

# TAIWAN'S ANTITRUST STATUTES: PROPOSALS FOR A REGULATORY REGIME AND COMPARISON OF U.S. AND TAIWANESE ANTITRUST LAW

*Lawrence L.C. Lee\**

## TABLE OF CONTENTS

- I. INTRODUCTION
  - A. *Source of Antitrust Laws*
  - B. *Economic Theories of Antitrust Laws*
  - C. *Ideological Spectrum of Antitrust Law*
  - D. *Development of Antitrust Laws*
  
- II. ANTITRUST LAWS IN THE UNITED STATES AND TAIWAN
  - A. *Overview of the Antitrust Laws of the United States*
  - B. *The Taiwan Fair Trade Law*
  - C. *The Taiwan Enforcement Rule of Fair Trade Law*
  
- III. ENFORCEMENT OF THE ANTITRUST LAWS
  - A. *The Antitrust Division of the U.S. Department of Justice*
  - B. *The U.S. Federal Trade Commission*
  - C. *The Taiwan Fair Trade Commission*
  
- IV. EXEMPTION FROM THE ANTITRUST LAWS
  - A. *Relevant U.S. Regulations*
  - B. *The Exemption under the Taiwan Fair Trade Law §§ 45-46*
  
- V. MONOPOLIES AND OLIGOPOLIES
  - A. *The Sherman Act § 2*
  - B. *The Taiwan Fair Trade Law §§ 5, 10*

---

\* Lawrence L.C. Lee is pursuing a doctoral dissertation at the University of Wisconsin School of Law; LL.M., American University, Washington College of Law 1996; LL.M., Boston University School of Law, 1993; and LL.B. Soochow University School of Law, 1990 (Taiwan). The author would also like to extend his appreciation to his parents for their guidance and inspiration and to his wife, Tabatha, for her patience and support. All errors, needless to say, remain those of the author.

## VI. MERGERS AND ACQUISITIONS

- A. *The Clayton Act § 7*
- B. *The 1992 Horizontal Merger Guidelines*
- C. *The Clayton Act § 7 (Hart-Scott-Rodino Antitrust Improvement Act)*
- D. *The Taiwan Fair Trade Law §§ 6, 11-13*

## VII. HORIZONTAL CONCERTED ACTIONS

- A. *The Sherman Act § 1*
- B. *Per Se Rule and Rule of Reason (as Applied to U.S. Precedents)*
- C. *The Taiwan Fair Trade Law §§ 7, 14-17*
- D. *Rule of Reason (As Applied to Taiwanese Precedents)*

## VIII. VERTICAL RESTRAINTS

- A. *The Sherman Act § 1*
- B. *The Clayton Act § 3 (Tying Arrangement)*
- C. *The Taiwan Fair Trade Law § 18*

## IX. UNFAIR COMPETITION AND EXCLUSIONARY PRACTICES

- A. *The Clayton Act § 2 (Robinson-Patman Act of 1936)*
- B. *The Clayton Act § 8 (Interlocking Directorates and Officers)*
- C. *Federal Trade Commission Act § 5*
- D. *The Taiwan Fair Trade Law § 19-24*

## X. CIVIL REMEDIES AND CRIMINAL PENALTIES

- A. *Relevant U.S. Regulations*
- B. *The Taiwan Fair Trade Law Chapters 5 and 6*

## XI. DECISIONS UNDER THE TAIWAN FAIR TRADE LAW

## XII. CONCLUDING OBSERVATIONS: THE FUTURE OF ANTITRUST LAWS IN TAIWAN

## I. INTRODUCTION

Along with its miraculous economic growth in the past four decades, the Republic of China on Taiwan (ROC or Taiwan) has created external and internal pressure for political reform and democratization and reform of the

antiquated, unruly, and inadequate economic order.<sup>1</sup> Furthermore, there are demands from the major industrial countries for equal competitive opportunities in Taiwan for their companies. In particular, the United States (U.S.) places great emphasis on the protection of American intellectual property rights for the U.S. possessors.<sup>2</sup> Consequently, the Legislative Yuan<sup>3</sup> of the ROC enacted the *Kung Ping Jiau Yih Fa* (Fair Trade Law or FTL)<sup>4</sup> on February 4, 1991, which protects customers' interests, provides a competitive market,<sup>5</sup> and encourages the increase of foreign investment in Taiwan.<sup>6</sup>

