiwan's shipping companies relative to foreign lines, a seemingly mercantilist policy.<sup>35</sup> In another merger of affiliates of a Dutch bank with a branch office in Taiwan, the TFTC stated in its approval that this restructuring would enhance Taiwan's position as a regional financial center, which was a similar (albeit somewhat wishful) policy manifestation.<sup>36</sup> Another merger control case involved one foreign bank's takeover of the assets and business of the branch of another foreign bank, which withdrew from Taiwan because a third foreign bank, which already had a branch in the relevant market in Taiwan, acquired it. The TFTC held that maintaining the employment of the existing staff constituted one of the reasons for such an approval.<sup>37</sup>

These decisions and interpretations do not necessarily present a coherent inner logic, evidencing that the TFTC still is groping for the purposes of the FTL in actual cases. They indicate both paternalistic and free market tendencies; the language of some decisions suggests industrial policy concerns, while other decisions suggest moralistic undertones. The TFTC enforcement decisions against foreign cosmetics firms whose distribution and pricing practices were challenged in mid-1992 present one

33. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-029*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Aug. 1992, at 44.

34. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-001*, 1 GAZETTE OF THE FAIR TRADE COMM'N, June 1992, at 4.

35. See Fair Trade Comm'n, *Approval No. 81-Kung-Yi-01924*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Sept. 1992, at 20; Fair Trade Comm'n, *Approval No. 81-Kung-Chieh-001*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Sept. 1992, at 20.

36. See Fair Trade Comm'n, *Approval No. 82-Kung-Chieh-5000*, 2 GAZETTE OF THE FAIR TRADE COMM'N, Jan. 1993, at 33-34.

37. See Fair Trade Comm'n, *Approval No. 81-Kung-Yi-08104*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Sept. 1992, at 22; Fair Trade Comm'n, *Approval No. 81-Kung-Chieh-002*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Sept. 1992, at 22.

example. These TFTC decisions took the position that firms should compete on the merits of the product and should not create an image of prestige by maintaining high retail prices. In the decisions, the TFTC also advised big department stores distributing cosmetics products to remain mindful of their corporate image because of their substantial capital base!

Obviously, these decisions suggest an explicit TFTC concern with the high prices of status/luxury goods.<sup>38</sup> There may be an implicit concern with cross-border price discrimination by multinational firms as well, as imported cosmetics products command prices much higher in Taiwan than they do in Europe or North America, the substantial appreciation of the New Taiwan dollar at the time notwithstanding. On the whole, however, these TFTC decisions illustrate a preference for allowing more room for market forces, signifying Taiwan's trend toward a more open market economy.

### *C. The TFTC and Its Work*

The FTL was one of the few bills drafted before but enacted after President Chiang lifted Taiwan's Martial Law decree. This legislative history has one important implication. As is common with pre-1990 legislation, the FTL grants tremendous discretion to the TFTC as the trade regulator. The TFTC was to become a department of the MOEA, thereby following the German approach (that is, the federal cartel office, or *Bundeskartellamt*). Therefore, competition law enforcement would be subject to bureaucratic controls. Post-Martial Law developments led to the elevation of the TFTC to become a purportedly self-governing commission, but it has struggled ever since to fulfill this expectation of independence.

Pursuant to the FTL and the Organic Statute for the Fair Trade Commission, the TFTC shall consist of nine commissioners, including one as chairman and one as vice chairman. All commissioners must be nonpartisan, and they must possess certain professional qualifications in fields such as law, economics, accounting, and public administration.<sup>39</sup> Even so, there is room for flexible interpretation of such mandatory

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38. See, e.g., 1 GAZETTE OF THE FAIR TRADE COMM'N, Aug. 1992, at 10, 12, 16, 20, 24. On status goods, see THORSTEIN VEBLÉN, THE THEORY OF THE LEISURE CLASS (1899).

39. See Organic Statute of the Fair Trade Comm'n arts. 1, 11, 12, 13 (Jan. 13, 1992). Although the TFTC chairman may not participate in political activities, soon after he was inducted in early 2000, the third-term chairman took to the streets to join anti-nuclear power advocates in Taiwan, despite a reminder from the Premier that he not participate in such demonstrations. He received strong criticism and subsequently pledged never to do it again.

professional credentials so that political appointments do occur. Commissioners often possess impressive credentials. For example, all of the first-term TFTC commissioners but one possess a doctoral degree.

Commissioners serve three-year terms, and multiple terms are possible. More importantly, the same political party may only represent less than a majority of the commissioners. One therefore can argue that, other than the Central Elections Commission created under the Elections and Recall Law, the TFTC is perhaps the only true commission-style agency in Taiwan. Other government commissions, such as the Council for Economic Planning and Development (CEPD) and Securities and Futures Commission (SFC), operate more like the traditional agencies headed by a single responsible official. Commissioners of the CEPD and SFC essentially serve as *ex officio* representatives of other agencies.

Despite its institutional arrangements and protections against domination by political parties, the TFTC failed to achieve sufficient independence and professionalism during its first decade. To begin with, under Taiwan's Constitution it is virtually impossible to create a truly independent commission. This is principally because all agencies exist under the EY, the supreme executive agency under the Constitution. Indeed, the full title of the TFTC shows that it is a part of the EY! Therefore, as a member of Taiwan's cabinet, the chairman of the TFTC is susceptible to political pressure in the enforcement of the FTL. The enforcement campaign against high prices of foreign-imported cosmetics products in the early 1990s provides an example. This campaign closely followed a cabinet meeting in which the Premier complained about inflation pressure and high-priced imports.<sup>40</sup>

To be sure, the TFTC should operate like a commission. However, the chairman still can assert influence over the TFTC that is stronger than any regular member. In the first two terms of the TFTC, the chairman informally invited most commissioners to serve before the President ever approved the formal recommendation of nominated commissioners, including the chairman himself. For the appointment of the third-term TFTC commissioners, the DPP-controlled EY became even more assertive in proposing candidates.<sup>41</sup> In addition, the TFTC chairman's influence

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40. This mirrors what General Hau Pei-tsun did as Premier. Cosmetics happened to be one product that relied on pricing and other strategies to maintain a high end image. However, what Thorstein Veblen recognized as status goods did not fare well with the TFTC. *See supra* note 38 and accompanying text.

41. After relocating from mainland China in 1949, the KMT ruled Taiwan until the presidential election of March 2000.



reaches other areas such as case assignment, coordination with other agencies, and the mood of full-commission deliberations. The traditional Chinese bureaucratic culture also solidifies personal control by the titular head of an agency originally set up to have collective leadership and decision-making authority. This type of personal leadership by the TFTC chairmanship is particularly strong when he or she comes from the administration. The TFTC staff originally came from the Price Surveillance Council of the MOEA, where this kind of personal leadership was not unusual.

There is one healthy aspect of the commissioners' conduct. Even though no public record of this fact exists, all anecdotal evidence suggests that commissioners have become more argumentative over time. During the first two terms, the TFTC rarely resorted to actual voting among commissioners. Much like a panel of appellate judges, commissioners would compromise to reach a common position for more difficult cases. However, they developed a practice from the very first term of the TFTC to keep internal records of dissents. Starting in 2000, the TFTC began to publish dissenting opinions of the commissioners in the TFTC Gazette. Over time, this practice would make the TFTC more semi-judicial in behavior and therefore more accountable.<sup>42</sup>

Another reason for the phenomenon of a strong chairmanship is that despite the professional and political requirements for becoming a commissioner a limited supply of potential commissioners exists. They come from either the bureaucracy or academia, as political concerns preclude recruiting commissioners from the business community. Universities loan academics on a term of leave of absence, which usually is for three or four years.<sup>43</sup> Unfortunately, Taiwan enacted the FTL when campus politics began in earnest and Taiwan began to embrace democratization. University professors did not wish to allow their colleagues to enjoy the limelight and perceived power at the TFTC with an extended leave of absence! Therefore, universities extend such a three- or four-year leave of absence only once in a while.

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42. First-term TFTC commissioners, who argued that they should be able to write dissenting opinions, must receive credit. A compromise led to internal recordation of dissents. The source of inspiration for this practice came from Taiwan's Council of Grand Justices, which publishes dissenting opinions. In Taiwan, regular courts do not publish dissenting opinions. On this judicial practice, see Lawrence Shao-liang Liu, *Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan*, 39 AM. J. COMP. L. 509 (1991).

43. A TFTC commissioner possesses stature equivalent to that of a political appointee (analogous to a vice minister), which means that individuals who have not passed the civil service test for tenured civil servants may still qualify.

While commissioners with academic backgrounds are intellectually thoughtful and may bring expertise, they suffer from the usual problems of Taiwanese academics: a lack of real world experience and administrative skills. Their short leaves of absence also make it difficult to maintain continuity, unless a commissioner decides to permanently leave academia for the TFTC. Commissioners (other than the chairman and vice chairman, who have administrative responsibilities) receive assignments to supervise cases by random choice. In actuality, the staff is really in charge of moving the cases along and analyzing the issues. These factors combine to disconnect the link between the permanent TFTC staff and the temporary commissioners. In the first decade of the TFTC, this phenomenon created unavoidable confusion and delays.

In the first three terms of the TFTC, no chairman has ever been an expert in competition law or antitrust economics. This is unfortunate because a real expert could have launched a new agency like the TFTC with the necessary verve and technical capabilities. However, like other economic laws in a Chinese society, Taiwan enacted the FTL before a societal consensus for its need or psychological acceptance of it existed within Taiwan's bureaucracy. The first TFTC chairman, a first-rate professor of marketing and a savvy politician, focused on public awareness rather than enforcing the law as his foremost enforcement goal. This wise strategy dampened industry concerns and opposition because initially there was more smoke than fire. In addition, it significantly enhanced public awareness. However, this background caused unusual results to ensue: it weakened FTL enforcement. Because publicity generated many complaints from alleged victims, the TFTC has had a heavy workload. However, as the following case law analysis demonstrates, the work overload has caused the quality of its work to suffer.

Compared with the courts, the TFTC monopolizes FTL enforcement. Unlike the United States, the FTL is not and never will become judge-made common law. Very few FTL cases even exist, and none of them constitute meaningful precedent. Judges in Taiwan are professionally-trained law graduates who typically start their career young and without much practical experience (let alone business experience or exposure to the commercial practice of law). Virtually none of them show interest in the rigorous economic analysis that pervades antitrust law. Indeed, economics never has occupied a significant role in the curriculum of Taiwan's law schools, which remain part of the undergraduate college education. In 1999, Taiwan amended the FTL to require deferral of all criminal prosecutions arising under the FTL until the TFTC first has

assessed administrative fines. In light of the above, the FTL now operates as a kind of administrative law. Unless the administrative nature of FTL enforcement changes, it will have a long-term adverse impact on the development of antitrust jurisprudence in Taiwan.

The TFTC also has tried advocating competition policy within the EY, albeit with limited success. Primary regulators believe they should regulate and protect certain industry members. The fact that the TFTC sometimes fails to take a position based purely on competition policy grounds compromises its role as a champion for competition policy within the government. However, Taiwan's recent accession to the WTO (and the subsequent opening up of the economy) will make the TFTC's competition advocacy work much easier.

As previously mentioned, the TFTC carries a very heavy workload.<sup>44</sup> Since the mid-1990s, its annual intake has ranged from two thousand and twenty-five hundred cases involving petitions, complaints, and requests for interpretations. This amount does not include investigations initiated by the TFTC itself, interagency coordination on competition advocacy, and other activities, and is substantial for an agency of less than three hundred individuals. One reason for the TFTC's heavy workload is that it handles many cases that should be regular civil and commercial litigation cases. However, many complainants saw the advantage of using TFTC enforcement to gain leverage over an opposing party. For example, the bulk of FTL cases involve false advertising arising under Article 21 of the FTL.<sup>45</sup> Another important aspect of these enforcement statistics is that even though the TFTC initiated a significant number of investigation cases, it did not vigorously pursue them. The large amount of general unfair trade practice cases arising under Article 24 of the FTL reflects this.<sup>46</sup> In addition, combination approvals (that is, merger review cases) constituted a large portion of the TFTC's caseload.<sup>47</sup> This is deceptive because the FTL's low threshold actually captures many franchise participation cases, which should not concern antitrust authorities!

One indicia of the TFTC's monopolization of FTL enforcement is the plethora of rules and guidelines it developed throughout the first decade of the FTL. The FTL itself only authorized a few rules like the Implementing Rules and Rules Governing Multilevel Distributions and Sales. However, because of the KMT's perceived concerns of a robust FTL enforcement

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44. See Table 1, *infra*, at 161.

45. See Table 2, *infra*, at 161.

46. *Id.*

47. *Id.*

program, the TFTC began developing various guidelines to “guide” industry conduct through moral suasion. Moreover, after a few years work in a particular field, the TFTC accumulated some decisions, interpretations, and position statements on specific issues. The TFTC then combined these “hard” and “soft” laws into guidelines. Foreign practices, such as various U.S. Department of Justice and Federal Trade Commission guidelines also influenced the FTL. That many commissioners came from academia helped: academics could embrace such abstract principles more readily. Finally, as the TFTC expanded, it developed a need for certain procedural rules to achieve internal procedural coherence. The Administrative Procedure Act (APA), enacted in mid-1999 and entering into force in 2001, contained similar procedural requirements for predictability and transparency.

The following represent the major rules and guidelines promulgated by the TFTC. They include a set of guidelines on what types of joint construction bids would not be subject to the FTL. The TFTC adopted these guidelines before Taiwan enacted the Government Procure Law (GPL) as part of the WTO negotiations. The TFTC therefore intervened because enough commissioners during the TFTC’s first term thought this field was fraught with corruption, bid rigging, unfair competition, favoritism, and irregularities. However, some guidance would be necessary in the case of joint bids, which could be pro-competitive. Therefore, the TFTC intended these guidelines to fill the gap and provide a level playing field. After passage of the GPL, the TFTC then terminated these guidelines.

The TFTC also adopted a set of guidelines governing how the FTL would affect the private law conduct of government agencies. There are two ways for public agencies in Taiwan to get involved with private economic activities. First, they could operate as a state-owned operating business unit, like the old Directorate General of Telecommunications (DGT) before the passage of the telecommunications reform legislation. Second, they could purchase goods and services. In both cases, the TFTC has asserted its jurisdiction, and these guidelines sought to offer more predictability.

The work of trade associations often strengthens cartel activities. Therefore, the FTL defines enterprises to include trade associations.<sup>48</sup> The TFTC also adopted a set of guidelines interpreting what trade association conduct the FTL would reach.

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48. FTL art. 2(3).

In the area of merger control, the TFTC developed a set of criteria for determining the minimum sales amount that would trigger merger control. It also adopted a set of regulations governing fast-track merger review. As the discussion below will show, most merger control cases in Taiwan actually involve franchise participation cases. In response, the TFTC adopted a set of guidelines governing information disclosure by franchise owners. In addition, the TFTC also developed an important set of guidelines governing cross-border merger control in 2000.

In the area of cartel control, the TFTC adopted guidelines on the review of joint pricing decisions by small and medium size businesses pursuant to the SME exemption, elaborated upon below. The TFTC also adopted a set of deadlines pursuant to APA requirements that will apply to its review of applications for concerted actions.

In the areas of vertical restraints and unfair competition, the TFTC has formulated numerous guidelines. For example, it adopted a set of guidelines to review factors governing the determination of “threats of unfair competition,” mentioned in several clauses of FTL Article 19.<sup>49</sup> To implement the Article 19(3) imperative against improper enticement of competitors’ customers using illegal means, the TFTC adopted a set of guidelines on the limits and extent to which merchants may resort to offering gifts and prizes to attract customers. The TFTC also adopted a set of guidelines in late 1990s governing the exercise of intellectual property rights, including the issuance of warning letters asserting patent, trademark, and copyright infringement. Similarly, in 2001, the TFTC adopted a set of guidelines governing antitrust review of technology licensing programs. Another set of guidelines defines what constitutes illegal shelf space fees demanded by convenience store chains from brand merchants. When the importance of cable television programming became obvious and the industry began both vertical and horizontal consolidation, the TFTC adopted a set of guidelines governing the transparency of program licensing activities by program providers.

Other similar guidelines governing unfair competition include those addressing passing off, false advertising or misleading commercial symbols, and the pre-sale of housing units and related advertising programs. The TFTC took guidelines governing what constitutes deceptive and other unconscionable conduct to define the general principle against unfair and deceptive practices in Article 24 of the FTL. To demonstrate

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49. *See, e.g.*, FTL art. 19(3) (“No enterprise shall . . . [cause] the trading counterpart(s) of its competitors to do business . . . by coercion, inducement with interest, or other improper means . . .”).

the meticulousness of the TFTC, it even drafted a set of guidelines to govern its review of “illegal family and household outsourcing contract work” for factories.

Several guidelines are more procedural in nature. In addition to the cartel-approval deadlines, the TFTC adopted guidelines governing “administrative guidance,” which addresses how it will apply moral suasion to the private sector. Indeed, this kind of regulatory conduct could stand competition law on its head. However, for a society like Taiwan with little exposure to formal competition law, moral suasion remains important and necessary. The APA even contains a general authorization for such a regulatory practice. In addition, the TFTC adopted guidelines governing cross-border cases.

Two recent procedural guidelines are noteworthy. The first relates to the conduct of oral argument as part of the TFTC review. The second relates to the conduct of formal public hearings, which is particularly important for the future because the TFTC jealously has sought to protect its “independence” since its formation. As the EY polices the TFTC and its decisions, the TFTC runs the risk of the private sector challenging its decisions before the EY under the APA. The TFTC is increasingly uncomfortable with any other agency in the executive branch of the government challenging its decisions and therefore is beginning to resort to the APA public hearings procedure. According to the APA, an agency adjudication following a formal public hearing obviates an administrative appeal. One can only challenge the decision in court pursuant to the Administrative Litigation Law (ALL).

Even though the TFTC is a young and somewhat inexperienced antitrust regulatory agency, it is very energetic in the area of international outreach, including its practice of holding international symposia approximately every three years, at which internationally renowned scholars and leaders of fellow antitrust agencies give lectures.<sup>50</sup> The TFTC maintains a working relationship with the Organisation for Economic Cooperation and Development (OECD) through the OECD’s dialogue program with dynamic economies. Most importantly, as a part of the Asia-Pacific Regional Operations Center (APROC) initiative mentioned herein, the TFTC received the EY’s support and funding for proposing the current Asia-Pacific Economic Cooperation (APEC) Competition Policy Database

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50. The author had the pleasure of organizing the first international symposium of the TFTC entitled the Symposium on the International Harmonization of Competition Law and Policy. The proceedings have been reprinted in *INTERNATIONAL HARMONIZATION OF COMPETITION LAWS* (Chih-kang Wang et al. eds., 1995).

to the APEC forum. This database has the potential to be one of the strongest collections of competition law and policy in the Pacific Rim and the APEC region.

The TFTC's international outreach is not without reason. First and foremost, Taiwan suffered greatly from PRC-imposed diplomatic isolation. Taiwan therefore cannot participate in international organizations requiring statehood and political sovereignty. However, along with globalization came the necessity for all sorts of fora and dialogue on economic policy. Second, the heavy academic representation of the commissioners provided the TFTC with a contingent with excellent international training and exposure. Third, the TFTC clearly is thinking about what role its enforcement experience could play in much of Asia where fostering competition law and policy is an emerging enterprise.

#### *D. Enterprises and State Actions*

The FTL primarily regulates the conduct of "enterprises" in the market.<sup>51</sup> The TFTC continually develops case law on what constitutes an enterprise. For economic agents engaging in profit-seeking activities in the private sector, the more difficult question is the status of certain self-employed professionals and other individuals providing goods and services. The TFTC's interpretations seem to suggest that, as these individuals are laborers without a definite employer, they are not independent and therefore are not enterprises.<sup>52</sup> As a result, the TFTC declined to comment on the legality of price control arrangements or other means of restricting competition among such "laborers." One could find fault with these legalistic interpretations, as these individuals clearly operate as self-employed, free-lance "firms" as understood in the traditional economic sense. The FTL's definition of what constitutes an enterprise sweeps broadly enough to encompass them.

Taiwan is a mixed economy with state intervention. Accordingly, an important issue under ROC laws is whether and to what extent the FTL would apply to acts of government agencies and instrumentalities. For

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51. Article 2 of the FTL defines enterprises to include companies, sole proprietorships, partnerships, trade associations, and other persons or organizations engaged in transactions through the sale of goods or provision of services. *See* FTL art. 2(3).

52. *See, e.g.*, Fair Trade Comm'n, *Interpretation No. Kung-Yen-028*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Aug. 1992, at 43 (stating that members of the association of bookkeepers are not enterprises for tax purposes); Fair Trade Comm'n, *Interpretation No. Kung-Yen-059*, 2 GAZETTE OF THE FAIR TRADE COMM'N, July 1993, at 366 (stating that members of the association of sales promotion personnel are not enterprises).

certain, the definitions of “enterprises” and “business operators” capture SOEs, which are legal persons. However, it is more difficult to determine where to draw the line with government agencies, which engage in official acts.

Interpretations and decisions of the TFTC point to an emerging test in Taiwan: whether the agency engages in conduct considered to be a market transaction, or whether it performs a government function. For example, the review of payment standards by the Employment Insurance Bureau is a public act because the agency was conducting government functions in a program created under a mandatory provision of the Statute for Employment Insurance.<sup>53</sup> The TFTC’s interpretation relating to government funding of public hospitals’ budgets also indicates a public and official act of the government not subject to the FTL, though this fails to square with another TFTC interpretation treating subsidies for purer water supplies as illegal.

In yet another interpretation, the TFTC held that the Press of the Provincial Government of Taiwan (PPGT) was not an enterprise, as it was not an independent entity. In addition, the Provincial Government of Taiwan’s (PGT) decree to subordinate agencies and provincial, county, and city schools that they would contract out printing for official documents and books to the PPGT was an official act of the government designed to conserve the budget and ensure confidentiality. As such, the FTL failed to extend to this conduct.<sup>54</sup> However, assuming that the official conduct doctrine is acceptable, its application in this situation is questionable. The FTL’s definition of enterprises contemplates “groups,” which essentially are unincorporated entities with a representative. The PPGT clearly engages in the sale of goods, as book printing is a well-recognized market industry. The need to maintain confidentiality for printing, say, textbooks also presents a puzzling justification. The implicit justification that the PPGT would be cheaper than all commercial presses in Taiwan lacks an empirical foundation, and it defies the trend towards privatization in Taiwan.

The TFTC followed the same approach in another interpretation rendered just a few months later. The PGT engaged Taiwan Bookstore (TB), a PGT-affiliated enterprise, to print and supply textbooks for four courses taught in all elementary schools as a way to implement national

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53. See Fair Trade Comm’n, *Interpretation No. Kung-Yen-055*, 2 GAZETTE OF THE FAIR TRADE COMM’N, May 1993, at 53.

54. See Fair Trade Comm’n, *Interpretation No. Kung-Yen-034*, 1 GAZETTE OF THE FAIR TRADE COMM’N, Sept. 1992, at 31.



education. The TFTC opined that such conduct and TB's contract with commercial presses to delegate the printing and sale of such books both constituted official conduct, which falls outside the scope of the FTL. However, TB's distribution and sale of other textbooks was *ultra vires* and therefore could not constitute official conduct. To that extent, the FTL would reach TB's conduct.<sup>55</sup> Granted that national education is a policy implemented pursuant to the ROC Constitution, why should it necessarily follow that a state-owned bookstore could monopolize the provision of textbooks for certain courses?

In a similar interpretation, the Students' Group Insurance Program for the Province of Taiwan, which the PGT-affiliated Taiwan Life Insurance Company manages, received a challenge. The TFTC followed the same official conduct doctrine and opined that this program for students of public schools was a "mandatory social insurance" program of the PGT. The PGT-affiliated insurance company only served as an agent entrusted to administer the program.<sup>56</sup> One could perceive, for example, deposit insurance as a form of social insurance to reduce the systemic risks of runs on financial institutions. However, why would group insurance for students of some public schools necessarily constitute a form of social insurance? Like the PPGT interpretation, this interpretation fails to square with the logic of the official conduct doctrine.

The TFTC's later enforcement policy has focused on applying the FTL to government agencies as purchasers (instead of purveyors) of goods and services. This type of cases, such as writing specifications so as to favor a private vendor of goods or services, often arises in the context of opening tender offers. The enforcement policy nevertheless operates somewhat strangely, as fellow government agencies are rarely at the receiving end of enforcement activities by authorities administering competition laws. One would think that Taiwan's laws governing the ethics of civil servants would be a more applicable enforcement tool. They are, but the general perception of laxity in enforcement persists. Such enforcement under the FTL therefore reflects frustrations with the futility of codes of ethics and suggests an activist distrust of some agency behavior.

When the FTL was drafted in the 1980s, Taiwan was just beginning to open its economy. As a result, the FTL contained a provision in Article

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55. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-041*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Dec. 1992, at 53.

56. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-038*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Sept. 1992, at 35.

46(2) that exempted the conduct of SOEs for four years.<sup>57</sup> The drafters originally intended this short-term escape clause to provide an opportunity for the SOEs to make adjustments. From the beginning, however, the TFTC (which lacked the power to grant such exemptions) took a conservative approach to applications for such exemptions. The TFTC clearly enjoyed the general support of public opinion, which always has displayed grassroots resentment of the phenomenon of “permitting officials to set fires, but denying citizens the right to even light lanterns” in traditional Chinese culture. Pressure from consumers, media, and the private sector made it difficult for SOEs to obtain any meaningful exemptions.

Timing also was an important factor. The FTL was drafted when Taiwan still operated under the Martial Law decree. However, by the time of enactment, Taiwan already was a precocious democracy. The Article 46(2) exemption became an empty promise to SOEs and, ultimately, the 1999 amendment to the FTL repealed it. SOEs, however, were not subject to the rigorous enforcement of the FTL during the first decade of enforcement. The government simply could not break away from the previous policy (and social contract) and prosecute SOEs, which often carry social responsibilities. In other words, a weak exemption indeed constituted a useless shield. However, the TFTC also could not find the political will to turn other FTL provisions into a sword against SOEs. As the third term of the TFTC drew to a close, however, signs began to emerge of a new approach toward SOEs and private companies with substantial market power.

#### *E. The Regulated Industry Exemption*

Another exemption under Article 46 of the FTL essentially applies to regulated industries. This FTL provision permits a conduct-specific (and, to such an extent, essentially permanent) exemption when an enterprise engages in conduct “in accordance with law.”<sup>58</sup> For example, fixing the commission rate for securities brokerage transactions pursuant to the Securities and Exchange Law (SEL) was held exempt under this provision.<sup>59</sup> Similarly, financial institutions’ fixing of penalty rates for an

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57. Former Article 46(2) provided an exemption for conduct by such companies, public utilities, and transportation enterprises if they obtained approval from the EY. FTL art. 46(2) (repealed 1999).

58. FTL art. 46 (“Where there is any other law governing the conduct of enterprises . . . such other law shall govern; provided that it does not conflict with the purposes of this Law.”).

59. See Press Release, Fair Trade Comm’n, Taipei, Taiwan (Mar. 28, 1992).

early termination of time deposits in accordance with MOF regulations adopted pursuant to the Banking Law also was exempt.<sup>60</sup> In addition, local monopolies for gas utilities and their price formulation in accordance with the Statute for the Supervision of Privately-Owned Public Utilities constituted an exempt conduct.<sup>61</sup> Likewise, the Customs Law authorized MOF regulations governing the provision of customs clearance services. As a result, although the TFTC could invoke the Article 9 interagency coordination mechanism, it could not challenge these regulations as violations of the FTL.<sup>62</sup>

However, certain inconsistencies existed. For example, joint decisions made by members of the trade association of container transportation enterprises to increase freight without first obtaining the definitive approval of the Ministry of Transportation and Communications (MOTC) would not fall within the exemption of Article 46, even if the trade association reported the increase to the MOTC.<sup>63</sup> Where an administrative agency issued a decree impacting the market based on its general regulatory power to oversee the activities of regulated firms and not on the basis of a specific provision of the regulatory legislation, the FTL would not exempt the conduct. However, the TFTC was unclear as to whether collective conduct in reliance upon such unauthorized administrative guidance, or moral suasion, constituted an illegal cartel.<sup>64</sup>

For certain, exemptions for public utilities and transportation enterprises under the repealed 46(2) exemption overlap with the current Article 46 exemption. Regardless of their sophistication or propriety, different competition policies are formulated under the FTL to deal with the intricate interface of antitrust, regulation, and state ownership. The FTL thus allows some leeway for different economic principles governing these areas.<sup>65</sup> The TFTC has advocated opening the markets for Taiwan's

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60. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-049*, 2 GAZETTE OF THE FAIR TRADE COMM'N, Jan. 1993, at 41. As part of Taiwan's interest rate deregulation, the Banking Law ultimately was amended to prevent banks from fixing interest rates.

61. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-010*, 1 GAZETTE OF THE FAIR TRADE COMM'N, July 1992, at 22.

62. See Fair Trade Comm'n, *Administration of Customs Clearance Service & Trade-Van Information Service Co., Ltd.*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 41 (1999).

63. See Fair Trade Comm'n, *Decision No. 82-Kung-Chu-057*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Dec. 1992, at 21.

64. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-052*, 2 GAZETTE OF THE FAIR TRADE COMM'N, Mar. 1993, at 54.

65. For a classical theory of regulation and its critique, see STEPHEN BREYER, REGULATION AND ITS REFORM 13-35 (1982).

regulated industries in order to introduce more competition.<sup>66</sup> During the second term of the TFTC, the EY began an economic reform program called the APROC initiative. It involved an aspirational, voluntary program to remove entry and operating barriers, which would allow Taiwan to maximize its comparative advantages and seek a more prominent regional role. In other words, the APROC initiative was a revival of the ILI initiative of the mid-1980s.

One of the goals of the APROC initiative was to rely more on competition policy and less on industrial policy.<sup>67</sup> The TFTC quickly seized this opportunity to develop a program it called the “Article 46(2) Special Project.” The TFTC intended the special project to survey all laws and regulations that led to the displacement of market forces by government regulation. Under the auspices of this special project, the TFTC pursued a dialogue with other agencies that were the primary regulators of various industries. However, the TFTC ultimately failed to persuade other ministries to drop their anticompetitive industry regulations. Other agencies would take the position that they were coequals with the TFTC. In fact, in the 1999 amendment to Article 46, the Legislative Yuan (LY) strengthened the hands of the TFTC. The amendment requires that industry regulation follow the “spirit” of the FTL. In other words, the LY intended this amendment to transform the FTL into an economic Magna Carta. However, the amendment turned out to offer only lip service. As the 1999 amendment was not part of the original amendment bill sponsored by the TFTC, it did not invoke this new economic power itself. In sum, despite its failure, the TFTC’s competition advocacy effort further reinforced the deregulatory and market-opening measures of other agencies.

#### *F. An Exemption Based on Intellectual Property Rights*

The FTL also contains an exemption for the “proper exercise” of intellectual property rights such as patents, trademarks, and copyrights.<sup>68</sup> This measure should be recharacterized as a “rule of reason” approach to licensing and other antitrust issues relating to intellectual property. In

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66. See *Interview with Chih-kang Wang: Even with Punches on the Nose, Promotion of Fair Trade Is a Must*, UNITED DAILY NEWS, Jan. 2, 1994, at 19.

67. See Lawrence S. Liu, *Aspiring to Excel—The Uneasy Case of Implementing Taiwan’s Asia-Pacific Regional Operations Center Plan*, 10 COLUM. J. ASIAN L. 199 (1996). The author served as the chief architect of this policy in favor of competition policy, and served as the first Director General in charge of the APROC initiative.

68. FTL art. 45. It is notable that Article 45 does not specifically mention know-how.

other words, this provision does not contemplate a true exemption, which would presuppose a certain level of improper conduct. As Taiwan continues to liberalize its domestic market, integrate with other economies in the region, and develop more mature, higher value-added technologies, the antitrust implications of licensing activities become more important. By the mid-1990s, the TFTC developed guidelines governing, for example, how owners of technologies such as patents could send out warning letters. Failure to comply with these guidelines when sending out warning letters would constitute an improper exercise of their intellectual property rights, and subsequently the intellectual property exemption would not apply.

Somewhat similar to the old Article 46(2) exemption for SOEs, the intellectual property exemption was not much of a shield. By the end of its third term, the TFTC even began using the FTL as a sword against intellectual property licensing programs. The outgoing third term adopted guidelines governing licensing activities in early 2001. On the same day, it handed down a decision challenging the joint CD-R patent licensing program of Philips, Sony, and Taiyo Yuden, three global leaders holding advanced CD-R and DVD technology. The TFTC accepted most of the allegations made by Taiwanese licensees, which occupied about 70% of the global market for the manufacture of CD-Rs.

## II. MONOPOLY CONTROL

### *A. Finding Monopolies and Oligopolies*

The central goal of antitrust rules is to control monopolistic behavior. Taiwan's FTL sets forth an elaborate framework for finding monopolies and punishing monopoly conduct. Patterned after the German and European Union models of competition law, it covers both monopolies and oligopolies.<sup>69</sup> Ostensible reasons for controlling oligopolies are that the government perceives many sectors of Taiwan's economy to be highly concentrated and proving collusive conduct could be very difficult.<sup>70</sup> The mandatory publishing and updating of a list of monopolistic enterprises by

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69. See FTL art. 5. A monopoly exists when an enterprise either does not face competition in the relevant market (which contemplates both the product and geographical markets), or occupies such a dominant market position that it excludes competition. Several enterprises that collectively constitute a monopolistic market structure and fail to engage in price competition could be deemed monopolistic or oligopolistic.

70. See Lawrence S. Liu, *In the Name of Fair Trade: A Commentary on the New Competition Law and Policy of Taiwan, The Republic of China*, 27 INT'L LAW. 145, 149 (1993).

the TFTC, based on this government fear of highly concentrated sectors, is a measure borrowed from the Korean Fair Trade Law. The task of gathering basic industry information began even when the FTL was still pending in Taiwan's LY, and in February 1992, the TFTC published a list of forty monopolies covering thirty-three relevant markets.<sup>71</sup>

The Implementing Rules provide for qualitative and quantitative tests to assist in the determination of the relevant market and the existence of monopolies.<sup>72</sup> Certain factors must be taken into account, and certain specific numeric rules of thumb exist. All in all, however, the approach is generally structural; like Article 22 of the German GWB, the finding of certain market shares, regardless of industry, presumptively could lead to a finding of a single-firm monopoly, duopoly, or three-firm oligopoly. In February 2002, these tests were elevated from the Implementing Rules and placed directly into the FTL through an amendment. This amendment has made the FTL more rigid in determining whether market power exists.

Under the FTL as amended in 2002, a monopoly or oligopoly does not exist unless it meets an aggregate market share test. In addition, either an individual market share test or an individual revenue test must be satisfied. In the case of a single firm, an enterprise controlling a 50% share in the relevant market could constitute a monopoly. Two enterprises jointly possessing a two-thirds market share could constitute a duopoly. Three enterprises collectively commanding a 75% share in a market could constitute a three-firm oligopoly. However, each such enterprise also should have at least a 10% share in the relevant market, or more than NT\$1 billion (less than US\$40 million) in revenues for the fiscal year preceding the determination.

Where special circumstances exist, enterprises could constitute monopolies or oligopolies even though they do not meet these general tests. Such circumstances include entry barriers to the provision of goods or services created by law (such as government licensing regulations) or technology, and other factors that enable existing enterprises to influence the supply and demand in the relevant market and exclude competition.<sup>73</sup>

The TFTC subjects qualifying monopolies to a more rigorous antitrust scrutiny. They may not (1) engage in unfair exclusion to block other competitors, (2) make improper decisions on the prices of their goods or

71. See Fair Trade Comm'n, *Public Notice No. 82-Kung-Fa-Mi-002*, 2 GAZETTE OF THE FAIR TRADE COMM'N, Feb. 1993, at 1.

72. See Implementing Rules to the Fair Trade Law of 1999 arts. 3-5, available at <http://www.ftc.gov.tw> [hereinafter Implementing Rules].

73. FTL arts. 4-5.

services (or improperly maintain such prices), (3) provide discriminatory treatment to counterparties with just cause, or (4) otherwise abuse their dominant market positions.<sup>74</sup>

The requirement of publishing and updating a list of monopolies in the abstract under rigid quantitative tests and before any public or private enforcement action is taken proved to be costly, marginally useful, problematic, and lacking support in economic theories. First, this exercise essentially used Taiwan as the relevant geographical market. Yet, Taiwan's export promotion policy and its status as an increasingly open island economy undercut the persuasiveness of this approach. Many Taiwanese firms compete largely on a global basis. Enforcement authorities need not delimit the boundary of geographical markets by their national borders. The joint venture between General Motors and Toyota to manufacture cars in Fremont, California serves as an example.<sup>75</sup>

Second, the listing and updating requirement created the incorrect impression that Taiwan was full of monopolies. No one disputes that Taiwan, like any other economy, may contain monopolies. Most of the forty enterprises listed as monopolies or oligopolies were either colonial companies inherited from the Japanese occupation from 1895 to 1945 or products of Taiwan's postwar industrial policy. The FTL-mandated list of monopolies in no way represents Taiwan's current economic reality.

Third, the TFTC applies the relative and absolute quantitative tests arbitrarily, without regard to the different nature of various industries. Even the structural market share test under the GWB model, from which the FTL drew its inspiration, may not withstand rigorous academic scrutiny. In addition, despite the enumeration of other factors, the apparent dispositive factor is market share, which may have received too much weight, especially in light of the crude approach to market definition.

In the European Union, a similar decision of the European Commission is instructive. DMV, the surviving company of a proposed merger between the stainless steel tube subsidiaries of Germany's Mannesmann, France's Vallourec, and Italy's Ilva would control 36% of the European market. With Sweden's Scandvik already controlling 33% of the stainless steel tube market, the proposed merger could create a 70% duopoly. Despite the urging of its competition commissioner, Karel Van Miert, and the Merger Task Force of Directorate General IV, the European Commission in a tie

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74. FTL art. 10.

75. See John E. Kwoka, Jr., *International Joint Venture: General Motors and Toyota*, in *THE ANTITRUST REVOLUTION* 46-79 (John E. Kwoka, Jr. & Lawrence J. White eds., 1989).

vote decided that the merger was legal.<sup>76</sup> Query the policy justifications for, and wisdom of, a small, open economy such as Taiwan taking a position on market structure that is more stringent than the European Union!

Fourth, the FTL requires a finding that firms in a heavily concentrated market not engage in actual price competition before being deemed a collective monopoly. This exercise apparently was disregarded and, surprisingly, the firms contesting their listing did not raise this issue in their briefs.<sup>77</sup>

Fifth, the FTL's requirement of periodically listing monopolies operated like a mandate to strenuously and regularly aim, but not shoot, at a moving target. This wasted a lot of time; at the time when the TFTC worked on investigations and research leading to the publication of the list, it had to mobilize almost half of its professional staff for months exclusively for this task.<sup>78</sup> The FTL's legislative intent was benign: send a warning so that only the labeled monopolies need be concerned. However, when competitors or consumers filed complaints, or when the TFTC took enforcement actions on its own motion, market conditions may have changed. This constitutes the principal reason why the FTL was amended in 1999 to do away with this requirement of listing monopolies.

Sixth, even though the list of monopolies may not be completely correct, it is still an ironic accusation of Taiwan's industrial policy from an earlier era. Most monopolies turned out to be either state-owned or state-affiliated enterprises or firms created as a result of government policies restricting entry into the relevant segment of the economy.

### *B. Rules Against Monopolization and TFTC Case Law*

The rules against monopolization in Article 10 are the centerpiece of the FTL. These rules prohibit a monopoly (or a group of oligopolies) from directly or indirectly using unfair methods to prevent other enterprises from competing. It may not improperly determine, maintain, or change the prices of goods or the remuneration for services. In addition, it may not

76. See *European Competition Policy: Down the Tubes*, ECONOMIST, Jan. 29, 1994, at 66-67.

77. Until such challenges became final, some academic controversy existed as to whether an announcement like this constitutes an agency action challengeable under Taiwan laws. However, Interpretation No. 156 of Taiwan's Council of Grand Justices, which allows standing to citizens adversely affected by a modified urban plan, suggests its justifiability.

78. The author served as an adviser to the Preparatory Office of the Fair Trade Commission, a precursor to the TFTC, and saw firsthand the work of the officials who ultimately comprised the TFTC staff.



cause a counterparty to provide preferential treatment without proper reasons. Finally, Article 10 contains a general prohibition against the abuse of a dominant market position. In the abstract, these anti-monopolization rules appear sound and appropriate. However, as the text below demonstrates, the challenges lie in the actual enforcement of these rules.

Reflecting a concern with the exclusionary practices of public utilities and legal monopolies, the TFTC has invoked the anti-monopolization provisions of Taiwan's FTL to prevent an exclusionary practice by the state-owned Chinese Petroleum Corporation (CPC). A listed monopoly in several market segments (including the provision of family-use liquid gas), the CPC possessed a general distribution arrangement with the Liquid Gas Supply Division (GSD) of the Veterans' Assistance Council (VAC). The VAC is an agency created in the 1950s that owns businesses run by veterans as a way to assist their livelihood. The CPC had granted GSD exclusive franchises. Following a challenge of this marketing arrangement as being illegal under the FTL, the TFTC gave the CPC six months to open the distribution franchises.<sup>79</sup>

The *CPC Liquid Gas* case is important in several aspects. First, the TFTC took action directed at an SOE. Such enforcement necessarily has political significance. The challenged monopoly, in fact, is one of the CPC's less important monopolies, which, for example, monopolized the importation and refinery of crude oil until 1999. Second, the FTL's enforcement action followed the moral suasion rather than adversarial approach. This essentially resulted in a de facto consent decree. In other words, the TFTC adopted a lenient and clearly unfair approach with the CPC, perhaps because of its status as a state unit. Third, it remained unclear whether the FTL provides any sort of structural remedy. The *CPC Liquid Gas* case came very close to reaching the same result of applying a structural remedy, for there was no divestiture or break up of an enterprise, but the FTL nonetheless was able to gouge open the vertical restraints in the market.