This article attempts to discuss the underlying philosophy behind the Republic of China on Taiwan's Fair Trade Law, *Kung Ping Jiau Yih Fa Shih Hsing Hsi Tsê* (Enforcement Rules of Fair Trade Law or ERFTL),<sup>7</sup> and the experience of the Taiwanese Fair Trade Commission (FTC)<sup>8</sup> in implementing and enforcing the FTL for the past three years. It focuses primarily on a

---

1. Lawrence S. Lee, *Legal and Policy Perspectives on United States Trade Initiatives and Economic Liberalization in the Republic of China*, 11 MICH. J. INT'L L. 326, 326-27 (1990).

2. Jeffrey V. Crabill, Note, *Taiwan Keeps Torch Burning by Enacting Trade Law*, 2 IND. INT'L & COMP. L. REV. 449, 449-50 (1992).

3. The Constitution of the Republic of China, adopted in 1946 and amended in 1991, 1992, and 1994, provides for a central government with five branches. The government of the Republic of China is headed by the President of the ROC, who is currently elected by the National Assembly and will be popularly elected after March 1996. The president is the highest representative of the nation, possessing specific constitutional powers to conduct national affairs.

The five branches consist of the Executive Yuan, the Legislative Yuan, the Judicial Yuan, the Examination Yuan, and the Control Yuan. The Executive Yuan is responsible for national policy making and implementation. The Legislative Yuan, similar to the U.S. Congress, represents the people in passing legislation and supervising the operation of the Executive Yuan. The Judicial Yuan is in charge of civil, criminal, and administrative trials and the disciplining of public functionaries. The Examination Yuan is responsible for the examination, appointment, screening, recording, payment, and other personnel matters of government agencies. The Control Yuan, the highest supervisory organ of the nation, has the rights of consent, impeachment, censure, correction, and audit. For background on the Constitution of the ROC, see GOVERNMENT INFORMATION OFFICE OF ROC, CONSTITUTION OF THE REPUBLIC OF CHINA (6th ed., 1994).

4. See *infra* notes 65-95 and accompanying text explaining Taiwanese Fair Trade Law.

5. Chih-Kang Wang, Chairman, Fair Trade Commission, Executive Yuan, ROC, Address at the Symposium on International Harmonization of Competition Laws, Taipei, ROC (Mar. 12-13, 1994) in INTERNATIONAL HARMONIZATION OF COMPETITION LAW (Chia-Jui Cheng, Lawrence S. Liu & Chih-Kang eds. 1995).

6. Paul S. P. Hsu, *International Trade and Investment Regulation: Developing Jurisprudence in Taiwan*, 11 MICH. J. INT'L L. 368, 378 (1990).

7. See *infra* notes 96-99 and accompanying text interpreting the Taiwanese Enforcement Rules of the Fair Trade Law.

8. See *infra* notes 120-34 and accompanying text discussing the Taiwanese Fair Trade Commission.

review of the current FTL and a survey of comparable legislation in advanced nations, particularly the antitrust laws of the United States, including the Sherman Antitrust Act,<sup>9</sup> Clayton Act,<sup>10</sup> and Federal Trade Commission Act.<sup>11</sup> Finally, this article proposes a model antitrust law to serve as a useful pattern for future development of the Fair Trade Law of the ROC.