In another case, the Fu Hwa Securities Finance Company, a TFTC-listed monopoly controlled by the then-ruling party in Taiwan, the KMT, and occupying a strong position in margin lending business, received a challenge. The TFTC failed to take enforcement action against Fu Hwa because it achieved its monopoly or market dominant status by

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79. See Chih-kang Wang, *The Current Status and Prospect for the Enforcement of the Fair Trade Law 15* (Dec. 11, 1993) (copy on file with author) [hereinafter Chairman Wang's Report].

authorization under the SEL and Taiwan's industrial policy of an earlier era.<sup>80</sup> Even the SFC does not possess a complete say in whether the securities financing market can be liberalized.

In a way, the *Fu Hwa Securities Finance Company* case is more significant than the *CPC Liquid Gas* case. After finding that Fu Hwa did not violate the FTL, the TFTC nevertheless invoked Article 9 of the FTL to argue strongly with the SFC, the MOF, and the CBC for opening the markets. Article 9 essentially requires the TFTC to consult other agencies that regulate certain industries and businesses when applying the FTL. This requirement serves as a useful wedge for the TFTC. It enables the enforcement authorities of competition laws to both conduct moral suasion with private enterprises and seek voluntary compliance action and competition advocacy within the government bureaucracy.

The FTL's anti-monopolization provisions in Article 10 obviously target the pricing practices of listed monopolies.<sup>81</sup> There is reason to believe that the TFTC would challenge predatory pricing. In a bid challenged by other competitors under a similar provision of the FTL,<sup>82</sup> one of two affiliated biomedical companies won the bid for a contract with Taiwan's Department of Health for hepatitis-B vaccines. It sent in a token bid price of NT\$0.1, and its sister company bid on the basis of supplying the vaccines at no charge. The TFTC held that, once adopted, consumers could not substitute the vaccines easily. Therefore, such bidding conduct constituted an attempt to corner the market for similar supplies in the future through predatory pricing.<sup>83</sup>

The *Vaccine Bid* case suggests that the FTL generally is concerned with predatory pricing. A clear inference is that the FTL's anti-monopolization provisions also manifest the same concerns. Like European competition laws, the text of Article 10 of the FTL reaches broadly enough to be concerned with artificially high prices. For example, the TFTC's aforementioned investigations of imported cosmetics products echo the same concerns with high prices.

As another aspect of the FTL's monopoly control, price and non-price discrimination could constitute monopolistic conduct challengeable under Article 10 of the FTL. However, unjustifiable discrimination against other enterprises and consumers could constitute a violation of either the general

80. *See id.*

81. *See* FTL art. 10.

82. The bid was challenged under Article 19(3) of the FTL, which prohibits an enterprise from using improper incentives to entice others to engage in business with it. *See supra* note 49.

83. *See* 1 GAZETTE OF THE FAIR TRADE COMM'N, June 1992, at 1.

anti-discrimination rule<sup>84</sup> or the catchall rule against unfair competition.<sup>85</sup> The legislative history of Article 10(c) demonstrates a concern with “monopsony.” The *CPC Jet Fuel I* case is the leading case arising under the FTL, although the TFTC did not decide it under Article 10(c).<sup>86</sup> Before the CPC’s listing as a monopoly, the TFTC held that the CPC violated the FTL provision generally prohibiting unjustifiable discrimination.<sup>87</sup> The conduct involved supplying a privately owned domestic airline with jet fuel at higher prices than those for both China Airlines, the de facto state-owned flag carrier, and foreign airlines.

Much remains unexplored as to the meaning of “abuse of a dominant market position” under the FTL’s anti-monopolization rule in Article 10(d). Article 148 of Taiwan’s Civil Code contains a rule against the “abuse of rights” in civil matters. However, the criminal sanctions of imprisonment for violating the similarly worded rule in Article 10(d) of the FTL create discomfort in Taiwan’s business community, despite the argument that the anti-monopolization rule under Section 2 of the Sherman Antitrust Act, which carries the same imprisonment sanctions, does not even define “monopolization.” Similar provisions of the German GWB and Article 82 of the Treaty of Rome do not authorize criminal sanctions.

The TFTC appears to be very careful about invoking FTC Article 10(d), even though a published list of TFTC-mandated monopolies existed during the period when former Article 10(2) required such a list. In view of its problems and controversies with listing such monopolies, the TFTC appears to be extremely careful in its investigation of any case arising under Article 10(d), and indeed under any clause of Article 10. Until 2000, the TFTC seemed content with resorting to more well-defined provisions to challenge anticompetitive conduct. For anticompetitive market structures reflecting certain regulatory concerns, the TFTC seemed more inclined to rely on its “Article 9 program” of resorting to moral suasion with regulated enterprises and competition advocacy with their regulators.

One example of this moral suasion approach is the *Taipei Water Department Overdue Bills* case. It involved a TFTC request made on the Taipei Water Department in 1995 to amend its operating charter to no

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84. FTL art. 19(2) (“No enterprise shall . . . [treat] another enterprise discriminatively without justification . . .”).

85. FTL art. 24 (“In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order.”).

86. See 1 GAZETTE OF THE FAIR TRADE COMM’N, Sept. 1992, at 11.

87. See *supra* note 84.

longer require new users at the same location to pay the overdue bills of old users before they could obtain water.<sup>88</sup> Even though this case resembles a consumer protection case, and the Taipei Water Department was not trying to exclude competition (it was a monopolistic public utility), the TFTC invoked Article 10 of the FTL. However, it did not take formal enforcement action. Rather, using the Article 9 interagency coordination provision, the TFTC asked the Taipei Water Department and other water companies, as well as their primary regulators, to remove such unreasonable payment requirements from their operating charters.

Another example of the moral suasion approach is the *Taiwan Stock Exchange Data Transmission* case.<sup>89</sup> The Taiwan Stock Exchange (TSE) is a self-regulatory organization under the SEL. Until the early 1990s, it constituted the only centralized securities trading market in Taiwan, and as such, a monopoly in its relevant product market. The TSE entered into an exclusive data transmission service agreement with Chung Hua Telecom (CHT), the state-owned telecom monopoly authorized by the DGT.<sup>90</sup> The TFTC found that the TSE established minimum capitalization and other factors as entry barriers to providing such electronic data transmission services. Instead of formally invoking Article 10 of the FTL, however, it relied again on Article 9's interagency coordination provision to ask for the revision and removal of this anticompetitive rule.

In 1996, the DGT itself fell under attack. As the state-owned monopoly telecommunications operator, it provided very poor service. Consumers complained to the TFTC that the DGT and its subordinate local offices failed to properly investigate subscriber complaints about calls that they claimed someone else made. In the *Telecom Office Billings* case, the TFTC hinted at invoking Article 10.<sup>91</sup> However, again it relied on Article 9's interagency coordination provision to ask DGT to improve its billing and call verification practice.

Consumers challenged the Taipei Water Department in the 1996 *Taipei Water Department Installation Fees* case, alleging overcharging for installation.<sup>92</sup> The Taipei Water Department also prohibited users from

88. See Fair Trade Comm'n, *Public Utility*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 29-30 (1999).

89. See Fair Trade Comm'n, *Taiwan Stock Exchange Corp.*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 30-32 (1999).

90. Indeed, as the forthcoming text will show, before the telecommunications reform in 1995-96, the CHT was recognized as the business arm of the DGT.

91. See Fair Trade Comm'n, *The Telecommunication Offices*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 32-34 (1999).

92. See Fair Trade Comm'n, *Taipei Water Department*, 1 CASES AND MATERIALS ON THE FAIR

outsourcing such installation from other contractors. Therefore, in addition to allegations of the abuse of a monopoly position and overcharging for installation, there were allegations of exclusionary practices. These findings would have supported an Article 10 anti-monopolization case. Again, to maintain harmony and allow an adjustment period, the TFTC invoked Article 9's interagency coordination procedure to end this anticompetitive activity.

Trade policy, specifically the high prices for domestically produced sugar, fell under attack in the *Taiwan Sugar Corp. High Sugar Price* case of 1996.<sup>93</sup> For decades, Taiwan has maintained a high price policy for domestic sugar and prohibited the importation of foreign sugar. The state-owned Taiwan Sugar Corp., which has lost its competitiveness in the core farm business but remains one of the largest land owners in Taiwan, administers this policy. In this case, food processing companies that were major users of sugar complained to the TFTC that high sugar prices and a no importation policy added costs to their products. The TFTC found no Article 10 violation because (1) Taiwan Sugar Corp. was only following government orders, (2) there were many issues regarding the opening up of the sugar industry, and (3) the TFTC already had made its competition advocacy pitch in inter-government coordination meetings. In other words, the TFTC decided to throw up its hands!

In 1996, two air freight warehousing companies complained to the TFTC, which led to its decision in the *Airport Express Delivery Center* case.<sup>94</sup> These companies had applied to the Taipei Customs Bureau in 1995 to establish an express delivery center. However, the Customs Bureau turned down their applications because it claimed that they lacked enough manpower to regulate these new facilities. Meanwhile, under a bilateral air transport agreement between Taiwan and the United States, Taiwan agreed to supply express courier transshipment facilities to American carriers (such as Federal Express and United Parcel Service) if space permitted. Since this is a heavily regulated area and the government possessed an APROC policy involving certain usage of airport facilities, the TFTC went through an Article 9 coordination without ever taking a definitive position on the complaints.

In 1997, food processing companies challenged the Taiwan Sugar

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TRADE LAW OF THE REPUBLIC OF CHINA 35-36 (1999).

93. See Fair Trade Comm'n, *Taiwan Sugar Corp.*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 37-38 (1999).

94. See Fair Trade Comm'n, *Yung Ch'u Co., Ltd. & Yuan Hsiang Warehouse Co., Ltd.*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 38-39 (1999).

Company in the *Taiwan Sugar Corp. Payment Terms* case.<sup>95</sup> As the name suggests, the food processing companies challenged the Taiwan Sugar Company over unreasonable payment terms. Their complaints included demands made by Taiwan Sugar Corp. for cash payments against purchase orders, preventing buyers from personally loading sugar, and requiring buyers to furnish transportation to pick up grain sugar. The TFTC found that these were not unreasonable terms and were common in other industries as well. As a result, it found no Article 10 violation.

The 1997 *Taiwan Stock Exchange Securities Trading Information* case represents the culmination of the moral suasion approach.<sup>96</sup> In this case, allegations were made against the TSE for abusing its dominant market position by charging for securities trading information based on the number of computer terminals that securities firms owned. Allegations also were made that this practice would complement the TSE's revenues, hinting at some kind of tying arrangement. The TFTC concluded that the SFC had approved the TSE regulations and it therefore could not exercise "complete discretion under administrative guidance." Nevertheless, the TFTC sought adjustment of this practice and the TSE caved in by offering a wider range of tiered pricing.

In March 2000, Taiwan's presidential election led to a DPP President, who was inducted in May. For the first time in about fifty years, the KMT became an opposition party. This political change coincided with the TFTC's first two anti-monopolization decisions. The first of such decisions was the *Taipei Metropolitan Gas Company* case.<sup>97</sup> Based on consumer complaints, the TFTC found that the Taipei Metropolitan Gas Company regularly had installed a type of gas meter (called the No. 5 Meter) that would have a higher level (eighteen degrees) of minimum usage per month for many household consumers, rather than the No. 3 Meter, which only had a minimum usage of twelve degrees per month. The TFTC also found that compared with other gas utilities, minimum-usage payments made to the Taipei Metropolitan Gas Company accounted for 8.7% of all of its accounts, whereas similar minimum-usage payments by other gas companies only represented somewhere between 0.02% and 1.32% of their total accounts, representing a ratio eight to ten times higher.

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95. See Fair Trade Comm'n, *The Taiwan Sugar Corp.*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 40-41 (1999).

96. See Fair Trade Comm'n, *Taiwan Stock Exchange Corp.*, 1 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 43-44 (1999).

97. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-083*, 9 GAZETTE OF THE FAIR TRADE COMM'N, May 2000, at 125.

In addition, TFTC investigations also showed that in two sample months in 1994 and 1999, the No. 5 Meter represented 69.5% of all meters used by the Taipei Metropolitan Gas Company. The TFTC then found the Taipei Metropolitan Gas Company to be a monopoly, an easy determination due to its status as a statutory public utility. The TFTC also found that its conduct violated Article 10(b)'s improper price determination test. The TFTC ordered the Taipei Metropolitan Gas company to both pay a substantial administrative fine (NT\$5 million, or about US\$170,000) and install within one month No. 3 Meters for households that would have met the lower minimum usage level.

The TFTC rendered its second anti-monopolization decision in the *CPC Jet Fuel II* case.<sup>98</sup> As part of the petroleum liberalization plan in Taiwan, the government gradually allowed more competition with the CPC, the state-owned former monopoly. Wen Chiu Company then began providing jet fuel to international carriers at the CKS International Airport in March 1997. In July 1997, the government opened up the jet fuel supply market for domestic carriers as well. Wen Chiu Company then sought quotations from the CPC twice in 1999 for jet fuel supply so that it could supply domestic carriers. By January 2000, the CPC advised Wen Chiu Company that since all domestic carriers had signed annual jet fuel supply agreements with the CPC, it would not supply such fuel to Wen Chiu. Wen Chiu Company subsequently complained to the TFTC.

Other than a value-added tax of 5%, the TFTC found no differentiation between jet fuel supply to international carriers and domestic carriers. In addition, it found no operational differences in the storage, distribution, and supply of jet fuel for these different carriers. The TFTC further found that delays in the Civil Aeronautics Administration's regulations on jet fuel supply foreclosed Wen Chiu Company's opportunity to supply domestic carriers with imported jet fuel. In addition, Formosa Plastics (CPC's largest competitor in the petroleum market since 2000) did not initiate production of jet fuel until May 2000. Therefore, the TFTC found that the CPC's procrastination, followed by its refusal to deal, constituted an open-and-shut case of monopolistic exclusionary practice in violation of Article 10(b) of the FTL. The TFTC fined the CPC NT\$5 million as well.

In a major decision in early 2001, the outgoing third-term TFTC showed its concerns with high prices in a major Article 10 case against

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98. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-170*, 9 GAZETTE OF THE FAIR TRADE COMM'N, Oct. 2000, at 62.

three leading foreign firms, Philips, Sony, and Taiyo Yuden.<sup>99</sup> These companies lead the development of technologies for the manufacture of CD-R products. They own blocking patents, which are essential to the manufacture of CD-R products. As a part of the global licensing arrangement, the three firms entered a program delegating Philips as the front-line authority to license technologies represented by their patent pool to manufacturers. Typically, these joint licensing agreements, including those with Taiwan licensees, provide for a running royalty of 3% of net sales, or ten Japanese Yen per piece, whichever is higher.

Over time, Taiwanese licensees became leading manufacturers of CD-R products worldwide, enjoying more than 70% of the global market. Keen competition (and perhaps price wars brought on by Taiwan licensees) dramatically reduced CD-R prices over time as well. As a result, the Japanese Yen flat royalty rate became a substantial cost for Taiwanese licensees' manufacture of CD-Rs. When they refused to pay this rate and demanded price renegotiations, the foreign licensors took recourse with civil litigation. As a countermeasure, the licensees filed complaints with the TFTC, alleging both illegal cartel-like licensing in violation of FTL Article 14 and monopolization in violation of FTL Article 10. After more than eighteen months of investigations, the TFTC ruled against the foreign licensors and levied a substantial administrative fine. The foreign licensors since have desisted from joint licensing activities, paid the fine, and challenged the TFTC's decisions with the EY as part of the administrative appeal process.

Several aspects of the TFTC's decision against foreign licensors of CD-R patents are problematic. First, the TFTC defined the relevant product market as the innovation market for CD-Rs, failing to take other storage devices and technologies into account. More important, the TFTC took the position that a drop in the prices of the licensed products would require pricing renegotiations. Otherwise, it would impact the licensees unfairly. Specifically, the TFTC cited the "improper price maintenance" language of Article 10 and argued that charging high prices would violate the rules against monopolization. Among the arguments supporting the TFTC's position is the doctrine of unforeseen circumstances (reflected in the Latin doctrine of *res sic stantibus*) under civil obligations law.

It is amazing that the TFTC found "high" rather than low prices to be monopolistic conduct! Increasing prices invites competition, whereas

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99. See Fair Trade Comm'n, *Decision No. 90-Kung-Chu-021*, 10 GAZETTE OF THE FAIR TRADE COMM'N, Feb. 2001, at 150. The author represents the foreign licensors in their defense and challenge of the TFTC decision.



reducing prices may smack of predatory pricing. As Lester Telser discovered, licensors (or manufacturers owners) of products would not overcharge licensees (or distributors) because it would be similar to taxing licensees and would lead to a sales shrinkage.<sup>100</sup> This, argued Telser, would not happen if manufacturers shared the same economic incentives as distributors: to maximize sales and profits.<sup>101</sup> Therefore, it is in the self-interest of licensors to ensure that they do not overcharge for their patents. In fact, it is clear that the joint licensing of blocking patents would maximize wealth and efficiency more than unilateral or sequential licensing. Indeed, one of the commissioners since has published a paper demonstrating the legality of such a joint licensing program and the propriety of the pricing of the royalties *ex ante*.<sup>102</sup>

The *CD-R* case is important in several aspects. First, the TFTC's enforcement policy—that “high” prices may constitute monopolization—is dangerous and misguided. Second, the TFTC read the “improper price maintenance” language of Article 10 as creating a duty to renegotiate in good faith when market conditions change. The context of the *CD-R* case shows that one possible reason for the market change is the price wars brought on by Taiwan *CD-R* manufacturers licensed by the three foreign patent owners. In any event, the TFTC has intervened in the terms of royalty arrangements. Third, the licensees themselves controlled about 70% of the global market, and in the FTL's own terms, this may even present a case of “monopsony” (an aspect the TFTC has ignored). Fourth, in finding that foreign licensors constituted monopolies, the TFTC adopted a narrow approach of product market definition by focusing on the technology of *CD-R* manufacturers, rather than technologies for all similar storage devices. Fifth, this case presents a classic “us versus them” scenario, as licensors are foreign and licensees are leading Taiwanese companies. Therefore, there is a high risk of using the competition law to “protect” national champions. This would stand competition law on its head!

While the *Taipei Metropolitan Gas Company* and *CPC Jet Fuel II* cases are less difficult, their simplicity helped the TFTC (or at least enough TFTC commissioners to constitute a clear majority) launch its anti-monopolization campaign in the closing days of the FTL's first decade. In fact, the *Taipei Metropolitan Gas Company* case is more like a consumer protection case. The Taipei Metropolitan Gas Company was not

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100. See Lester Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

101. *Id.*

102. Jun-ji Shih, *Patent Pools: Analysis and Antitrust Implications* (2001).

concerned with competition because it had no competitors. The TFTC could have relied on the catchall in Article 24 of the FTL, but instead it chose to invoke Article 10 to make a point and signal its new anti-monopolization policy.

While direct evidence of the TFTC's higher profile beginning in 2000 is difficult to identify, the coincidental timing of the political change in Taiwan and more aggressive FTL enforcement shows that politics matter. It matters if the decentralization of political power allows antitrust authorities to perform their jobs professionally. However, politics can have an adverse effect on antitrust law enforcement. In the *CD-R* case, some of Taiwan's national legislators publicly took positions favoring the Taiwan licensees and demanded that the TFTC "rigorously enforce the law." The *Taipei Metropolitan Gas Company* and *CPC Jet Fuel II* cases are important in that both monopolies are creatures of either government law (the metropolitan gas utility) or policy (giving the CPC decades of monopoly status for strategic reasons). The implication is that if Taiwan further liberalizes its domestic economy by embracing competition policy, competition law enforcement would become much easier.

In May 2002, the leading members of the Taiwan press reported that the TFTC would begin an investigation of Microsoft Taiwan's licensing practice.<sup>103</sup> This case arose out of the Ministry of Justice (MOJ)'s crackdown on illegal software. To set a good example, the MOJ itself had to purchase legal software from Microsoft Taiwan. Some legislators in the LY then decided to politicize this issue by claiming Microsoft Taiwan charged monopoly rent. They then filed an official request for the TFTC to look into possible excessive pricing and other licensing practices of Microsoft Taiwan. There was no allegation of illegal exclusion of competitors by Microsoft Taiwan. In other words, these legislators thought the TFTC would find a violation of the FTL if the price was "unfair." After all, they reasoned, is not that what a fair trade law is all about?

### *C. Merger Control*

Merger control occupies an important position in the FTL. Taiwan chose to transplant Western competition law in a virtually wholesale manner. As a result, the integral role that merger control plays in Western competition law is now an integral part of the FTL. Yet, in Taiwan, the difficulty of developing an enlightened policy that reflects Taiwan's

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103. The author represents Microsoft Taiwan in this investigation.

smaller domestic economy complicates merger control. This issue of market size is more acute in the area of merger control law, as such control represents an incipency measure.

In Taiwan's merger control regime, concerns with fairness seem to occupy as prominent a position as concerns with the anticompetitive effects of mergers. This occurs because merger control reflects a populist attitude towards regulating the convergence of economic resources among business firms as well as concerns with irregular corporate activities, such as related party transactions at other than arm's length and the threat that larger businesses present to smaller ones. The definition of mergers, or "combinations," under the FTL was affected by an Affiliated Companies Law bill that amended the Company Law, so as to control activities among groups of companies with a view to protecting creditors and minority shareholders!<sup>104</sup>

For merger control purposes, Article 6 of the FTL defines a "combination" broadly. A combination includes:

- (1) mergers,
- (2) holdings or acquisitions of more than one-third of the voting stock or capital of another enterprise,
- (3) a transfer or lease of all or a majority of an enterprise's business or property,
- (4) frequent joint operations with other enterprises or operating another enterprise at its request, and
- (5) the exercise of direct or indirect control over the personnel, finance or operations of another enterprise.<sup>105</sup>

Several problems arise with this definition. First, it is overly infatuated with corporate law. For example, this definition would apply to a statutory merger between a parent company and its wholly owned subsidiary. Of course, such antitrust review would be meaningless, as the economic situation does not change with the merger of two previously affiliated legal entities. In addition, the fifth type of combination sweeps unreasonably wide to encompass cases in which firms would enjoy substantial influence over other firms through a combination of business

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104. The Affiliated Companies Law bill itself was a product of transplanting German stock corporation law and American case law regarding piercing the corporate veil and equitable subordination. It was enacted as an amendment to the Company Law in 1997.

105. See FTL art. 6 (1992).

and equity arrangements.

The overbroad sweep of the merger definitions finally was narrowed down in February 2002 as a result of the CEPD's request to the author to overhaul laws and regulations governing mergers and acquisitions. A council of ministers that acts as the Premier's think tank and economic policy coordinator, the CEPD accepted a Corporate Mergers and Acquisitions Law (CMAL) bill prepared by a team of lawyers led by the author. Included in the CMAL bill were provisions relating to reform of the FTL's merger review provisions.

TFTC agreed with the CMAL bill, but it requested that the FTL provisions be separated from this omnibus legislative bill. In its stead, the TFTC sponsored an FTL amendment bill that included essentially the same proposals for streamlining merger review. In February 2002, this FTL amendment became effective. One of the changes it made was to exclude parent subsidiaries from the merger definition, by following the "economic interest group" concept espoused by CEPD consultants.

The overencompassing nature of this merger definition also produced a controversial interpretation—TFTC Interpretation No. 12—that tried to limit the application of merger control. It rendered this interpretation at the request of China Airlines, which proposed a joint venture travel agency with certain domestic travel agencies. The TFTC adopted the view in that interpretation that establishing a new joint venture would not fall within the merger control definition of the FTL. It argued that the "acquiring" language in Article 6(2) contemplates acquiring an interest in an existing entity.

Of course, this argument is flawed. If it made sense, then the United States government would not have possessed grounds to review the joint venture proposal between Toyota and General Motors to manufacture cars in Fremont, California, in the early 1990s. Why then did this interpretation emerge? Some TFTC Commissioners (including the presiding chairman) wanted to avoid applying the merger control provisions too aggressively out of fear of its potential chilling effect on green-field investment projects.

Merely meeting one of the definitions is insufficient to trigger merger control. The TFTC follows market share and revenue tests to determine the size of transactions that would constitute reportable combinations.<sup>106</sup> A combination is reportable to the TFTC if any of the following conditions exists:

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106. FTL art. 11.

- (1) the combined enterprise will have a one-third market share,
- (2) one of the constituent enterprises to a combination has a one-fourth market share, or
- (3) the sales of one of the constituent enterprises to a combination for the previous fiscal year exceeds the minimum revenues published by the TFTC.<sup>107</sup>

In marginal cases, the market share test can present difficulties to merging enterprises that must bear the risks of not filing with the TFTC because of inaccurate calculations. The TFTC has fined several enterprises for their failure to file when they met the minimum revenue level, even though the enterprises argued that their transactions would not constitute a combination under the FTL.<sup>108</sup> The minimum revenue test is more objective. The TFTC first set it at NT\$2 billion (less than US\$70 million), and later increased it to NT\$5 billion (approximately US\$170 million) in the mid 1990s.

The 2002 FTL amendment, prompted by the CEPD study to reform the regulatory framework for mergers and acquisitions, made another important change. It authorized the TFTC to set different filing thresholds for different industries. As a result, for nonfinancial firms, the annual turnover threshold was changed to NT\$10 billion, or about US\$350 million (while the target has to have at least NT\$1 billion of turnover). For financial firms, the threshold now is NT\$20 billion (approximately US\$700 million).

Until 2002, a reportable combination required TFTC approval.<sup>109</sup> The TFTC essentially applied a cost-benefit analysis, and the consummation of a combination without obtaining TFTC approval could have led to divestiture, compulsory disposition of assets, cessation of business, and administrative fines.<sup>110</sup>

According to an interview by the TFTC chairman in the mid-1990s, the TFTC had not challenged any combination on its merits.<sup>111</sup> Toward the end of the TFTC's-third term, still only four decisions had resulted in the disapproval of merger applications. On the other hand, during the first

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107. *Id.*

108. See *Don't Lose Sight of the Merger Filing Threshold: Failure to File Not Only Leads to Fines, But Also a Bad Reputation for Business*, ECON. DAILY NEWS, Feb. 13, 1994, at 2 [hereinafter *Merger Filing Threshold*].

109. See FTL art. 11 (amended 2002).

110. FTL arts. 12-13.

111. See *Merger Filing Threshold*, *supra* note 108, at 2.

decade of the TFTC, companies making combinations submitted more than five thousand filings. This is amazing, and such statistics clearly show that overregulation occurs in the merger control area of the FTL. Indeed, a closer look at the TFTC's merger control statistics reveals that most of those had little to do with the kind of mergers that antitrust authorities would be concerned with. The overwhelming majority of the filings concerned franchise participation cases involving corner convenience stores. The applications and approvals became so routine that the TFTC, pursuant to its fast track review procedure, even developed forms for its combination approvals that look like traffic tickets!

The FTL's overregulation of merger review became a spotlight in the CEPD study that led to the enactment of the CMAL. As an integral part of M & A regulatory reform, the TFTC was asked to shift to a clearance regime following the Hart-Scott-Rodino Act in the United States. Under the FTL as amended in 2002, the approval requirement became a notice and thirty day waiting period. However, once challenged by a second FTC request, an approval would be required. This is because Taiwan's administrative law practice has never required agencies to litigate in court to enforce their rights. Private parties not satisfied with an agency adjudication have to sue them to quash the adjudication!

Other cases that led to TFTC approval of combination applications show the TFTC considered a wide range of factors in balancing the social costs and benefits of proposed mergers, as well as the effect of the proposed mergers on the constituent firms. The usual factors the TFTC considered were the enhancement of operating efficiency, improvement of economies of scale, improvement of financial structure or product quality, breakthrough from existing operating constraints, and increased globalization. The TFTC also evaluated benefits to industry, which included industry development or transformation, industry competitiveness, enhanced technical levels, and the opening of the market. Social benefits might have included improved services to consumers, maintenance of the original workforce or preservation of failing enterprises, and an improved use of public resources. When the applications involved conglomerate mergers, the TFTC also reviewed risk diversification with the interests of both creditors and investors. The TFTC also reviewed certain anticompetitive factors, including potential price increases, market concentration, trends toward product homogeneity, impacts on market entry, and any previous occurrences of illegal mergers or other restrictive practices.

The first decade following enactment of the FTL demonstrates that the TFTC has developed the usual skills to review mergers. However, the

aforementioned lengthy list of factors suggests that such scrutiny is strongly formalistic and irrelevant. For example, many TFTC merger control decisions read like formal essays that routinely analyze the enumerated factors. In fact, a quick look would reveal that the TFTC should have approved many of these cases, as there were no anticompetitive risks. Many such discussions were unnecessary, as the TFTC did not need to concern itself too much—except in a small number of marginal cases—with gains internal to constituent firms. In short, the TFTC wasted too many resources regulating an area of competition law that posed no real anticompetitive threat.

The TFTC must process cross-border merger cases more efficiently and expeditiously. By its very nature, merger control law is regulatory and often contemplates discussions and negotiations with the merger enforcement officials. Even though the TFTC is already experimenting with a fast track review practice, it could compare notes with its foreign counterparts to streamline its review process.<sup>112</sup> In the area of cross-border merger control, the problems of the TFTC loom larger. First, the pre-amendment low revenue thresholds captured many cross-border mergers that did not involve conduct or market structure in Taiwan. Second, the TFTC has not developed enough of an understanding of international business, and occasionally will form innocent questions that are either difficult to answer or irrelevant to the merger review. For example, during the TFTC's first term, a commissioner in charge of a cross-border merger asked for lists of shareholders of the two merging publicly listed companies! In August 2000, the TFTC implemented a set of new guidelines governing cross-border mergers that reflected its experience to that point. However, the guidelines initially produced a significant level of confusion for the first several cross-border combination cases arising under them. The gist of the problem was the TFTC's own doubt as to how best to address its decisions to offshore companies that did not operate direct branches in Taiwan.

Of the four TFTC decisions that rejected the combination approvals, three involved CATV system operators. In Taiwan, the CATV industry cropped up in the late 1980s for two reasons. First, as Taiwan began to democratize, the ruling party, the KMT, still controlled the media. Opposition politicians tried to break this chokehold through community cable television systems, often even illegally. Second, terrestrial television has not maintained high quality programming, and consumers began

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112. *Id.*

exploring other means (including satellite-streaming programs from abroad) to satisfy the demand for content. The Seoul Olympiad of 1988 was the watershed event, as that year saw the mushrooming of small-dish satellites on virtually every rooftop in Taiwan. However, markets were developing without a law permitting the industry to exist. Indeed, even today, the CATV industry members bear a casual description as the “fourth stations,” that is, illegal stations other than the three legal, state-affiliated terrestrial stations!

When the Government Information Office (GIO) began to license and regulate the CATV industry in the mid-1990s, an industry owned by local politicians and other local interests was formed. As a result of political compromises, the CATV Law and GIO regulations divide Taiwan into fifty-one franchise areas, with up to five system operators for each area. In addition, in the name of cultural security and fair competition, the CATV Law imposed foreign ownership limitations (which were relaxed in 2001) as well as ownership diversification requirements. These rules were doomed to create problems, as they prevented system operators from attaining economies of scale. In fact, ownership limits were very formalistic and the TFTC only reviewed one layer of ownership until the CATV Law amendment in the late 1990s. Meanwhile, keen competition and integration between content providers and system operators led to territorial disputes and the termination of program licensing contracts towards the end of the year, which angered consumers and dismayed senior government officials.

Analysts should review the three TFTC rejections of merger applications by these CATV operators against the background of industry consolidation. For example, a practice emerged among multiple system operators (MSOs) in the mid-1990s to create a network of affiliated system operators through holding companies and other ownership arrangements. The CATV Law amendment in the late 1990s also added a one-third threshold for the national market in terms of subscribers and other indicia. Such industry consolidation often necessitates the transfer of ownership or control. As indicated above, Article 6 of the FTL would capture such activity as a merger subject to TFTC review. In these three cases, even though the TFTC understood the efficiency gains that would arise from such proposed mergers, the “wild west” image of the first generation of system operators as well as the anti-business (known as *anti-zaibatsu*) impression of the subscribing public troubled it. More importantly, the TFTC remained unsure whether operators would launch another “year-end program termination war,” which would create tremendous pressure from the Premier to seek enforcement action.



Due to the formalism of the ownership limitation rules and the de facto use of multiple layers of ownership, combining firms may bypass TFTC review altogether. In a clever move, a proposed system operator filed a combination application with the TFTC before actually implementing the investment. After the TFTC granted approval, news reports suggested that the beneficial ownership behind the applicant belonged to the Carlyle group from the United States, even though its name never appeared in the applications.<sup>113</sup>

The only non-CATV rejection of a combination application was a letter to the CPC in November 1997. In this letter, the TFTC took the “tentative position” that until the government began to permit the importation of petroleum, the TFTC would not permit joint ventures or new companies to establish gas stations involving the CPC as a party or shareholder. The CPC’s monopoly in Taiwan has lasted for decades. In the mid-1990s, Taiwan finally adopted a long-awaited petroleum product liberalization plan that aimed to open this market in stages. The first stage began with the free importation of fuel, jet fuel, and crude oil in 1999, and the second stage allowed for the free importation of diesel and other petroleum products in 2000. The CPC’s new gas station plan proposed to expand its market penetration from its 50.2% market share at the time.

The CPC case provides several interesting points. First, the CPC is a state-owned monopoly. This suggests that the government should privatize and deregulate the petroleum market, which would render FTL enforcement much easier. Second, the TFTC obviously was ensuring that the CPC would not preempt the government’s petroleum market-opening schedule using any countermeasures. In other words, the TFTC wanted to ensure a level playing field. Third, the formal TFTC statistics do not identify this decision as a rejection. The decision only appeared in the TFTC Gazette, perhaps to save face for the CPC.<sup>114</sup> Fourth, this letter served as a blanket rejection of all potential applications that the CPC might file in this particular market. In other words, the TFTC made it painfully clear that it would not revisit this issue every time the CPC filed a combination application.

The TFTC’s enforcement of merger controls suggests that a consistent body of case law has yet to be developed. As indicated above, until 2002,

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113. For details on Taiwan Broadband Communications Co.’s proposed acquisition of Southern Taoyuan CATV, see Fair Trade Comm’n, *Decision No. 88-Kung-Chieh-0704*, 8 GAZETTE OF THE FAIR TRADE COMM’N, Aug. 1999, at 128-32.

114. See Fair Trade Comm’n, *Decision No. 86-Kung-Erh-04181*, 6 GAZETTE OF THE FAIR TRADE COMM’N, Nov. 1997, at 113.

the TFTC required approval for mergers between parent and subsidiary companies, even though no additional economic integration of resources occurred. In other words, the TFTC followed a legalistic approach to enterprises and combinations.<sup>115</sup> This may not be the TFTC's fault; the text of the FTL's pre-2002 merger control provisions seems to capture the merger of any two companies.

Ironically, the same legalistic approach led to an interpretative ruling, mentioned above, that different enterprises setting up a joint venture company to engage in a new business would not constitute a combination within the meaning of the FTL.<sup>116</sup> The rationale—which possesses factual and theoretical flaws—is that, legalistically, when the combination is proposed, the joint venture company does not yet exist and the FTL's merger control provisions only apply to existing entities. This interpretation in essence created a blind spot for merger control whenever a new joint venture company is proposed. However, another perspective of this result remains interesting. The TFTC cannot justify its interpretation by any fundamental theory in economics, but it provides virtually all new joint ventures among competitors with a free hand. Indeed, this interpretation seems to contradict the TFTC's position in its November 1997 letter regarding a tentative, blanket rejection of all combination approvals that the CPC might submit pursuant to its proposed investment project for gas stations. More importantly, the position of this interpretative ruling indicates the TFTC's concern with its own legitimate role in merger control.

Other perverse results also follow the same legalistic approach. As previously indicated, franchise participation cases made up most of the merger control cases. The TFTC held that conduct of the President Enterprises Corporation (PEC), a major food processing company, in granting franchises to franchisees to open 7-11 convenience stores triggered the TFTC's approval requirement each time the PEC planned to open a new franchise. Again, the TFTC's filing requirement's lack of a "size of transaction" test that would screen out mergers with insignificant market impact produced this problem.<sup>117</sup> Interestingly, the TFTC has not chosen to either review all such serial, ongoing franchise licensing cases in their totality, or explore whether, in the aggregate, these combinations

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115. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-021*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Aug. 1992, at 34.

116. See Fair Trade Comm'n, *Interpretation No. Kung-Yen-012*, 1 GAZETTE OF THE FAIR TRADE COMM'N, July 1992, at 24.

117. The TFTC has granted dozens of such approvals, which read like standard forms.

would be anticompetitive to traditional groceries and sidewalk produce stands. The TFTC should consider examining the “forest” all at once, rather than simply review each “tree” as it is planted.

### III. CARTELS, VERTICAL RESTRAINTS, AND UNFAIR COMPETITION

#### *A. Controlling and Punishing Horizontal Cartels*

The FTL bases its cartel regulation on the German GWB and European Union models. It defines a “concerted action” broadly to regulate joint activities between competing enterprises.<sup>118</sup> A concerted action refers to a horizontal action among firms at the same level of production that may affect how supply and demand for the relevant goods and services interact in the market. However, the Implementing Rules seek to exclude cartels among competitors that lack adequate market power from antitrust scrutiny.<sup>119</sup> In an unpublished decision, the TFTC held that two transportation companies, each possessing less than 1% of market share, would not violate the FTL by fixing the rates of their freight.<sup>120</sup> Whether the FTL authorizes the TFTC to adopt Implementing Rules leading to this result is debatable.

The FTL seeks to both punish and regulate horizontal cartels. It sets out a general “per se” illegality principle by stating that competing enterprises may not engage in concerted actions to restrict prices, quantities, customers, territories, or otherwise restrict each other’s commercial activities.<sup>121</sup> However, an extensive proviso followed this prohibition, allowing seven specific exceptions where, after the TFTC grants an approval after assessing the general economic benefits and public interest, it could legalize such cartels. These seven exceptions all require the TFTC to perform a rule of reason analysis. The TFTC proposed two additional exceptions, one for a general application and the other to apply to trade associations’ self-regulatory practices, in a draft bill to amend the FTL.

Concerted actions that may be legalized are:

- (1) standardization cartels for products or models in order to reduce costs, improve quality, or enhance efficiency;

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118. FTL art. 7.

119. See Implementing Rules art. 2.

120. See Resolution of the 91st Meeting of the Fair Trade Commission (on file with author).

121. FTL art. 14.

- (2) research or marketing cartels to upgrade technology, improve quality, reduce costs, or enhance efficiency;
- (3) specialization cartels for enterprises to engage in separate specializations so as to facilitate rationalization;
- (4) export cartels applicable to foreign markets to ensure or facilitate exports;
- (5) import cartels for the joint importation of foreign goods in order to improve the effect of trade;
- (6) recession cartels that allow competing enterprises to jointly restrict output, sales, equipment, or prices pursuant to a plan to meet demand during an economic recession when market prices for goods are lower than the average production cost, and enterprises in that industry experience difficulties in surviving or with excess production; and
- (7) small business cartels to improve operational efficiency or enhance competitiveness.<sup>122</sup>

In granting its approvals to concerted actions, which expire after a maximum of three years, the TFTC may impose conditions and require modifications as a precondition of approval. However, the TFTC may not grant block exemptions, nor does it regularly grant negative clearances. Application for an interpretative ruling as to the applicability of the cartel regulation provisions is theoretically possible, but can be very time consuming. These factors suggest that obtaining an approval may require substantial bureaucratic efforts.

As of this writing, there is very little joint importation of grains. Therefore, one suspects that Taiwan's business community routinely may disregard their requirement when forming arrangements among competing enterprises that may be pro-competitive and, therefore, permissible under the FTL. The substantial burden to furnish sensitive information and uncertainty with the result of a rule of reason analysis may constitute the reasons.

The TFTC has taken only a few enforcement actions against anticompetitive cartels, such as those fixing the price of eggs in eastern counties of the Province of Taiwan and fixing interest rates in the lending

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122. *Id.*

market among credit cooperatives in Kaohsiung. An investigation of the three listed monopolies engaging in short-term bill financing ended without any enforcement action because, even though the three firms offered the same interest rates, one could expect such a result in an oligopolistic market where interdependence among firms exists.

The primary difficulty in this case is one of proof: the TFTC was unable to obtain evidence of actual agreements among competing bill finance companies to fix interest rates. Nonetheless, following its moral suasion and competition advocacy program, the TFTC currently is advocating further deregulation of this market segment that it believes is the solution to this case. For example, a bid rigging case involving more than sixty enterprises (and even gangsters) in the market for the supply of cables and wire to Taiwan's sole electricity supplier, Taipower Corporation, came under TFTC investigation.<sup>123</sup>

Looking back at cartel enforcement under the FTL, the first impression is that the TFTC generally has done a good job in creating public awareness of the illegality of cartels. As noted above, the FTL specifically lists trade associations as an "enterprise" under the FTL.<sup>124</sup> Cartels are often the product of conspiracies arranged through trade associations; therefore, the inclusive definition has the important effect of making trade associations and their representatives accountable under the FTL. This enhances the deterrent effect of the cartel control provisions.

Second, illegal cartel cases represent only about 4% of the approximately fifteen hundred cases where the TFTC has sanctioned illegal conduct. It is difficult to objectively gauge how robust the cartel enforcement program is relative to overall TFTC enforcement. However, a recent study conducted by the TFTC itself suggests the increasing difficulty posed by cartel enforcement is due to the evidentiary problem of proving the existence of collusion.<sup>125</sup> In this statistical analysis conducted by TFTC staff members, 109 representative cases were studied. The sample included 32 cases in which the TFTC found illegal conduct and 77 cases in which the TFTC did not produce sufficient evidence of illegality. The study examined factors such as industry structure, product features, entry barriers, differences in cost structure, market differentiation, modes of production, and consumer patterns to look for variables that would

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123. See *61 Companies Alleged to Engage in Bid Rigging*, COMMERCIAL TIMES, Jan. 4, 1994, at 30.

124. See *supra* note 51.

125. See Tay-cheng Ma and The-chang Hung, *An Analysis of the Decision of Collusive Cases Made by the Fair Trade Law*, FAIR TRADE Q., Apr. 2001, at 37.

support a finding of illegality by the TFTC.