Undoubtedly, a hallmark of a democratic, market-driven economy is that businesses should be free to compete fairly without the distraction of unfair competition. In theory, antitrust laws protect competition without regard to enforcement of public or private enterprises.<sup>12</sup> Free and open competition benefits consumer interests by ensuring low prices and new and better products. "In a freely competitive market, competing businesses try to attract consumers by cutting their prices and increasing the quality of their product or services."<sup>13</sup> Competition also provides incentives for businesses to develop new technical progress and innovative, more production-efficient methods.<sup>14</sup>

Consequently, such situations indirectly promote the vitality of business enterprises, while consumers benefit from competition through lower prices, better products, and better services. Meanwhile, inefficient manufacturers or companies that fail to react to consumer needs soon find themselves falling behind in the marketplace competition.<sup>15</sup>

The primary goal of antitrust law is ultimately to increase consumer welfare and economic efficiencies through competition.<sup>16</sup> To achieve this, it is necessary for antitrust law to keep markets pure and to keep behavior fair. It achieves this by limiting the restrictive practices of business firms and by eliminating other inhibitions to the achievement or maintenance of noncompetitive market structures.<sup>17</sup> Thus, rigorous antitrust laws, rather than being seen as a hinderance to business efficiency, should be viewed as

---

9. Sherman Act, 15 U.S.C. §§ 1-7 (1994). For background on antitrust law and the legislative history of the Sherman Act, see James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L. J. 257-395 (1989).

10. Clayton Act, 15 U.S.C. §§ 12-27 (1994).

11. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994) [hereinafter FTC Act].

12. Joseph F. Brodely, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1020 (1987).

13. U.S. DEP'T OF JUSTICE, *ANTITRUST ENFORCEMENT AND THE CONSUMER* 1 (1992).

14. *Id.*

15. *Id.*

16. Roger Bern and Michael M. Tansey, *Proper Application of the Rule of Reason to Vertical, Territorial Restraints: Debunking the "Intrabrand-Interbrand" and "Efficiencies" Deviations*, 20 AM. BUS. L.J. 435, 437 (1983); Brodely, *supra* note 12, at 1023.

17. *Id.*

beneficial, even necessary, to the well-being of both consumer and industry interests.

#### A. *Source of Antitrust Laws*

The antitrust laws' historical lineage extends from common law actions which limited restraints of trade and, to some extent, sought to proscribe monopoly power and middleman profits.<sup>18</sup> Today, however, antitrust laws are aimed at controlling private economic power through the prevention of monopolies, the punishment of cartels, and the protection of competition in other ways.

The schools of antitrust law and economics believe that when competitors negotiate to allocate markets, such as when they fix prices, rig bids or allocate customers or markets, consumers forfeit the benefit of competition.<sup>19</sup> When competitors agree in these ways, prices become artificially high, inaccurately reflecting cost, and therefore distorting the allocation of societal resources.<sup>20</sup> Consequently, a net loss is borne not only by individual consumers and taxpayers, but also by the economy as a whole.

Antitrust law also seeks to establish a regulatory framework within which private enterprises are free to seek maximized profits without invoking governmental interference which diversifies competition.<sup>21</sup> Maximized economic profits for private industries, however, will frequently be contrary to governmental economic policy, as expressed through a comprehensive set of antitrust laws. For example, arrangements that divide markets between competitors and thereby limit competition are violative of antitrust principles, as are requirements of mandatory resale prices imposed on retailers by manufacturers.

Generally speaking, the government does not prosecute all agreements between companies—only those that threaten to raise prices for consumers or deprive them of new and better products. However, once competing companies come together to fix prices, limit outputs, divide business territory between them, or make other anticompetitive arrangements that provide no benefits to consumers, government should act promptly to protect the interest of its consumers and taxpayers.

---

18. MARTIN J. SKLAR, *THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM 1890-1916* 105-07 (1988).

19. ROGER D. BLAIR & DAVID L. KASERMAN, *ANTITRUST ECONOMICS* 3-5 (1985).

20. Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 14 (1995).

21. Andrew A. Bernstein, Note, *Access to Cable, Natural Monopoly, and the First Amendment*, 86 COLUM. L. REV. 1663, 1688 (1986).