The study found that the cartel prohibition rule of the FTL offers an effective deterrent. Interestingly, it found that TFTC investigations and sanctions against illegal cartels occurred more frequently in more competitive markets, which puzzled the staff as being inconsistent with industrial organization theory. The study also found that cases involving regional markets and possessing oligopolistic features created an increased likelihood of TFTC prosecution. A third finding suggests that small businesses in the form of sole proprietorships or partnerships with owners that lacked an advanced educational background were more likely to suffer sanctions from the TFTC. On the other hand, major firms seemed to have a better understanding of the FTL and, therefore, finding an agreement or explicit collusion to cartelize proved more difficult. Conscious parallelism was more likely in cases involving these bigger firms.

In the future, the TFTC might focus more of its enforcement resources on cartel prosecution. Improvement is likely if the TFTC conserves its enforcement resources by streamlining other enforcement programs (including merger control).

Third, the TFTC should intensify its cooperation with prosecutors to enhance joint enforcement against illegal cartels. As an administrative agency, the TFTC does not possess any criminal investigative powers. It therefore would have to rely on prosecutors to share part of the investigative burden. In this regard, the TFTC may have fallen prey to its own devices, as it was responsible for an amendment to the FTL that required all criminal prosecutions to follow a TFTC referral. Although this TFTC-first policy does not eliminate criminal prosecution, it does push the TFTC to the forefront. When it refers a case to prosecutors for formal indictment, it should possess enough evidence at that point to make prosecution an easier task.

Fourth, the TFTC should review the procedure for legalizing cartels under Article 14 of the FTL and propose an amendment for improvement. The primary problem with Article 14 is that it requires prior TFTC approval to legalize cartels. This represents perhaps the most disenchanting aspect of European antitrust influence on Taiwan. However, the European Union is undergoing its own reform to streamline its cartel legalization program. The United States requires no such prior approval, allowing for the issuance of informal business letters. This informal process is better, as it prevents the challenge of pro-competitive collaboration among competitors simply due to a lack of government approval.

Fifth, certain types of cartels should not receive classifications as

justifiable cartels. Examples include joint exports, joint imports, depression cartels, and specialization cartels. Indeed, one should view any cartels relating to international trade with suspicion, and Taiwan should be careful not to run afoul of the WTO because Taiwan is easily susceptible to trade retaliation. Other types of cartels like depression cartels give the government a reason to intervene, which actually leads to procrastination in making the painful adjustment in economic downtime.

Sixth, Article 14 should be amended to broaden other possibilities for allowing pro-competitive collaboration among competitors. Currently, the FTL specifically enumerates seven grounds on which to obtain TFTC approval for cartels, with the exception of the small business exemption. In the legislative debate leading to the enactment of the FTL, arguments were made as to whether it was appropriate to create a general category of antitrust exemptions just for small businesses. At the urging of a German-trained legislator, who relied on the argument of a German-trained law professor, Article 14(7) became the small business exemption from cartel activities. In fact, it would be rather difficult to justify an antitrust exemption for small businesses to fix prices illegally on efficiency grounds. Nonetheless, the TFTC actually did just that. It adopted a set of guidelines to allow tire shops to fix prices for retreading tires! In the future, legislators should revamp Article 14(7) as part of the Article 14 overhaul, so that it will legalize all efficiency-enhancing horizontal arrangements regardless of the status of the enterprises involved.

### *B. Vertical and Other Restraints*

The FTL contains provisions that deal with issues such as vertical price and non-price restraints, exclusionary practices, and other restraints and practices often applied in a distribution arrangement. Interestingly, even though authorities often treat such provisions as antitrust issues, the FTL essentially treats them as rules against unfair competition.<sup>126</sup> This arrangement reflects an apparent influence from the Japanese Antimonopoly Law.<sup>127</sup> It also suggests that ensuring adequate competition and a fair balance of different parties' interest in the distribution market constitutes a legislative purpose of both Chinese competition laws. In 1999, Taiwan amended the FTL to add the phrase "restricting competition" to Article 19, the operating provision of the FTL governing

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126. These provisions reside in Chapter III of the FTL, which regulates unfair competition.

127. See HIROSHI IYORI & AKINORI UESUGI, *THE ANTIMONOPOLY LAWS OF JAPAN* 92-110 (1983).

vertical and other restraints. However, it remains unclear whether this amendment will change the previous enforcement position of treating these restraints as a form of unfair competition.

To this end, the FTL nullifies resale price maintenance (RPM)<sup>128</sup> and, as interpreted by the TFTC, prohibits such conduct by allowing for TFTC-issued administrative fines.<sup>129</sup> Even though the FTL creates a theoretical exception for the TFTC to list daily consumer goods for which adequate competition exists, the TFTC has yet to utilize this exception. In addition, the FTL contains a similar provision (albeit one that provides for criminal sanctions) that prohibits an enterprise from imposing unreasonable restraints on the commercial activities of its counterparties.<sup>130</sup> Such restraints include tying, exclusive dealing, and restraints relating to customers, territories, and field of use. Much like the FTL's anti-cartel provisions, Article 19(6) adopts a rule of reason approach, requiring an examination of the parties' intent, purpose, market position, market structure, the characteristics of its goods or services, and the effects of the restraints.<sup>131</sup>

Due to the perceived relation between RPM arrangements to price levels and inflationary pressure, the TFTC adopted an aggressive campaign against RPM arrangements. The anti-RPM rule is perhaps the only rule of per se illegality in the FTL; it only requires proof of the RPM's existence (which the TFTC quite often can obtain from provisions in distribution agreements of the uninitiated producers). The most prominent enforcement actions against RPM arrangements involved the aforementioned imported cosmetics cases. A body of case law is emerging from TFTC decisions that involve non-price restraints, in which the TFTC engages in a market analysis.

The FTL prohibits an enterprise from using "improper inducement" to cause a counterparty to transact business with it instead of other competitors.<sup>132</sup> As interpreted by the TFTC, offering prizes and gifts in connection with the sale of goods likely would constitute an offense.<sup>133</sup> In a case involving a newspaper offering apportionments of gold worth several million Taiwan dollars as lottery prizes to new subscribers, the TFTC conducted a careful market analysis. It then concluded that,

128. FTL art. 18.

129. FTL art. 41.

130. FTL art. 19(6).

131. See Implementing Rules art. 24.

132. FTL art. 19(3). See also *supra* note 49.

133. See, e.g., Fair Trade Comm'n, *Interpretation No. Kung-Yen-020*, 1 GAZETTE OF THE FAIR TRADE COMM'N, Aug. 1992, at 33.



although such conduct could violate the FTL when the prizes became the primary reason motivating the purchase, the case actually represented the pro-competitive situation of a smaller firm seeking to lure more business away from the two established, more popular newspapers.

The upholding of this promotional campaign clarifies some prior interpretations suggesting that giving prizes and price premiums may be illegal under Article 19(3) of the FTL. Once again, Article 19(3) illustrates the FTL's struggle between balancing efficiency and fairness, which is unthinkable in a country like the United States. However, due to the influence from a similar statute like the Japanese Antimonopoly Law, a pro-competitive practice designed to create allocative efficiency may constitute unfair competition in Taiwan.

### *C. Discriminatory Treatment*

The FTL prohibits discriminatory treatment in two provisions. One appears within the aforementioned anti-monopolization rules;<sup>134</sup> the other prohibits unjustifiable discrimination as a general rule insofar as it may result in unfair competition.<sup>135</sup> Presumably, this prohibition prohibits not only price discrimination but non-price discrimination as well. Thus, the FTL operates differently from statutes like the Robinson-Patman Act (RPA) in the United States, which requires price differences to establish a prima facie case.<sup>136</sup> Charging the same price could still constitute a form of economic price discrimination, but it would not constitute a violation of the RPA.<sup>137</sup> In contrast, the FTL provides no such assurance.

Like other FTL provisions, Article 19(2) follows a rule of reason approach, and one can find justifications for this approach by examining, for example, the supply and demand in the market, cost differential, the volume of the transaction, and credit risks.<sup>138</sup> The TFTC has decided several cases in this area, with the aforementioned *CPC Jet Fuel* cases representing two of the leading cases. Some unpublished TFTC decisions suggest that the TFTC is developing a theory of cross-border discrimination that may violate Article 19(2) or the general prohibition of Article 24. However, even in the European Union, “[c]harging different prices in different countries does not, in itself, infringe article 85 [of the

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134. FTL art. 10(3).

135. FTL art. 19(2).

136. Robinson-Patman Act, 15 U.S.C. § 13(b) (1994).

137. See ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 408 (4th ed. 1994).

138. See Implementing Rules art. 24.

Treaty of Rome] . . .”<sup>139</sup>

In another case, a petitioner alleged to the TFTC that the state-owned CHT adopted a very selective standard for technical services in the computer graphic systems of telecommunications networks and sporadic point accumulation operations. In 1997, the TFTC found that CHT adopted this selective standard for vendors of technical services that could become qualified bidders when it still operated as a part of the DGT before the telecommunications reform of 1996. The TFTC found that such a bidder qualification standard violated the FTL. However, because of CHT’s recent reorganization and its lack of intent to erect an entry barrier for the provision of such services, the TFTC did not punish it.<sup>140</sup>

The CHT case shows favoritism and similar irregularities in the state-owned sector that reflects years of foreclosure from competition. A similar unlawful discrimination case arose around the same time and involved the Environmental Protection Agency of the Taipei City Government in a bid for garbage cans. Acting on complaints, the TFTC found that the Taipei City EPA designated a single company to provide garbage cans without going through a proper bidding competition. However, according to the TFTC’s own guidelines governing procurement and other private law activities of public agencies, these agencies do not constitute enterprises within the meaning of the FTL. Therefore, the TFTC referred the Environmental Protection Agency to the Taipei City Government for self-rectifying conduct.<sup>141</sup>

In another market sector, the heavily regulated CATV market, the TFTC also found pervasive discriminatory practices. In the *Hsin Shih Po Cable Broadcast System Corp.* case involving program licensing, the TFTC found that a regional distributor of CATV programming products discriminated against different system operators.<sup>142</sup>

#### *D. Unfair Competition in General*

Unfair competition cases constitute a significant portion of FTL enforcement actions. However, the FTL labels many practices as acts of

139. Margot Horspool & Valentine Korah, *Competition*, 37 ANTITRUST BULLETIN 337, 342 (1992).

140. See Fair Trade Comm’n, *Chunghwa Telecom Co., Ltd.*, 2 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 73-75 (2000).

141. See Fair Trade Comm’n, *Taipei City Government Bureau of Environmental Protection*, 2 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 77-78 (2000).

142. See Fair Trade Comm’n, *Hsin Shih Po Cable Broadcast System Corp.*, 2 CASES AND MATERIALS ON THE FAIR TRADE LAW OF THE REPUBLIC OF CHINA 78-82 (2000).

unfair competition that antitrust rules generally would govern. The FTL also fills in the gap left by other laws. One example is the offense of passing off, which attempts to address the issue of protecting trade dress where the more traditional protection of intellectual property law may prove inadequate.

The public generally must know the commercial symbol or appearance that is being exploited unlawfully, which defines the context of unfair competition and sharpens the risks of free riding on the commercial goodwill of others. In addition, there is a special rule prohibiting the use of famous foreign trademarks, in which case the owner need not prove consumer confusion, which the FTL inherently presumes in such a case.

On the other hand, if the misappropriated commercial symbol is a registered trademark in Taiwan, Taiwan's Trademark Law will subsume the FTL's passing off offense. In addition, the FTL provides several exceptions to the rule against passing off where one can demonstrate that, for example, a customary, generic use of the commercial symbol or the good faith use of one's name in connection with the sale of goods or provision of services occurred.

The fact that Taiwan's prohibition against passing off refers to consumer confusion presents another problem: it remains unclear whether the standard reaches potential confusion or necessitates actual confusion. Providing proof of actual detriment or confusion could be difficult. In Taiwan, the parties to enforcement actions now contemplate polling consumers to satisfy this evidentiary requirement.

The FTL prohibits the knowing commission of either false advertising or circulation of fraudulent or misleading information by business operators or advertising agencies (e.g. the media).<sup>143</sup> Although both provisions appear in the chapter governing unfair competition, they actually operate more like direct consumer protection provisions. Unlike the rule against passing off, there may not be an actual infringement of any competitor's commercial symbol in this situation, which could make proving a detriment to competitors more difficult.

The FTL prohibits an enterprise from using improper inducement or incentives to cause the other party to transact business with it.<sup>144</sup> It nevertheless fails to delineate clearly the means by which one enterprise may unfairly interfere with a competitor's advantageous trade relations with a third party.

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143. FTL art. 21.

144. FTL art. 19(3). *See also supra* note 49.

The FTL also prohibits trade libel.<sup>145</sup> Its language, however, is unclear as to whether a violation requires knowledge that information is false.

Trade secret protection serves as an important means to ensuring proper competition in the ROC. However, Taiwan's FTL does not define trade secrets, and due to the inappropriate placement in the FTL of the rule protecting trade secrets, the TFTC must issue a cease-and-desist order prior to meting out sanctions.<sup>146</sup> As a result, this prohibition has lost much of its bite.

The FTL punishes illegal multilevel distribution arrangements and authorizes the TFTC to adopt rules that regulate permissible multilevel distribution arrangements.<sup>147</sup> This reflects Taiwan's painful experience with the Pomzi-style pyramid sales schemes in the 1980s that many ordinary citizens motivated by greed lost their savings to. Multilevel distribution still constitutes big business in Taiwan. A TFTC study shows that direct selling is big business. The popularity of this distribution arrangement belies the social traits and networking ability of the Chinese.

#### *E. The Catchall Rule Against Deceptive and Unconscionable Conduct*

Unfair competition can take many forms; thus, Article 24 of the FTL contains a catchall provision that prohibits, in addition to those violations specifically enumerated in the legislation, other deceptive and obviously unconscionable acts that may affect the orderly conditions for transacting business.<sup>148</sup> There was logic to this provision: the restricted nature of the offense compensates for the breadth of its prohibition. The TFTC may impose only administrative sanctions, and violating conduct does not constitute a criminal offense. As such, Article 24 follows Section 5 of the U.S. Federal Trade Commission Act in text and spirit.<sup>149</sup> The TFTC's recent focus on this provision also suggests its potential as a direct measure for consumer protection. As a catchall remedy, Article 24 could capture conduct that falls slightly short of a prima facie violation of other countries' rules in competition legislation.

The logic of having a vaguely worded catchall rule supported by

145. FTL art. 22.

146. The general protective provision for trade secrets in the Fair Trade Law is Article 19(5).

147. FTL art. 23.

148. FTL art. 24.

149. *Compare* FTL art. 24 ("In addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order") with 15 U.S.C. § 45(a)(1) (1999) ("Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.").

administrative sanctions ceased with the 1999 FTL amendment. This amendment required all criminal prosecutions arising under the FTL to follow an administrative adjudication by the TFTC.<sup>150</sup> As a practical matter, most FTL issues became administrative law disputes that the TFTC monopolized control over. Criminal prosecutions became even more infrequent. When all FTL violations became administrative law violations, there was no logic for having a rule like Article 24, whose vagueness had become glaringly annoying.

There is more than just the TFTC's own goal of monopolizing FTL enforcement through this amendment that led to the smorgasbord style of Article 24 enforcement. For example, the actual enforcement history of the FTL shows that the TFTC wavers in difficult or borderline cases, primarily those involving large companies, SOEs, and novel issues that one cannot categorize easily. As the foregoing discussion shows, all antitrust offenses arising under Articles 10 (monopolization), 14 (cartel-like conduct), 18 (resale price maintenance), and 19 (boycott conduct, refusal to deal, discrimination, and other vertical restraints) overlap with Article 24. Likewise, Article 24 could capture and subsume Article 20 (passing off) and Article 21 (false advertising). Such situations thus lend themselves to an effort by the TFTC to sweep these cases under the Article 24 rug.

As a result, the TFTC invoked Article 24 to punish franchised convenience stores for demanding a "storefront fee" from brand owners whose products they carry.<sup>151</sup> The TFTC subjected hospitals allowing "most favored customer" treatment to certain medical suppliers to the same sanction.<sup>152</sup> Other Article 24 case law involves the bad faith termination of display contracts by vertically integrated content providers in order to pressure cable television system operators,<sup>153</sup> as well as refusals by photocopiers possessing a strong market position to provide parts to independent service providers.<sup>154</sup> In substance, this line of decisions represents a series of antitrust offenses involving firms with different levels of market power, which the TFTC could have disposed of by

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150. FTL arts. 35-36.

151. See Fair Trade Comm'n, *Decision No. 86-Kung-Chu-036*, 6 GAZETTE OF THE FAIR TRADE COMM'N, Mar. 1997, at 34.

152. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-103*, 9 GAZETTE OF THE FAIR TRADE COMM'N, July 2000, at 158.

153. See Fair Trade Comm'n, *Decision No. 87-Kung-Chu-039*, 7 GAZETTE OF THE FAIR TRADE COMM'N, Feb. 1998, at 29.

154. See Fair Trade Comm'n, *Letter No. 86-Kung-Erh-85-022821011*, 6 GAZETTE OF THE FAIR TRADE COMM'N, Mar. 1997, at 58.

invoking other, more well-defined provisions of the FTL.

Another line of Article 24 case law captures unfair methods of competition. Again, other FTL rules appear to be more specific and relevant. However, the TFTC used Article 24 to challenge cybersquatting on popular domain names,<sup>155</sup> passing off,<sup>156</sup> blatant plagiarism,<sup>157</sup> the frivolous distribution of warning letters by intellectual property right owners,<sup>158</sup> free riding on another's efforts,<sup>159</sup> and wholesalers engaging in retail businesses despite the lack of necessary operating licenses.<sup>160</sup>

The third line of Article 24 case law essentially deals with contractual relationships in which information asymmetry or other phenomena of disparate bargaining positions exist. For example, the TFTC has intervened in cases involving improper sales promotion,<sup>161</sup> consumer contracts for pre-sale housing units,<sup>162</sup> real estate brokerage commissions,<sup>163</sup> and standard terms contracts for users of financial services.<sup>164</sup> A pattern of conduct may justify invocation of Article 24, as these cases involving the rights and obligations of private parties do not represent isolated events.

Despite its theoretical problems, Taiwan's emerging Article 24 jurisprudence illustrates the importance of consumer protection. The aforementioned second and third lines of Article 24 case law reflect the TFTC's strong desire to react promptly and effectively to consumer

155. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-036*, 9 GAZETTE OF THE FAIR TRADE COMM'N, May 2000, at 137.

156. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-090*, 9 GAZETTE OF THE FAIR TRADE COMM'N, July 2000, at 82.

157. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-114*, 9 GAZETTE OF THE FAIR TRADE COMM'N, Oct. 2000, at 17.

158. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-134*, 9 GAZETTE OF THE FAIR TRADE COMM'N, Sept. 2000, at 12.

159. See Fair Trade Comm'n, *Decision No. 85-Kung-Ch-130*, 5 GAZETTE OF THE FAIR TRADE COMM'N, Oct. 1996, at 6.

160. See Fair Trade Comm'n, *Decision No. 87-Kung-Chu-139*, 7 GAZETTE OF THE FAIR TRADE COMM'N, June 1998, at 69.

161. See Fair Trade Comm'n, *Decision No. 87-Kung-Chu-073*, 7 GAZETTE OF THE FAIR TRADE COMM'N, Mar. 1998, at 27.

162. See Fair Trade Comm'n, *Decision No. 84-Kung-Chu-008*, 4 GAZETTE OF THE FAIR TRADE COMM'N, Jan. 1995, at 27.

163. See Fair Trade Comm'n, *Decision No. 89-Kung-Chu-062*, 9 GAZETTE OF THE FAIR TRADE COMM'N, May 2000, at 118.

164. These enforcement guidelines appear in the Guidelines Governing the Rectification of Processing of Overdue Time Deposits by Banks and Relevant Information Disclosure, and the Guidelines Governing the Rectification of Handling of Demand by Banks on Checking Account Deposits to Maintain Minimum Balance and Relevant Information Disclosure. See Fair Trade Comm'n, *Letter No. 84-Kung-Yi-00108*, 4 GAZETTE OF THE FAIR TRADE COMM'N, Feb. 1995, at 84; Fair Trade Comm'n, *Letter No. 84-Kung-Yi-01933*, 4 GAZETTE OF THE FAIR TRADE COMM'N, Mar. 1995, at 135.

concerns. As a related legislative measure, in early 1994, Taiwan enacted the Consumer Protection Law (CPL), which contains strict liability for defective goods, defective services, and product recalls, regulates unconscionable standard contract terms, and provides for punitive damages and class action relief.<sup>165</sup> Viewing the legislative history, legislators of the LY (rather than the EY) originally sponsored the CPL bill. At the time of the legislative debates, the KMT still controlled both the EY and LY, but Taiwan rapidly was becoming a robust civil society. The CPL bill was the creation of the Consumer Protection Foundation (CPF), a nongovernmental organization set up in the early 1980s to combat an undue national emphasis on producer welfare.

The Consumer Protection Commission, which was created under the CPL, possesses a unique organizational structure, which reflects a political compromise made during the enactment of the CPL. Chaired by the Vice Premier the Consumer Protection Commission employs a staff of only a few dozen officials and is only responsible for policy coordination. The Consumer Protection Commission placed the actual responsibility for enforcing the CPL with relevant agencies and local governments.<sup>166</sup> The whole purpose of this arrangement, not unlike the background behind the reluctant passage of the FTL a few years earlier, was to preemptively prevent consumerism in Taiwan from getting out of hand.