### B. *Economic Theories of Antitrust Laws*

Microeconomic theory provides both the basis and vocabulary of antitrust law.<sup>22</sup> Economists postulate that market efficiency is the product of optimal allocation—that is, the level of production that satisfies societal needs (Allocation Efficiency), while at the same time achieves the maximum profit for the enterprise (Productive Efficiency). In a perfect model, price is regulated in terms of demand. For example, if a manufacturer seeking excessive profit on a product prices it too far above the cost of production, it provides an incentive for a new supplier to enter the market at a lower realized profit.<sup>23</sup>

Consumers create demand for a product and establish its price; where the demand for a product is high and the market fails to provide a viable substitute, consumers will pay a correspondingly high price for the value of the good.<sup>24</sup> Alternatively, when there are viable substitutes for the products in demand, consumers are apt to pay less. The value of the good reaches a point in the equation where consumers will forego it altogether or seek alternatives. It is precisely this unrealized demand that demonstrates the benefits of competition in the marketplace.

Economic theory also defines such antitrust terminology as consumer, firm, industry, and seller concentration rate. Both economics and antitrust law also outline barriers to entry into a marketplace, including capital cost, trademark, and longevity of competition. They prefer market competition rather than oligopoly, monopoly, and unfair competitive methods.

Critics point out, however, that the model of market efficiency is too simplistic to benefit antitrust policy. Others see economic theory as being little better than educated post-hoc guesswork which has little practical value in a society in which optimal efficiency may not be the highest good.

### C. *Ideological Spectrum of Antitrust Law*

The evolution of an antitrust regulatory framework in the United States developed out of populist distrust of big business interests such as those found in the railroad, petroleum, and financial industries. In reaction to the excess produced by the Industrial Revolution, several trust-busting

---

22. For a discussion of economic theories and antitrust law, see Walter Adams & James W. Brock, *Antitrust, Ideology, and The Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257 (1995); TERRY CALVANI & JOHN SIEGFRIED, *ECONOMIC ANALYSIS AND ANTITRUST LAW* (2d ed. 1988).

23. Prof. Robert H. Lande, Lectures in Antitrust Law at Washington College of Law, the American University Washington College of Law (Jan. 10, 1994) (on file with author).

24. Steven B. Johnson & John B. Corgel, *Antitrust Immunity and the Economic of Occupational Licensing*, 20 AM. BUS. L. J. 471, 479 (1983).

regulations were implemented to protect the little guy by limiting the most abusive tactics of the big businesses of the period.

Many schools and theories of antitrust law have emerged and influenced the development of the antitrust law,<sup>25</sup> such as the so-called Traditional Modulate Theory<sup>26</sup> which permits mergers resulting in an entity having fifteen to twenty percent of the total market. The basic idea espoused by proponents of the Traditional Modulate School is one based on the notions of economic efficiency and the protection of consumers.

Similarly, the Liberal School<sup>27</sup> allows limited vertical restraint and mergers of ten percent or less of the market power. The Liberal School's goal is economic efficiency and the protection of both individual consumers and society and political interest as a whole.<sup>28</sup>

The Conservative School, typified by the work of Judge Robert Bork,<sup>29</sup> views the application of antitrust laws as a form of misguided social and political engineering<sup>30</sup> practiced by the Warren Court.<sup>31</sup> Bork was critical of the evisceration of American business by the Court's reckless and primitive egalitarianism.<sup>32</sup> To conservatives, the movement away from such outcome-driven economic adjudication came as a result of the influence of the so-

---

25. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 213-14 (1985).

26. The Traditional Modulate Theory modified Realist/Traditionalist Theory which stressed that competition was the core of antitrust law rather than efficiency and is diametrically opposed to theories espoused by the Chicago School. Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust--Retrospective and Prospective: Where Are We Coming From? Where Are We Going?* 62 N.Y.U. L. REV. 936, 969-88 (1987). Advocates of the Traditional Modulate School include former Justices Blackmun, Marshall, and Timothy Brennan, as well as Ann Bingamun, Assistant Attorney General of the Antitrust Division of the Justice Department. Professor Robert H. Lande is also a proponent of the Traditional Modulate School.

27. Advocates of liberalism included Judge Learned Hand and the Warren Court, as well as Louis B. Schwartz, John J. Flynn, and Harry First. While this position is less influential today, it is still asserted by plaintiffs' lawyers.

28. For background on the Liberal School, see Edward O. Correia, *Antitrust and Liberalism*, 40 ANTITRUST BULL. 99 (1995).

29. ERNEST GELLHORN & WILLIAM E. KOVACIC, *ANTITRUST LAW AND ECONOMICS* 505 (4th ed. 1994).

30. Robert Pitofsky, *Antitrust in the Next 100 Years*, 75 CALIF. L. REV. 817, 826 n.30 and 827 (1987) (describing libertarians emphasis on no need for antitrust law because the market could contain and erode anticompetitive behavior).

31. Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 431 (1988).

32. See, e.g., ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

called Chicago School<sup>33</sup> of law and economics which stressed market efficiency as the primary goal.<sup>34</sup> Obviously, economic theories affected the interpretation and application of the antitrust laws.<sup>35</sup> The Chicago School became tremendously influential during the Reagan Administration.<sup>36</sup> Judge Richard Posner of the Seventh Circuit is a well-known proponent of the Chicago School's theory of economics.<sup>37</sup>

While there are jurists and legal scholars who believe that antitrust laws are necessary, others (for example, libertarians) believe that there is no need for antitrust law.<sup>38</sup> At the risk of oversimplification, the libertarian position is that government regulation of business is inconsistent with the liberty interests of business. Libertarians prefer a "hands off" approach, permitting price fixing and other practices, while holding a minimalist perspective of the government's role in commerce, which Libertarians believe should function primarily as a referee. In many ways, the Libertarians' view is the polar opposite to the liberal regulatory model and almost represents a throwback to nineteenth century *laissez faire* capitalism.<sup>39</sup>

Marxists are another opponent of antitrust laws.<sup>40</sup> A Marxist critique of antitrust law is that it is a farce, another tool for capitalist exploitation of the dispossessed classes. In this view, antitrust law is misleading due to the fact it provides a false sense of security, while in reality it permits businesses to do whatever they wish. This position has largely been discredited, and today is merely of historic interest.

A more fashionable, contemporary theory is that of the Industrial Policy School, whose advocates view the nexus of government policy and corporate development as highly desirable.<sup>41</sup> This is patterned on the

---

33. In addition to Richard Posner, advocates of the Chicago School also include Judge Robert Bork, Alchian W. Allen, William F. Baxter, former Attorney General, Antitrust Division, and Demsetz. See U.S. Dep't of Justice 1984 Merger Guidelines, 49 Fed. Reg. 26,827 (1984); see Fox & Sullivan, *supra* note 26, at 969 n.2.

34. Joe Sims & Robert H. Lande, *The End of Antitrust-or a New Beginning?* 31 ANTITRUST BULL. 301, 306-07 (1986).

35. While serving as Assistant Attorney General of the Antitrust Division from 1972-1976, Thomas Kauper adjusted the organization of the Antitrust Division by creating the Economic Policy Office which was responsible for antitrust economic analysis.

36. 1980's election appointees are Robert Bork and Richard Posner, proponents of the Chicago School's economic arguments. Lande, *supra* note 31, at 438.

37. See, e.g., RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1978).

38. Pitofsky, *supra* note 30, at 818.

39. May, *supra* note 9, at 275.

40. Alan S. Greenspan, *Thoughts about the Transitioning Market Economics of Eastern Europe and the Former Soviet Union*, 6 DEPAUL BUS. L.J. 1, 13 (1994) (indicating that Marxist ideology, emphasizing central economic planning, presumed competition to be destructive and therefore organized its production through state monopolies).

41. Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP L. 1, 4 (1996).



Japanese model, which systematically targets industry for development through regulatory practices,<sup>42</sup> such as the establishment of standards for the telecommunications industry and high-definition television.