A plan has existed since the late 1990s to merge the Consumer Protection Commission into the TFTC, which likely would be the survivor. This proposal would streamline the work among different agencies in relation to the prohibition of unfair competition and consumer protection. However, political considerations and bureaucratic opposition have placed this proposal, which includes streamlining other government agencies, in a stalemate. Recently, in 2002, the DPP government revived this merger proposal under a comprehensive government reengineering plan.

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165. The CPL constituted a reaction against the pro-growth, anti-redistribution economic policy of Taiwan during its postwar development. One indicator of this backlash is that the CPL provides strict liability even for defective services. This rule is not well grounded in theory or comparative law. Due to the difficulty in standardizing the rendition of services, a negligence standard usually is applied for liability arising under the performance of services.

166. For example, the SFC would possess responsibility for investor protection as part of its administrative duties under both the CPL and SEL.

## IV. THE ENFORCEMENT MECHANISM

A. *Civil Liability*

Antitrust laws in the Anglo-American world have had a long history as part of the common law. Civil liability and private sector enforcement constitute a very important feature of competition law enforcement. In contrast, Taiwan's competition law provides for apparently strong but practically weak civil relief. The FTL specifically grants standing to any injured person.<sup>167</sup> Theoretically, even consumers could sue in a price fixing case, so long as they can prove a direct injury. On the other hand, courts rely on and progressively develop traditional tort rules to handle one-on-one disputes. However, Taiwanese courts do not possess civil procedure rules (such as those pertaining to class actions) to deal with mass tort litigation. In fact, the traditional Chinese solution to mass litigation is through direct government regulation or ownership.

One recent indicator of change is the CPL rules that allow representative, *parens patriae* actions by recognized consumer groups on behalf of consumers in general,<sup>168</sup> as well as class actions if injured consumers decide to opt in.<sup>169</sup> For example, since the late 1990s, the Securities and Futures Market Development Institute, an SFC-supported nonprofit foundation, has embarked upon a program that works to achieve functionally the same class action procedure of the United States as a way to protect investors. It would solicit claims to deal with "opt in" problems. It also would piggyback a civil claim on behalf of victimized investors on the coattails of the public prosecutor's criminal prosecution of the same offense.<sup>170</sup> However, while Taiwan's CPL contains a groundbreaking provision that waives substantial court fees in the case of a representative action by consumer protection groups, the FTL contains no similar waiver provision.<sup>171</sup> Therefore, an injured party seeking damages in a Taiwanese district court must prepay the district court fees equal to 1% of the claimed amount. For appeals to the Taiwan High Court and the Supreme Court, it must prepay another fee for 1% and 1.5% of the claimed amount, respectively.

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167. FTL art. 32.

168. Consumer Protection Law art. 49 (1994) [hereinafter CPL]. An English translation of the CPL is available at [http://www.virtual-asia.com/taiwan/bizpack/legalcodes/consumer\\_protection.htm](http://www.virtual-asia.com/taiwan/bizpack/legalcodes/consumer_protection.htm).

169. CPL art. 54.

170. See Lawrence Liu, *Simulating Securities Class Actions: The Case in Taiwan*, CORP. GOVERNANCE INT'L, Dec. 2000, at 4-12.

171. CPL art. 52.



The FTL specifically provides for permanent and provisional injunctive relief.<sup>172</sup> Taiwan's injunctive relief for a violation of the FTL originates from the Taiwanese Civil Code rule protecting property rights in general.<sup>173</sup> Comparable provisions exist in Taiwan's intellectual property laws.<sup>174</sup> However, allowing competitors or consumers to apply this provision in an antitrust context could result in either anticompetitive behavior or disruption, as injunctive relief is an *ex ante* remedy that actually could restrain competition if awarded erroneously. However, in the first decade since passage of the FTL, this has not been a problem. The domination of the TFTC in this field has weakened overall civil liability enforcement. No party to a major case has ever sought injunctive relief as a remedy.

The FTL provides for compensatory damages and constructive damages, which allow an injured enterprise to recover profits resulting from an anticompetitive act if actual damages are difficult to determine.<sup>175</sup> Similar remedies exist in Taiwan's Civil Code and Company Law for the misappropriation of business opportunities and unfair competition by directors and managers, and in Taiwan's Patent Law and Trademark Law to assess damages for infringement.

Competition law enforcement often involves collusion and undue pressure by one party against the counterparty. Compensatory damages likely would be insufficient if the probability of private law enforcement is low. However, some level of deterrence would be necessary. Taiwan is one of the few jurisdictions—if not the only jurisdiction outside the United States—that awards treble damages for a violation of its competition laws. In fact, a study found that outside the United States, private antitrust suits virtually do not exist, and even when brought successfully, damage awards usually are much lower than damage awards in U.S. cases.<sup>176</sup>

The treble damage award clearly mirrors American antitrust law. However, damages do not automatically triple; the award, if any, and the measure (up to three times the actual damages) are subject to the discretion of the court, which will not award treble damages automatically. The FTL

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172. FTL art. 30.

173. Civil Code art. 767, translated in MAJOR LAWS OF THE REPUBLIC OF CHINA ON TAIWAN (James C. Liu et al. trans., 1991).

174. See Patent Law art. 88 (2001); Copyright Law art. 84 (1998); Trademark Law art. 61 (1997). English translations of the Patent Law, Copyright Law, and Trademark Law are available at <http://www.saint-island.com.tw/iplaws.asp>.

175. FTL arts. 31-32.

176. Joel Davidow, *The Worldwide Influence of U.S. Antitrust*, 35 ANTITRUST BULLETIN 603, 620 (1990).

nevertheless establishes the principle of awarding punitive damages for wrongful conduct. However, it remains unclear how effective this punitive relief is. In addition to the requirement to post court fees, other “barriers” exist to private enforcement of competition laws, including the lack of civil discovery procedures and judges’ general desires to control damage awards. Despite the ostensible strong relief under the treble damages clause, no important private causes of action for a violation of the FTL have been reported.

In sum, Taiwan’s experience thus far suggests that litigants do not rely exclusively on the adversarial approach to resolve economic issues or disputes. This phenomenon applies in disputes involving a conflict among different interest groups such as producers and consumers, and even among the producers themselves (such as large firms against small firms and manufacturers against distributors). For offensive reasons (like maintaining its role in unifying the interpretation of a highly technical but politically important economic statute like the FTL) and defensive reasons (such as preventing the occurrence of “wrong” enforcement positions and judicially-created interpretations that would stifle business), the TFTC decided to monopolize FTL enforcement. In the short term, FTL jurisprudence will grow primarily through agency decisions and interpretations, treatises, and scholarship, rather than through private litigation.

### *B. Criminal Sanctions*

The FTL authorizes criminal sanctions for certain violations. Monopolization, illegal cartels, passing off, and illegal multilevel distribution arrangements could lead to a maximum prison sentence of three years and/or a criminal fine of up to NT\$100 million (approximately US\$320,000).<sup>177</sup> Until the 1999 amendment, the maximum criminal fine available was only NT\$1 million, which the TFTC rarely imposed. Since the 1999 amendment, the TFTC has taken a more aggressive enforcement attitude, as the political environment is riper and the decentralization of power makes any effort to establish a more lenient enforcement program more difficult. However, while the TFTC has maintained criminal sanctions as a deterrent, it has focused primarily on administrative enforcement.

An unabated criminal violation of certain FTL provisions following a

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177. FTL art. 35.

TFTC order to cease and desist is punishable by up to two years in prison and a criminal fine of up to NT\$50 million.<sup>178</sup> These provisions encompass rules against boycott conduct, discrimination, luring customers or forming cartels with improper inducement or coercion, misappropriation of trade secrets, and unreasonable vertical and other restraints. Trade libel could lead to a maximum of two years in prison and/or a fine of NT\$50 million (reflecting an increase of over one hundred times the fine before the 1999 amendment).<sup>179</sup>

In addition to these strong criminal sanctions, Taiwan's Code of Criminal Procedure adopts the German approach<sup>180</sup> by allowing prosecution of a crime by the victim.<sup>181</sup> The criminal sanctions in the FTL therefore provide a potentially powerful tool with which competitors and consumers can threaten prosecution. In contrast, in the United States, criminal enforcement of competition laws is the exclusive responsibility of the U.S. Department of Justice. Excessive deterrence, compounded by the vague terms in the FTL and their possible multiple interpretations, has become a real concern of the business community in Taiwan. The TFTC accordingly sponsored an amendment, enacted in 1999, that requires all criminal prosecutions (including public prosecutions) to follow its administrative enforcement actions.

Thus far, few have witnessed the strength of the FTL's criminal provisions. The TFTC has recommended criminal prosecution in only a few cases involving egregious illegal cartel and bid rigging conduct. In the foreseeable future, criminal enforcement of the FTL likely will remain sporadic, and the TFTC likely will continue to reserve criminal sanctions for blatantly egregious conduct. In this regard, perhaps Taiwan's experience will mirror that of more industrialized nations.

### *C. Administrative Enforcement*

On its face, the FTL places equal weight on civil, criminal, and administrative modes of enforcement. However, in practice, it places the strongest emphasis on enforcement by administrative agencies, primarily the TFTC. As previously mentioned, the FTL and its companion statute, the Organic Statute for the Fair Trade Commission, authorized the creation

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178. FTL art. 36.

179. FTL art. 37.

180. JOHN H. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* 101-02 (1977).

181. Chung-hua Min-kuo Hsing-shih Su-sung Fa [Code of Criminal Procedure] art. 319 (1935) (amended 1990), *translated in* MAJOR LAWS OF THE REPUBLIC OF CHINA ON TAIWAN, *supra* note 173.

of the TFTC as a ministerial level agency under Taiwan's cabinet, the EY.<sup>182</sup> The TFTC is determined to dominate enforcement of the FTL, regardless of the substantive enforcement policies. In other words, the TFTC will determine whether and how to enforce the provisions of the FTL.

Although the TFTC would not admit it publicly, it wields semi-judicial power. The TFTC also possesses the power to conduct administrative investigations,<sup>183</sup> and it often holds informal hearings (by invitation only, except that members of the press sometimes may attend) in connection with such investigations. Invitees often include industry experts, competitors, representatives of consumer groups, other government agencies with jurisdiction over the target of the investigation, scholars, and the enterprise under investigation. The TFTC follows no trial-like investigative procedures; the Commissioner in charge of the investigation serves as the chairman and invites comments as if conducting a roundtable discussion. For a case of first impression requiring some expertise, the focus usually centers on policy issues. Invitees are all assumed to be experts, and usually are unrestrained, even when their comments exceed their field of expertise. These hearings reflect a strategy that the TFTC adopted early on to co-opt the media and scholars, which, in turn, help construct an image of accountability and legitimacy.

This informality is extremely useful for developing a sharpened understanding of the issues at hand. Compared with the practice of other agencies, and in view of the lack of legislation governing formal administrative procedures, such hearings provide desirable transparency and project an image of political accountability. However, the strength of this informality also could constitute its weaknesses; the enterprise under investigation does not know the identity of the complainants and may feel that no fair opportunity exists to present a defense on the basis of legal principles rather than policy preferences, especially when the TFTC holds hearings without its presence. Media reporting by attending members of the press or from the leakage of other attendees could cast a cloud over the corporate image of the enterprise under investigation.

The entry into force of the new ALL in July 2000 and APA in 2001, however, is forcing the TFTC to change its public hearing practice. As previously mentioned, the TFTC does not want its decisions challenged in an administrative appeals proceeding. If anything, the TFTC would rather

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182. See FTL art. 25; Organic Statute for the Fair Trade Comm'n art. 1. See also *supra* note 39.

183. FTL art. 27.

be reversed by the Superior Administrative Court, which came into being under the new ALL in July 2000. The APA provision on formal public hearings makes bypassing the EY review a possibility. In one way, this will be an improvement as there will be more direct access to judicial review. However, the EY will lose its check on TFTC activism in some individual cases.

Whether the Superior Administrative courts will provide the same quality control function remains to be seen. Outside the TFTC, little expertise on competition law exists. Therefore, the Superior Administrative courts, and the Supreme Administrative Court above it, must rely more on the adversarial system of the new ALL to remain aware of the difficult legal and economic issues and market practices arising under the FTL. However, one immediate drawback with the new ALL system exists. Because the Superior Administrative courts follow the civil litigation approach and allow oral argument, the numerous filings challenging agency adjudications have swamped their nineteen judges. Anecdotal evidence suggests that the first year of the new ALL system generated a backlog of more than twenty thousand cases. This heavy docket certainly will affect the quality of the judicial review of TFTC decisions, as many businesses will not be able to wait long for a judicial determination of their challenge to the TFTC's actions.

FTL Article 25(3) authorizes the TFTC to review the economic conditions and commercial activities of enterprises.<sup>184</sup> Unfortunately, the vague language of Article 25(3) leaves unclear whether the TFTC possesses the power to compel the release of information when it engages in general "investigations" when no allegation of illegal conduct exists, or whether it merely possesses the power to conduct "surveys," in which case it could not compel enterprises to furnish sensitive, proprietary information such as lists of their most important customers. Although this issue remains unsettled, the TFTC's current inclination is to assert the former argument. By the mid- 1990s, the TFTC's databank had grown rapidly and already contained basic information for over 10,450 enterprises in Taiwan.<sup>185</sup>

Every FTL violation could result in administrative fines and, in certain cases, structural and corrective remedies.<sup>186</sup> Before the 1999 amendment, the TFTC could assess administrative fines of up to NT\$1 million (US\$40,000) for each violation. As a result, when Taiwan enacted the

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184. FTL art. 25(3).

185. Chairman Wang's Report, *supra* note 79, at 15.

186. FTL art. 41.

FTL, there was substantial apprehension that a chilling effect on economic activities might result from overzealous enforcement actions. Accordingly, the TFTC's administrative sanctions have to follow cease-and-desist orders for acts of noncompliance. By the late 1990s, the decentralization of power and activism actually led to the TFTC's own dissatisfaction with the low ceiling on the administrative fines. The TFTC then secured an FTL amendment allowing the TFTC to assess administrative sanctions immediately upon finding a violation. In other words, after 1999, the TFTC could assess administrative sanctions without having to fire a "warning shot."

The 1999 amendment to the FTL substantially enhanced the TFTC's power to pursue administrative fines. It increased the ceiling of administrative sanctions against illegal mergers from NT\$100,000 to NT\$50 million. Similarly, under Article 41 of the FTL as amended, the TFTC could mete out administrative fines ranging from NT\$50,000 to NT\$25 million for a first substantive offense, with additional fines ranging from NT\$100,000 to NT\$50 million for continued violations.<sup>187</sup> The amendment also strengthened administrative punishment for violations of the rules obligating enterprises to accept administrative investigations.<sup>188</sup>

The unease of Taiwan's local and foreign business community following enactment of the FTL led the TFTC to embark on a campaign to publicize the law. By November 30, 1993, the TFTC had held more than five hundred explanatory seminars and distributed more than 1.2 million copies of explanatory materials to the business community and the public. For an economy with twenty-two million people and a land mass of thirty-six thousand kilometers (about the size of Lake Michigan), this is a formidable effort. The TFTC still continues to post announcements explaining the law and urging compliance with it on both the radio and the sides of public buses.<sup>189</sup> Generally, this campaign has succeeded in ensuring strong public awareness of the existence of competition laws.

As the first-term Commissioners served out the second half of their tenure, a trend towards more aggressive enforcement actions began. Generally, the TFTC has preferred taking the moral suasion approach over the adversarial approach. For example, the TFTC's stated goals for the last

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187. In addition, in accordance with Article 43, a violation of rules governing multilevel distributions and sales as strengthened by Articles 23-1, 23-2 and 23-3 would be subject to the same two-tier system of administrative fines.

188. See FTL art. 43. The TFTC would punish the first occurrence of noncompliance with orders to submit to an administrative investigation with fines ranging from NT\$20,000 to NT\$250,000. Continued noncompliance would result in fines ranging from NT\$50,000 to NT\$500,000.

189. Chairman Wang's Report, *supra* note 79, at 10-11.

year of the first-term Commissioners' tenure included a program to target certain industries for such moral suasion efforts. The targeted industries or business activities included banks, insurance companies, volume merchants and discount stores, tile companies, the automobile industry, tire companies, retail chains for electrical appliances, computer classes, and multilevel distribution practices.<sup>190</sup>

Several reasons exist for this course of action. First, the TFTC did not wish to create an anti-business image after laying the foundation for its enforcement program, especially with the recent reduction in Taiwan's economic growth. Second, firms under investigation that possess some market power presumably could wield political power as well. The TFTC has been careful not to confront powerful but often ignorant members of the LY, whose erratic conduct could lead to a budget freeze and disruption of enforcement activities. Third, when other ministries exercise primary jurisdiction over the substantive regulation of firms targeted by TFTC investigations, the FTL requires the TFTC to consult with them.<sup>191</sup> The desire to maintain a collegial appearance while persisting in its position also could lead the TFTC to adopt the moral suasion approach.

As Taiwan's democratization led to the decentralization of power toward the end of the 1990s, proponents of the adversarial approach within the TFTC began to outnumber those favoring the moral suasion approach. The most amazing tension focused on the second half of the TFTC's third term, which occurred from mid-1999 to early 2001. The amount of the administrative fines assessed by the TFTC represents an important gauge of this change in enforcement position. As of the end of April 2001, the TFTC had taken enforcement action and rendered sanctions against a total of 2,428 enterprises in a total of 1,601 cases.<sup>192</sup> Of those enterprises, 632 in 388 cases received administrative fines totalling NT\$413 million (about US\$14 million).<sup>193</sup> The latter-day third term administration of the TFTC was the most activist, recovering a total of NT\$155.56 million in administrative fines in 2000.<sup>194</sup> The TFTC had assessed a total of NT\$176.58 million in administrative fines by the end of 2001, 91% (NT\$161.91 million) of which occurred in January 2001 before the outgoing TFTC commissioners stepped down!

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190. *Id.* at 11.

191. FTL art. 9.

192. *See* Table 10, *infra*, at 167.

193. *Id.*

194. *Id.*

## V. CHANGING MARKET STRUCTURE THROUGH COMPETITION POLICY

### A. *Fostering Competition Policy: Telecommunications Reform*

There are different approaches to fostering competition law and policy. The most effective and straightforward approach would resemble the ILI and APROC initiatives, which focus on opening up the economy as much as possible. Consumers benefit the most by changing the market structure and allowing as much freedom as possible for firms to compete. In other words, allowing competition policy to guide national economic development policy makes competition law enforcement much easier. The FTL, on the other hand, clearly adopts another approach. It gives the government, via the TFTC, a more interventionist role. Enforcement constitutes an ongoing and costly enterprise. The FTL regulates conduct, not structure. Some of its rules are even potentially anticompetitive.

There have been sectors like SOEs or regulated industries in which the government either has displaced or suppressed competition. However, technological and market conditions have changed. Privatization and deregulation have led to an increased level of competition. However, rigorous competition law and policy are important in these newly open markets because an incredibly strong, often state-owned, incumbent opens up the market. Employees of the incumbent may be inefficient, but they jealously will protect their residual monopoly power or political influence over sympathetic politicians. The government essentially possesses a conflict of interest when the incumbent is state-owned. Even in the case of private monopolies, the smaller scale of the Taiwanese economy may magnify the market power of the monopolies.<sup>195</sup> Therefore, competition law enforcement and faithful adherence to a strong competition policy are that much more important a goal.

The FTL was designed to police competitive conduct in the marketplace. However, Taiwan's telecommunications sector presented a vastly different situation because it did not possess a competitive market structure. Like its laws, Taiwan's telecommunications industry follows the European model. Before the telecommunications reform in 1996, the Telecommunications Law (TL) contemplated the DGT as both the state-

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195. Recently, in Hong Kong, an interesting example emerged in which two telecom operators, Hutchison and Pacific Century Cyberworks, both were controlled by the Li Ka-shing family. The Li family reportedly has lobbied against the Hong Kong Legislative Council's grant of authority to OFTA, the Office of the Telecommunications Authority, to regulate mergers of telecom operators. See Simon Pritchard, *In Whose Best Interest?*, S. CHINA MORNING POST, June 20, 2001, at 14.



owned monopoly operator and regulator. Even though the DGT began to draft a bill to revamp the TL at the same time legislators drafted the FTL bill, it neither believed in competition nor foresaw the technological breakthrough, convergence, or global impact that increased competition would generate. It did, however, initiate a modest attempt to divide telecommunications services into Type I (basic) and Type II (enhanced or value added network) services. By the mid-1990s, the pressure for telecommunication reform was mounting. The DGT possessed a backlog demand for one million mobile phones, which it could not meet because of imposed procurement controls resulting from its status as a bureaucratic agency and SOE.

Taiwan applied for accession to GATT (now the WTO) in 1990. Without an amendment, the TL would not permit any foreign participation in the telecommunications sector. Indeed, the TL would prohibit even domestic firms from entering the telecommunications sector, as it essentially provided the DGT with a statutory monopoly. The EY therefore submitted three bills to the LY. First, a new TL would allow other firms to enter the telecommunications market in Taiwan. The second bill proposed an amendment to the Organic Statute for the DGT to transform the DGT strictly into a market regulator. The third bill proposed to enact a Statute for Chung Hua Telecom Corporation in order to separate and incorporate the business arm of the DGT.<sup>196</sup>

### *B. Phase One*

Intensive interagency lobbying efforts by the EY in 1995 led to the enactment of the three proposed bills into law in 1996. This reform ushered in the first phase of telecommunications reform in Taiwan, which truly began when the EY substantially overhauled the original bills.<sup>197</sup> The business arm of the DGT (the future CHT) drafted these bills in its own self-interest. Consequently, the bills were highly inadequate, and even anticompetitive in certain sections. For example, under the old DGT version of the TL amendment bill, the CHT would monopolize all Type I telecommunications services. The CHT would open the Type II services to the private sector gradually and piecemeal following a rigorous public

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196. In fact, the latter two bills were submitted after the LY rejected the first one as being insufficient on its merits. Legislators sympathetic to labor issues or reluctant to pursue privatization viewed the rejection as a good way to forestall market liberalization.

197. One of the authors of the bills was an official at the CEPD, which headed up interagency coordination efforts to lobby for passage of the economic reform laws. Taiwan grouped these laws and related actions under the APROC initiative.

interest review every six months.

This example illustrates the strong labor opposition to the DGT. As a result, the three telecommunications reform laws enacted in early 1996 constituted a compromise. The new TL possesses statutory authority for opening up the market, thus enabling future liberalization. Liberation was to come only gradually because the EY had to accept a five-year grace period from the date of CHT's incorporation (July 1, 1996) to entertain a complete market opening.<sup>198</sup> The new TL limited foreign ownership in Type I operators to 20%. Unfortunately, it was too late to remove the Type I and II classifications. Instead, all constituents reached a compromise so that the TL, as amended in 1996, defines a Type II business as anything that is not a Type I business, thereby making as much room for future growth of the Type II business as technological progress would make possible.

Article 30 of the TL represents yet another important compromise. It required the maintenance of CHT as an SOE. In other words, privatizing CHT would require passage of a future amendment. This proved difficult, as the ruling KMT party already was very factionalized. Indeed, the KMT lost its majority in the LY in the national parliamentary election held shortly before the passage of the telecommunications reform laws in 1996. As a result, Taiwan lost the momentum to push for the privatization of CHT so as meet the imminent threat of competition. Article 30 of the TL, as enacted in 1996, also ensured the maintenance of CHT as one company, eliminating the possibility of splitting it into several operating, and even competing, companies, short of any legislative amendment. This provision reflects the typical herd mentality of SOEs in Taiwan. No unit will be privatized, so goes this company-wide collective bargaining strategy, unless all units are privatized.<sup>199</sup> In sum, by forestalling privatization, the CHT allowed its employees to maintain civil servant status, thus ensuring job protection.

Within a year of CHT's incorporation, the new DGT completed the tendering process for all mobile communications in Taiwan. By early

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198. This grace period did not appear in the new TL. Rather, policy decisions under the APROC initiative reflected it. This gave the EY some leeway in interpreting the grace period. Indeed, one interpretation would mean that tendering would not begin until the end of the five-year period. However, the CEPD and MOTC persuaded the EY to follow the more enlightened interpretation that tendering should be early enough so that effective competition can occur by the end of the five-year period.

199. This kind of strategy does not always work. In the case of Taiwan Machinery Company's loss of competitiveness in all sectors, this strategy led to piecemeal privatization of each business unit. The government ultimately lost its going concern value for the entire business.

1998, private sector operators of mobile phone, paging, and mobile data services were up and running. Today, mobile phone penetration in Taiwan exceeds 90% of the telecommunications market, and CHT no longer possesses the largest market share. However, private sector operators encountered many regulatory and competitive hurdles. First, to ensure maximum participation, the DGT awarded national and regional licenses, thereby balkanizing the national market. Second, the DGT's interconnection regulations proved utterly ineffective in ensuring efficient interconnection arrangements between the new operators and CHT. These interconnection regulations, for example, used historical cost rather than forward-looking incremental cost as the basis for interconnection.

Worse yet, neither the TL nor the Organic Statute for the DGT provided effective dispute resolution mechanisms. The Organic Statute actually created a Dispute Resolution Committee within the DGT. Theoretically inspired by the Canadian Radio and Telecommunications Commission (CRTC) model, the members of this committee were to be appointed and balance off the forefront of the DGT. However, the Dispute Resolution Committee turned out to be a paper tiger. The most effective interconnection negotiations, it turns out, allowed private sector operators to enlist the support of their foreign shareholders (mostly American telecommunications companies), and through them, the United States Trade Representative (USTR). Therefore, consultations between the DGT and USTR regarding Taiwan's WTO accession also led to reductions in interconnection cost. Allegations of price-based and non-price predation made to the TFTC were essentially ineffective.

### *C. Phase Two*

The second phase of Taiwan's telecommunications market reform began in early 1998, almost simultaneously with the opening of the mobile communications sector. For more than a year, a blue ribbon committee created by the DGT and entitled the Fixed Network Market Opening Task Force worked on developing tendering rules governing the opening of a fixed network market, fair competition rules for the telecommunications market, and technological issues. The Task Force included more than one hundred members representing telecommunications companies in Taiwan and abroad, including agencies such as the DGT and the TFTC, scholars, experts, and representatives of consumer groups. Although not binding on the DGT, the Task Force provided a forum to discuss market opening

issues in a way that offered transparency and accountability.<sup>200</sup>

After a year's work, the Task Force made a number of recommendations to the DGT. Most notably, the Task Force recommended two full licenses, two international licenses, and three local licenses for the imminent market opening. However, in early 1999, legislators enacted an amendment to the Budget Law based on a bill floated by two members of the LY who thoroughly studied economics. This new law required the government to either run auctions for licenses or completely open a new sector, unless another statute authorized merit review, which would take precedence. Uncertain whether Article 12 of the TL, as amended in 1996, took precedence over the new Budget Law, the EY announced that it would not impose a numeric quota on the number of fixed network licenses slated for tender at the end of 1999. At the same time, the MOTC and DGT adopted fixed network telecommunication regulations that imposed a minimum initial paid-in capital floor of NT\$40 billion (about US\$1.3 billion) for each new fixed network operator. These regulations also permitted certain utilities (including mobile phone operators and cable operators) to obtain licenses to lease circuits. An earlier proposal granting successful applicants a four year grace period met resistance from the United States, as it perceived the proposal to be inconsistent with Taiwan's schedule for opening its markets in accordance with WTO accession.

Another controversial provision in the fixed network regulations involves a requirement that each potential operator build 1,000,000 telecommunications ports, and that no such operator may begin any business without building at least 150,000 ports. The DGT does not require use of DSL, HFC, or other technologies. However, each successful applicant must demonstrate the existence of such ports. This requirement, therefore, becomes very relevant to applicants who wish to use their cable operator network to roll out their infrastructure. This concerns their competitors as well, as the time it takes to reach the market is a concern for all. These rules demonstrate the DGT's dilemma. It wanted to use the fixed network tendering opportunity to require all successful applicants to construct an alternative infrastructure. At the same time, it wanted to provide mechanisms for robust competition among the new applicants, as well as between the applicants and CHT.

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200. The Task Force operated differently from a public hearing. After the Task Force completed its work, the APA was enacted and ultimately came into force in 2001. Based on similar legislation in the United States and Germany, the APA requires public hearings and comments when agencies adopt important measures affecting the public.

In 1998, the DGT selected the middle of 1999 as its deadline for submitting applications for fixed network licenses. However, the DGT delayed this schedule until the end of 1999 because it needed more time to review and adopt the relevant tendering rules and regulations governing fixed network operators. Meanwhile, another amendment to the TL was submitted for LY review. Enacted in November 1999, it contained several important changes. First, it allowed for an increase in direct foreign ownership of Type I telecommunications businesses up to a maximum of 20%. In addition, it raised the total foreign ownership limit to 60%, thereby allowing at least 40% indirect foreign ownership. However, due to legislative uncertainty, this provision finally went into force in January 2000 under an EY decree and well after the deadline for fixed network tendering had passed.

The TL, as amended in 1999, also provides for incentive price regulation through adjustable price caps. In addition, because of a loophole in the 1996 TL, the prohibition against cross-subsidization applied only between Type I and Type II businesses. The 1999 amendment removed this loophole by making the prohibition applicable to business segments within the Type I category (such as mobile and fixed network businesses) as well. In addition, the 1999 amendment mandated accounting transparency and separation. Most importantly, the 1999 amendment added a provision specifically prohibiting anticompetitive conduct.<sup>201</sup>

The 1999 amendment to the TL also removed the barrier to CHT's privatization, and specifically provides for the issuance of a golden share that the government would hold to safeguard public interest during and after the completion of privatization.<sup>202</sup> In tandem with the 1999 amendment and the tendering for the fixed network licenses, the DGT's regulations governing fixed network operators adopted a number of fair competition rules, including regulation of dominant telecommunications operators (a presumed status if a firm holds a 25% market share). The regulations mandate open access for holders of leased circuits that constitute dominant operators, bottleneck facilities, and key infrastructure facilities.<sup>203</sup>

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201. Telecommunications Law art. 26-1 (1996) (amended 1999). Interestingly, this provision was borrowed from Article 10 of the FTL, which applies to monopolization. However, only a prior determination by the DGT that a telecom operator is a dominant operator triggers this provision. On the other hand, the 1999 amendment repealed the comparable provision in Article 10(2) of the FTL.

202. Telecommunications Law art. 12. The practice of issuing a golden share, that is, a share of preferred stock containing certain negative controls, began with the privatization of British Telecom.

203. Local loop unbundling is easier said than done in Taiwan as well as in Europe. *See, e.g.*, Fred

Unfortunately, the fixed network market opening received criticism. The final review and interview of the management team occurred on March 19, 2000, one day after the presidential election.<sup>204</sup> After announcing the results, the DGT again amended the fixed network regulations to open the international submarine cable landing. This opening would be pro-competitive, but also would undercut the DGT's alternative infrastructure policy underlying the high capitalization and infrastructure rollout requirements.

#### *D. Beyond the Telecommunications Market Opening*

All three successful bidders for the fixed network licenses stress an information-communications strategy. All saw convergence as an unavoidable trend. How to meet the convergence trends properly will present the biggest challenge for all operators.<sup>205</sup> Meanwhile, technological convergence has made regulatory balkanization increasingly intolerable.

Taiwan possesses a highly segmented communications market. During the martial law era, the government strictly controlled the print media under the Publication Law. As a result, print media became highly concentrated. However, since the lifting of the martial law decree and related moratorium on entry into the print media in the late 1980s, competition has intensified with any new entrants. Since the late 1980s, competition has intensified in the broadcast and television segment as well. Under the Broadcast and Television Law, the government had monopolized the terrestrial television market for forty years through three affiliated stations. In the mid-1980s, however, dissatisfaction with poor programming and the desire by opposing politicians to break the government chokehold led to the mushrooming of illegal cable stations known as the "fourth stations." Authorities gradually discontinued unsuccessful and highly controversial enforcement attempts to crack down these illegal cable operators. Instead, the government began to face reality and enacted a Cable Television Law in 1993 to grant licenses to applicants who both passed the merit reviews of the regulator, the GIO, and

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Dawson, *Devil of A Time: Lack of Details Could Delay European Unbundling* 22-23 (May 1, 2001), at <http://www.phoneplusinternational.com/articles/151sec3a.html> (last visited May 19, 2002).

204. Three of the four consortia received establishment permits for the rollout.

205. For an excellent treatment of the relevant issues and strategies, see CARL SHAPIRO & HAL R. VARIAN, *INFORMATION RULES: A STRATEGIC GUIDE TO THE NETWORK ECONOMY* (1999).

completed the rollout requirement. Taiwan now enjoys over 70% cable penetration, which serves as a good foundation for an information society.

## VI. THE INTERACTION OF COMPETITION AND COMMUNICATION LAWS

### *A. Embracing Competition and Agency Coordination*

As mentioned above, FTL Article 46, when enacted, required the TFTC to defer to other agencies when specific legislation authorizes industry regulation. Despite its ambiguity, the 1998 amendment to Article 46 reflects the sentiment that competition policy should take precedence over industrial policy. Indeed, the APROC initiative under which the EY enacted three telecommunications laws reflects this policy inclination. As amended in 1996 and 1999, the TL now clearly demonstrates the same preference for competition policy. However, as the fixed network market opening and the tendering policy show, overcoming industrial policy is easier said than done.

Why is it desirable to add another layer of competition rules to the TL when the FTL contains general competition rules? Foreign examples suggest that the two-track approach to enforce competition policy ensures effective competition. In the telecommunications sector, no level playing field exists. Therefore, authorities should implant competition rules in the TL to supplement FTL enforcement. The TFTC and DGT, however, need to increase their coordination in enforcing various competition rules in these two statutes. So far, their coordination has left much room for improvement. In the future, a coordinated two-prong enforcement by the agencies will be desirable. The competition rules in the TL exist to ensure proper industry structure and practice. Compliance with these competition rules should not constitute an exemption from the competition rules in the FTL, which establish a higher behavioral standard.

### *B. Rethinking FTL Rules*

Applying competition rules in the communications market also requires some serious rethinking of the rules in the FTL. When markets and industries converge, defining the relevant market will become more difficult. In addition, as the time to reach the market becomes increasingly important, so do expeditious enforcement actions arising under the FTL's anti-monopolization provisions. The TFTC should not allow these provisions to atrophy in the hope that the less stringent rules (such as the general prohibition of unfair methods of competition under FTL Article 24) will do the work.

The cartel control provisions of the FTL need to be overhauled as soon as possible. Their rigidity and overbroad coverage are noticeable in the case of the telecommunications market, which epitomizes network economy. Competitors need to interconnect or otherwise cooperate efficiently. Application for prior TFTC approval will consume valuable time and directly contradict the speed requirement of the communications industry.

### *C. Rethinking Industry Regulation*

Legislation governing Taiwan's communications industry merits some serious rethinking as well. Taiwan adopted the Broadcast and Television Law, TL, and Cable Television Law at different stages of its economic and political development. The technologies that formed their legislative assumptions have undergone tremendous improvements. Maintaining regulatory balkanization will provide a disservice. For example, these statutes contain different rules governing foreign ownership limitations. Some statutes, such as the Cable Television Law, contain rigid ownership diversification requirements that make investment planning more difficult.

### *D. Enhancing Independence*

In 1998, the EY adopted a preliminary proposal to create a new commission patterned after the U.S. Federal Communications Commission (FCC).<sup>206</sup> This new commission will take over the functions of the Broadcast and Television Department of the GIO and DGT. The proposal contemplates an organizational structure very similar to the TFTC and FCC.

Whether this FCC model would work in Taiwan depends on a number of institutional and political factors. Clearly, the DGT, as an agency under the MOTC, does not possess sufficient institutional stature. In addition, the political and bureaucratic culture of an industry dominated by SOEs makes industry regulation difficult. The new commission, like the TFTC, would be a ministry-level agency directly under the EY. This would give it heightened stature and, subsequently, teeth. However, the more important task is to ensure that the new commission will perform the same functions as the FCC.

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206. This is ironic, as there have been proposals to do away with the FCC now that the Federal Telecommunications Act of 1996 mandates full competition. *See, e.g.*, PETER HUBER, LAW AND DISORDER IN CYBERSPACE: ABOLISH THE FCC AND LET COMMON LAW RULE THE TELECOSM (1997).



Indeed, the TFTC faces the same issue. Taiwan created the TFTC partially in the image of the U.S. Federal Trade Commission. The TFTC has had almost a decade to increase its stature, independence, and expertise. However, it has yet to behave like the U.S. Federal Trade Commission because political institutions and the culture in Taiwan are quite different. Any architect for a new commission to regulate Taiwan's communications sector should keep the TFTC's path in mind. On the other hand, one need not be unduly alarmed or discouraged: a lull existed as well in antitrust enforcement in the United States immediately following passage of the Sherman Act. In addition, in Chinese legal culture, the passage of a law only means the beginning of a government measure or program. Enforcement always comes much later.

In late 2001, a DGT-commissioned study by the author reaffirmed the 1998 EY proposal to set up an independent regulatory commission to be named the National Communications Commission (NCC). To follow convergence trends, the NCC would combine the regulatory functions of the DGT and GIO. However, in early 2002, the DPP government adopted a government-reengineering plan, whose main goal was to reduce the number of agencies. The plan calls for placing the NCC under a new Ministry of Science and Technology, thereby taking a surprising turn on Taiwan's now apparent long-awaited and still uncertain path to achieve regulatory independence!

#### *E. Avoidance of the Government's Conflict of Interest*

Lax law enforcement against SOEs is largely a reflection of the inherent conflict of government interests. Taiwan's telecommunications sector is only one such example. The FTL does not authorize structural remedies like divestiture. To level the playing field, CHT should be privatized. This is not to say that privatization necessarily will improve competition law compliance at CHT. However, it will remove the conflicts of interest that have prevented the government from faithfully enforcing its laws against SOEs. Privatization efforts also will enhance CHT's competitiveness. However, from a competition law perspective, avoidance of the government's conflict of interests requires that the government's residual interest in SOEs remains minimal.<sup>207</sup> This is unlikely to occur

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207. Under Taiwan's Privatization Law, an SOE is "privatized" once government ownership falls below 50%. However, drawing a distinction at 50% is unrealistic because less ownership still could constitute working control. In addition, personnel and procurement controls still could come at the ministry level, so long as it still is able to control a substantial interest in the "privatized" companies.

with CHT in the near future.

In Taiwan, privatization of SOEs often is difficult because of labor opposition. The CHT labor union has argued, for example, that labor representatives should sit on CHT's board of directors, following the German codetermination (*Mitbestimmung*) model. Indeed, the DPP's party platform calls for such labor codetermination. Since it came to power in May 2000, the DPP government has shown some hesitation in pursuing privatization in general.<sup>208</sup> CHT's unrealistically ambitious privatization plan already has experienced significant delays.

In hindsight, telecommunication regulation probably was unnecessary. The European model that Taiwan adopted has made it difficult to level the playing field. Taiwan possesses a short history of competition policy. The FTL's first decade will lay a good foundation for the enforcement of competition law. However, tremendous work is needed to make enforcement more effective and less rigid.

Thus far, the FTL, as a set of competition rules, has been more concerned with conduct. On the other hand, the TL and related regulations are more concerned with changing the industry structure. Competition law and communications law will become more compatible over time. Convergence also will force an overhaul of inconsistent, industry-specific legislation such as the TL, Cable Television Law, and Broadcast and Television Law.

Enforcement of competition rules in both the FTL and TL requires further improvement. A whole host of issues still face the TFTC and whatever new commission the legislature may establish with the aspiration of fulfilling a FCC function. However, two indicators suggest that one should be cautiously optimistic. First, Taiwan has embarked on a steady course of democratization. With political parties transferring power at the wishes of the people, competition law enforcement will become more apolitical and professionalized. Second, Taiwan's entry into the WTO will ensure a continued liberalization of all sectors of the domestic economy, including communications. Over time, competition law enforcement in the communications sector will become more robust.

## VII. CONCLUSION

Taiwan's first decade of enforcing the FTL offers an interesting and important example of fostering competition law and policy. One can draw

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208. Since 1990, Taiwan has seen less than half a dozen "privatization" projects.

several observations from this experience, and they may be useful, from a comparative perspective, to similarly situated economies.

First, as this Article clearly demonstrates, competition law and policy comprise a part of any jurisdiction's political economy. In Taiwan's case, the political economy took the form of traditional Chinese political views on monopolies and primitive rules against monopolization and illegal cartels. Political economy also informed the drafting and passage of the FTL, as well as the composition of the TFTC and its work.

Second, there should be a proper division of labor between competition law and competition policy. A vigorous competition policy will open the market, which makes competition law enforcement much easier and more sensible.

Third, calling competition law a "fair trade" law is dangerous. Legislative goals are laudably stated and elegantly pluralistic, but they cloud the real purpose of competition law, which is to foster consumer welfare. By labeling conduct in fairness terms, the FTL often ignores allocative efficiency. Certain FTL provisions and enforcement positions of the TFTC are clearly anticompetitive.

Fourth, from the perspective of public choice, the TFTC maximizes its own position. When activism was politically unacceptable, the TFTC started modestly, with a stronger focus on publicity and outreach than actual enforcement. The TFTC also developed a sophisticated practice of administrative guidance and moral suasion. However, when political power became more decentralized in Taiwan, the TFTC became more pluralistic and activist. Currently, the TFTC's infatuation with monopolizing FTL enforcement is more expedient than beneficial.

Fifth, certain provisions of the FTL, including those that concern cartel regulation and merger control, must be examined closely to ensure that they truly meet Taiwan's need to succeed in a global economy.

Sixth, the TFTC has demonstrated significant interest in the high-tech sector, which happens to involve the conflict of interest of strong foreign and domestic companies. The TFTC needs to reexamine certain enforcement positions and decisions, including the guidelines governing the issuance of warning letters by owners of intellectual property rights and the *CD-R* case. The TFTC must neither appear to favor domestic enterprises that possess licenses nor intervene in the terms of such licensing programs when its intervention is not based on well-reasoned antitrust economics.

Seventh, procedural rules are just as important as substantive rules. Even though Taiwan's FTL provides for extraordinary remedies like treble damages, judicial enforcement of the FTL remains weak. The more the

FTL parallels agency law, the more regulatory and burdensome it can be.

Eighth, Taiwan's experience shows that the government often bears responsibility for creating an anticompetitive market environment. It has done so in the usual ways: state ownership, heavy regulation of particular industries, cross-subsidies, and protectionism. The FTL embodies a different philosophy; competition policy is more than industrial policy or industry protection. However, fostering competition law and policy is easier said than done. The TFTC had to maneuver carefully in its first decade to fashion an effective enforcement policy that matched the transition of the industrial policy of Taiwan. Indeed, the TFTC even had to make some Faustian deals in order to protect its enforcement program.

Ninth, despite all the deficiencies of the TFTC and the FTL, Taiwan's first decade of competition law enforcement and fostering competition policy has produced admirable results. Now that the TFTC has established itself, it should develop a program in the next ten years to develop true professionalism and antitrust expertise. This would involve serious self-scrutiny by the TFTC to amend the FTL and adjust the enforcement program so that Taiwan can use its enforcement resources in the best possible ways.

## APPENDIX: TFTC STATISTICS\*

Table 1: TFTC Case Load

| Year       | Total  | Number of Cases |  |   |                          |
|------------|--------|-----------------|--|---|--------------------------|
|            |        | Complaints      | Applications for Exemptions on Concerted Actions | Applications for Approvals on Combination | Requests for Explanation |
| 1992       | 1,296  | 1,039           | 12   | 13  | 232                      |
| 1993       | 1,567  | 1,243           | 9  | 112                                       | 203                      |
| 1994       | 2,020  | 1,499           | 11   | 262                                       | 248                      |
| 1995       | 2,486  | 1,768           | 2  | 435                                       | 281                      |
| 1996       | 2,234  | 1,636           | 12   | 334                                       | 252                      |
| 1997       | 2,277  | 1,480           | 23   | 561                                       | 213                      |
| 1998       | 2,444  | 1,335           | 13   | 863                                       | 233                      |
| 1999       | 2,757  | 1,522           | 7  | 1,064                                     | 164                      |
| 2000       | 2,697  | 1,369           | 12   | 1,187                                     | 129                      |
| 04/30/2001 | 919    | 478             | 3  | 405                                       | 33                       |
| Total      | 19,779 | 12,891          | 101  | 4,831                                     | 1,956                    |

Table 2: Results of Complaints Filed with the TFTC

|            | Total Filings | Sanctioned by TFTC | No Action Taken | Administrative Handling <sup>209</sup> | Investigation Suspended <sup>210</sup> | Consolidated into Other Cases |
|------------|---------------|--------------------|-----------------|--|--|-------------------------------|
| Total      | 12,843        | 1,403              | 2,490           | 271                                    | 7,695                                  | 984                           |
| 1992       | 757           | 51                 | 100             | -                                      | 591                                    | 15                            |
| 1993       | 1,094         | 78                 | 200             | 7                                      | 749                                    | 60                            |
| 1994       | 1,408         | 118                | 306             | 40                                     | 852                                    | 92                            |
| 1995       | 1,643         | 157                | 281             | 75                                     | 997                                    | 133                           |
| 1996       | 1,633         | 172                | 331             | 62                                     | 931                                    | 137                           |
| 1997       | 1,662         | 198                | 323             | 34                                     | 912                                    | 195                           |
| 1998       | 1,409         | 218                | 285             | 23                                     | 773                                    | 110                           |
| 1999       | 1,453         | 151                | 284             | 17                                     | 912                                    | 89                            |
| 2000       | 1,384         | 199                | 304             | 13                                     | 759                                    | 109                           |
| 04/30/2001 | 400           | 61                 | 76              | -                                      | 219                                    | 44                            |

\* Source: Statistical Office, Taiwan Fair Trade Commission. All statistics are as of April 30, 2001, unless otherwise indicated.

209. Administrative handling means the TFTC has taken action to coordinate with the primary regulators of the respondents to seek a resolution of the dispute. Usually the TFTC will take no formal action. In other words, this is the TFTC's practice of administrative guidance or "moral suasion."

210. Suspended cases usually are terminated.

Table 3: Statistics of the Outcome of Application Cases

|            | Concerted Actions |          |          |                  |            | Combination Actions |          |          |                  |            |
|------------|-------------------|----------|----------|------------------|------------|---------------------|----------|----------|------------------|------------|
|            | Total             | Approved | Rejected | Partial Approval | Terminated | Total               | Approved | Rejected | Partial Approval | Terminated |
| Total      | 100               | 67       | 10       | 9                | 14         | 5,201               | 5,128    | 3        | 48               | 22         |
| 1992       | 9                 | 5        | 3        | -                | 1          | 8                   | 6        | -        | 2                | -          |
| 1993       | 9                 | 7        | 1        | -                | 1          | 113                 | 107      | -        | 4                | 2          |
| 1994       | 13                | 9        | 3        | 1                | -          | 259                 | 259      | -        | -                | -          |
| 1995       | 1                 | -        | -        | 1                | -          | 429                 | 426      | -        | -                | 3          |
| 1996       | 8                 | 5        | -        | -                | 3          | 340                 | 339      | -        | 1                | -          |
| 1997       | 18                | 11       | -        | 1                | 6          | 537                 | 535      | -        | 1                | 1          |
| 1998       | 22                | 18       | -        | 4                | -          | 855                 | 843      | -        | 9                | 3          |
| 1999       | 8                 | 4        | 2        | -                | 2          | 1,045               | 1,032    | -        | 9                | 4          |
| 2000       | 9                 | 6        | 1        | 2                | -          | 1,206               | 1,177    | 3        | 18               | 8          |
| 04/30/2001 | 3                 | 2        | -        | -                | 1          | 409                 | 404      | -        | 4                | 1          |

Table 4: TFTC Reactions to Requests for Interpretation

|            | Total Requests | Replied Interpretations | Termination | Consolidation into Other Cases |
|------------|----------------|-------------------------|-------------|--------------------------------|
| Total      | 1,977          | 1,332                   | 596         | 49                             |
| 1992       | 173            | 133                     | 39          | 1                              |
| 1993       | 220            | 164                     | 53          | 3                              |
| 1994       | 251            | 180                     | 59          | 12                             |
| 1995       | 279            | 157                     | 109         | 13                             |
| 1996       | 246            | 175                     | 60          | 11                             |
| 1997       | 238            | 148                     | 86          | 4                              |
| 1998       | 235            | 156                     | 76          | 3                              |
| 1999       | 169            | 108                     | 60          | 1                              |
| 2000       | 129            | 89                      | 39          | 1                              |
| 04/30/2001 | 37             | 22                      | 15          | -                              |

Table 5: TFTC Sanctions by Type of FTL Violation<sup>211</sup>

|            | Number of Cases Punished | Restrictive Practices |                             |                                   |                                    |                                  |                                     | Unfair Competition |   |
|------------|--------------------------|-----------------------|-----------------------------|-----------------------------------|------------------------------------|----------------------------------|-------------------------------------|--------------------|---|
|            |                          | Total                 | Monopolization (Article 10) | Illegal Combinations (Article 11) | Illegal Conc. Actions (Article 14) | Resale Price Maint. (Article 18) | Other Unfair Practices (Article 19) | Total              | Passing Off Others' Products or Services (Article 20) |
| Total      | 1,601                    | 201                   | 3                           | 19                                | 76                                 | 25                               | 78                                  | 1,263              | 19  |
| 1992       | 63                       | 22                    | -                           | -                                 | 4                                  | 10                               | 8                                   | 44                 | 1   |
| 1993       | 90                       | 11                    | -                           | 1                                 | -                                  | 3                                | 7                                   | 68                 | -   |
| 1994       | 156                      | 7                     | -                           | 1                                 | 2                                  | 1                                | 3                                   | 138                | -   |
| 1995       | 177                      | 26                    | -                           | -                                 | 5                                  | 2                                | 19                                  | 136                | 3   |
| 1996       | 197                      | 23                    | -                           | 4                                 | 5                                  | 4                                | 10                                  | 165                | 1   |
| 1997       | 222                      | 21                    | -                           | 2                                 | 10                                 | 2                                | 7                                   | 181                | 2   |
| 1998       | 245                      | 17                    | -                           | -                                 | 8                                  | 2                                | 7                                   | 192                | 7   |
| 1999       | 166                      | 26                    | -                           | 8                                 | 11                                 | -                                | 7                                   | 129                | -   |
| 2000       | 223                      | 34                    | 2                           | 2                                 | 21                                 | 1                                | 8                                   | 169                | 5   |
| 04/30/2001 | 62                       | 14                    | 1                           | 1                                 | 10                                 | -                                | 2                                   | 41                 | -   |

|            | Unfair Competition  |                                    |  |  | Others |            |            |
|------------|---|------------------------------------|--|--|--------|------------|------------|
|            | False Advertising or Misleading Commercial Practices (Article 21) | Trade Libel Practices (Article 22) | Deceptive or Obviously Unconscionable Practices (Article 24) | Multi-Level Distribution Schemes (articles 23, 23-1, 23-2, 23-3, 23-4) | Total  | Article 41 | Article 43 |
| Total      | 743   | 10                                 | 491  | 141  | 65     | 56         | 9          |
| 1992       | 42  | -                                  | 1  | 4  | -      | -          | -          |
| 1993       | 55  | -                                  | 13   | 11   | 5      | 3          | 2          |
| 1994       | 82  | 3                                  | 53   | 14   | 8      | 8          | -          |
| 1995       | 92  | 1                                  | 40   | 15   | 7      | 6          | 1          |
| 1996       | 104   | 1                                  | 59   | 5  | 8      | 8          | -          |
| 1997       | 108   | 2                                  | 69   | 18   | 10     | 8          | 2          |
| 1998       | 101   | 1                                  | 83   | 27   | 21     | 18         | 3          |
| 1999       | 69  | 1                                  | 59   | 16   | 3      | 3          | -          |
| 2000       | 77  | 1                                  | 86   | 24   | 1      | 1          | -          |
| 04/30/2001 | 13  | -                                  | 28   | 7  | 2      | 1          | 1          |

211. As some cases involved two or more violations, the total numbers of cases punished and illegal practices do not correspond. The statistics do not include 41 sanctions that since have been cancelled.

Table 6: Companies Involved in Multilevel Distribution Schemes

|            | Filings as of End of Last Year or Last Month | Filings in Current Month or Year | Cancellations of Filings during Current Month or Year | Total Filings as of End of Current Month or Year |
|------------|--|----------------------------------|---|--|
| 1992       | -  | 243                              | 17  | 226  |
| 1993       | 226  | 165                              | 39  | 352  |
| 1994       | 352  | 188                              | 109   | 431  |
| 1995       | 431  | 282                              | 109   | 604  |
| 1996       | 604  | 300                              | 146   | 758  |
| 1997       | 758  | 304                              | 218   | 844  |
| 1998       | 844  | 240                              | 343   | 741  |
| 1999       | 741  | 184                              | 281   | 644  |
| 2000       | 644  | 160                              | 160   | 644  |
| 04/30/2001 | 2,612  | 57                               | 35  | 2,634  |

Table 7: Multilevel Distribution Schemes by Enterprises and Administrative Districts (as of 04/30/2001)

| District        | Number of Enterprises |  | District         | Number of Enterprises |
|-----------------|-----------------------|--|------------------|-----------------------|
| Taiwan District | 665                   |  | Chiayi County    | 1                     |
| Taipei City     | 265                   |  | Tainan County    | 19                    |
| Kaoshiung City  | 77                    |  | Kaoshiung County | 6                     |
| Taiwan province | 323                   |  | Pingtung County  | 3                     |
| Taipei County   | 74                    |  | Taitung County   | -                     |
| Ilan County     | 3                     |  | Hualien County   | 3                     |
| Taoyuan County  | 47                    |  | Penghu County    | -                     |
| Hsinchu County  | 2                     |  | Keelung City     | 3                     |
| Miaoli County   | 2                     |  | Hsinchu City     | 6                     |
| Taichung County | 10                    |  | Taichung City    | 116                   |
| Changhua County | 4                     |  | Chiayi City      | 6                     |
| Nantou County   | 2                     |  | Tainon City      | 11                    |
| Yunlin County   | 5                     |  | Other areas      | 1                     |



Table 8: Combination Cases<sup>212</sup>

|            | Total Number of Approvals | Type of Approvals<br>(Article 6, Para. 1) |         |         |         |         |
|------------|---------------------------|---|---------|---------|---------|---------|
|            |                           | Para. 1                                   | Para. 2 | Para. 3 | Para. 4 | Para. 5 |
| 1992       | 6                         | 3   | 1       | 2       | -       | -       |
| 1993       | 107                       | 3   | 9       | 1       | -       | 94      |
| 1994       | 259                       | 5   | 10      | 4       | -       | 240     |
| 1995       | 426                       | 4   | 12      | 2       | 1       | 408     |
| 1996       | 339                       | 3   | 14      | 3       | 6       | 314     |
| 1997       | 535                       | 5   | 11      | 10      | 5       | 506     |
| 1998       | 843                       | 3   | 23      | 16      | 15      | 791     |
| 1999       | 1,032                     | 6   | 14      | 14      | -       | 998     |
| 2000       | 1,177                     | 25  | 16      | 59      | 2       | 1,079   |
| 04/30/2001 | 401                       | 5   | 5       | 14      | 1       | 375     |

212. Because a combination application may fall into more than one category, the actual cases are lower than the total shown. A Para. 1 combination refers to a statutory merger. A Para. 2 combination refers to the acquisition of one-third of the shares of a target company. A Para. 3 combination refers to a transfer of assets or operations by lease or sale. A Para. 4 combination refers to a joint operation or contract for operations by another enterprise. A Para. 5 combination refers to a transaction leading to the control of the personnel, finances, or business of another enterprise.

Table 9: Approvals for Actions Remaining  
Effective (as of 04/30/2001)

|     | Subject Matter for Approvals  | Effective Period                                   | Number of Participating Enterprises | FTL Authority                |
|-----|---|--|-------------------------------------|------------------------------|
| 1.  | Approvals for Extensions of Permitted Production of 69kv to 161kv Connectors through Joint Ventures | 03/11/99 – 02/14/02                                | 10                                  | Article 14(2)                |
| 2.  | Joint Purchase, Import, and Shipping of Soybeans and Corn   | 09/01/99 – 08/31/02                                | 53                                  | Article 14(5)                |
| 3.  | Joint Purchase, Import, and Shipping of Wheat   | 01/01/00 – 12/31/02                                | 9                                   | Article 14(5)                |
| 4.  | Approvals for Extensions of Joint Import and Shipping of Corn                                       | 03/01/00 – 02/28/03                                | 35                                  | Article 14(5)                |
| 5.  | Joint Purchase, Import, and Shipping of Soybeans  | 08/30/00 – 08/31/03                                | 11                                  | Article 14(5)                |
| 6.  | Joint Purchase, Import, and Shipping of Wheat   | 10/01/00 – 09/30/03                                | 4                                   | Article 14(5)                |
| 7.  | Joint Purchase, Import, and Shipping of Wheat   | 10/01/00 – 09/30/03                                | 41                                  | Article 14(5)                |
| 8.  | Applied Postponements of Import Shipping of Soybeans  | 12.12.00 ~ 12.31.03                                | 4                                   | Article 15                   |
| 9.  | ATM IC Card Joint Services by Financial Institutions  | 12/13/00 – 12/31/03                                | 41                                  | Article 14(1)                |
| 10. | Joint Ventures for Research, Development, Design, and Manufacture of Electric Motor Vehicles        | 12/29/00 – 12/31/03                                | 11                                  | Article 14(2);<br>Article 15 |
| 11. | Joint Sandstone Quarry Operations for District 3A of Hua Lien Creek                                 | Three years from date of issuance of quarry permit | 6                                   | Article 14(2)                |
| 12. | Joint Sandstone Quarry Operations for District 1A of Hua Lien Creek                                 | Three years from date of issuance of quarry permit | 10                                  | Article 14(2)                |

Table 10: TFTC Administrative Sanctions<sup>213</sup>

|            | Sanctioned Cases |                    | Assessment of Administrative Fines |                    |                          |
|------------|------------------|--------------------|------------------------------------|--------------------|--------------------------|
|            | No. of Cases     | No. of Enterprises | No. of Cases                       | No. of Enterprises | Fines (in NT\$ millions) |
| Total      | 1,601            | 2,428              | 388                                | 632                | 413,080                  |
| 1992       | 63               | 75                 | 4                                  | 5                  | 1,700                    |
| 1993       | 90               | 100                | 17                                 | 19                 | 4,050                    |
| 1994       | 156              | 218                | 23                                 | 24                 | 5,000                    |
| 1995       | 177              | 283                | 22                                 | 22                 | 6,950                    |
| 1996       | 197              | 217                | 17                                 | 17                 | 5,850                    |
| 1997       | 222              | 267                | 27                                 | 29                 | 7,650                    |
| 1998       | 245              | 282                | 48                                 | 48                 | 1,220                    |
| 1999       | 166              | 267                | 52                                 | 76                 | 48,520                   |
| 2000       | 223              | 560                | 140                                | 279                | 155,560                  |
| 04/30/2001 | 62               | 159                | 38                                 | 113                | 176,580                  |

Table 11: TFTC-Initiated Investigations<sup>214</sup>

|            | Cases Established |            |            |            | Cases Concluded |            |            |            |
|------------|-------------------|------------|------------|------------|-----------------|------------|------------|------------|
|            | Total             | Division 1 | Division 2 | Division 3 | Total           | Division 1 | Division 2 | Division 3 |
| Total      | 266               | 62         | 59         | 145        | 254             | 61         | 56         | 137        |
| 1992       | 10                | 4          | 1          | 5          | 4               | 2          | 1          | 1          |
| 1993       | 28                | 14         | 7          | 7          | 18              | 8          | 3          | 7          |
| 1994       | 40                | 10         | 10         | 20         | 37              | 13         | 6          | 18         |
| 1995       | 35                | 9          | 9          | 17         | 36              | 9          | 8          | 19         |
| 1996       | 21                | 8          | 4          | 9          | 27              | 9          | 9          | 9          |
| 1997       | 26                | 4          | 5          | 17         | 31              | 7          | 8          | 16         |
| 1998       | 38                | 5          | 6          | 27         | 34              | 5          | 2          | 27         |
| 1999       | 29                | 3          | 12         | 14         | 27              | 3          | 12         | 12         |
| 2000       | 37                | 5          | 4          | 28         | 37              | 3          | 6          | 28         |
| 04/30/2001 | 2                 | -          | 1          | 1          | 3               | 2          | 1          | -          |

213. The number of cases and enterprises and amount of fines do not include those sanctions that since have been cancelled.

214. Division 1 of the TFTC regulates the service and farm sectors in Taiwan. Division 2 regulates the manufacturing sectors in Taiwan. Division 3 is in charge of enforcement against unfair competition.

Table 12: The Input of Enforcement Resources  
for TFTC-Initiated Investigations

|  | Cases<br>Concluded | Input of Enforcement Resources |   |                                 |
|--|--------------------|--------------------------------|---|---------------------------------|
|  |                    | Manpower                       | Number of Hearings or<br>Public Panel Discussions | Number of Firms<br>Investigated |
| 1992-3/ 2001   | 254                | 1,830                          | 125   | 1,944                           |
| Division 1   | 61                 | 449                            | 61  | 554                             |
| Division 2   | 56                 | 473                            | 45  | 1,033                           |
| Division 3   | 137                | 908                            | 19  | 357                             |
| Jan - March 2001<br>Cases concluded<br>– status of the input of<br>resources | 3                  | 26                             | 1   | 12                              |
| Division 1   | 2                  | 16                             | -   | 11                              |
| Division 2   | 1                  | 10                             | 1   | 1                               |
| Division 3   | -                  | -                              | -   | -                               |

Table 13: Results of TFTC-Initiated Investigations

|                          | Sanctions |                     |                           | No Action<br>Taken | Administrative<br>Handling | Cases<br>Suspended | Others |
|--------------------------|-----------|---------------------|---------------------------|--------------------|----------------------------|--------------------|--------|
|                          | Total     | Cases<br>Sanctioned | Enterprises<br>Sanctioned |                    |                            |                    |        |
| As of the end<br>of 2000 | 149       | 200                 | 282                       | 32                 | 29                         | 38                 | 3      |
| Division 1               | 26        | 45                  | 60                        | 8                  | 14                         | 11                 | -      |
| Division 2               | 28        | 38                  | 100                       | 14                 | 10                         | 2                  | 1      |
| Division 3               | 95        | 117                 | 122                       | 10                 | 5                          | 25                 | 2      |
| Jan. – Mar.<br>2001      | 1         | 1                   | 4                         | 1                  | 1                          | -                  | -      |
| Division 1               | 1         | 1                   | 4                         | 1                  | -                          | -                  | -      |
| Division 2               | -         | -                   | -                         | -                  | 1                          | -                  | -      |
| Division 3               | -         | -                   | -                         | -                  | -                          | -                  | -      |
| 03/31/ 2001              | 150       | 201                 | 286                       | 33                 | 30                         | 38                 | 3      |
| Division 1               | 27        | 46                  | 64                        | 9                  | 14                         | 11                 | -      |
| Division 2               | 28        | 38                  | 100                       | 14                 | 11                         | 2                  | 1      |
| Division 3               | 95        | 117                 | 122                       | 10                 | 5                          | 25                 | 2      |