#### D. *Development of Antitrust Laws*

The Sherman Act<sup>43</sup> was created in the nineteenth century and is still at the center of U.S. antitrust legislation.<sup>44</sup> The antitrust laws are designed to control the exercise of private economic power by preventing monopolies and protecting competition.<sup>45</sup> Under this basic theory of antitrust law, many modern commercial powers, including the United States, Germany, and other wealthy nations, have enacted antitrust laws to ensure fair trade and consumer protection. Essentially, these laws prohibit business practices that unreasonably deprive consumers of the benefits of competition and would otherwise result in higher prices for inferior products and services.

The Uruguay Round of the General Agreement on Tariffs and Trade (GATT), concluded in 1994,<sup>46</sup> emphasized the importance of fair trade practices in international trade. The successful conclusion of the GATT indirectly increases the attention to antitrust laws, policies, and harmonization.<sup>47</sup> Moreover, a Draft International Antitrust Code was prepared by a group of international antitrust experts, as a GATT/World Trade Organization (WTO) Plurilateral Agreement.<sup>48</sup> As a result, countries world-wide—especially developing countries—are beginning to revise or adopt their competition laws. Through these bilateral and multinational

---

42. John M. Williams, III, *The Sun Rises over the Pacific: The Dissolution of Statutory Barriers to the Japanese Market for U.S. Joint Ventures*, 22 L. & POL'Y INT'L BUS. 441, 453 (1991) (discussing the Japanese Antimonopoly Act as applied by the Japanese Fair Trade Commission and Japanese Fair Trade Commission administrative guidelines).

43. Sherman Act, 15 U.S.C. §§ 1-7 (1994).

44. JOHN H. SHENEFIELD & IRWIN M. STELZER, *THE ANTITRUST LAWS: A PRIMER* 14 (1993).

45. *See, e.g.*, *Standard Oil Co. v. FTC*, 340 U.S. 231, 249 (1951).

46. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948), and superseded by the WTO, according to the Agreement Establishing the World Trade Organization, *opened for signature* Dec. 15, 1993, 33 I.L.M. 13. The WTO Agreement is a "single undertaking," integrating many Uruguay Round and previous GATT agreements into a single legal framework.

47. EARL W. KINTNER & MARK R. JOELSON, *AN INTERNATIONAL ANTITRUST PRIMER* 268-69 (1974).

48. The Draft International Antitrust Code of July 10, 1993, was published in *Working Group Unveils Draft Code on Antitrust within Framework of GATT*, 64 *Antitrust & Trade Reg. Rep. Sp'l Supp't*, (BNA) No. 1628 (Aug. 19, 1993).

cooperation agreements, antitrust statutes may be harmonized at the international level.<sup>49</sup>

## II. ANTITRUST LAWS IN THE UNITED STATES AND TAIWAN

Antitrust law represents a system of positive law, judge-made law, and law enforcement agencies' regulations which are unified in an effort to promote fair competition among rival businesses in the marketplace. Antitrust law looks to commerce as a whole and to a societal goal of eliminating collusion or predatory business practices. In doing so, it protects the consumer by protecting competition, while assuring the benefits of market efficiency, quality, and innovation.<sup>50</sup>

The antitrust law of the United States provides an efficient enforcement mechanism to ensure compliance with U.S. laws. It establishes broad principles of competition that are designed to preserve an unrestrained interaction of competitive forces that will yield the best allocation of resources, the lowest price, and the highest quality goods and services for consumers.<sup>51</sup>

By contrast, Taiwan's Fair Trade Law is one of the world's newest antitrust regulatory schemes. It is similar to the legislation of many civil law countries. Taiwan's FTL provides a checklist of detailed regulatory requirements.<sup>52</sup> To achieve its goal of avoiding anti-competitive business practices, while at the same time promoting the welfare of consumers, the FTL frequently requires modification to adapt to the needs of a dynamic society.<sup>53</sup>

### A. Overview of the Antitrust Laws of the United States

The American antitrust laws were drafted to preserve and protect the economic health of the United States. The vigorous enforcement of these principles has proven essential to ensuring that the U.S. economy remains

---

49. For a discussion of the development of international antitrust law, see Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 *FORDHAM INT'L L. J.* 833-45 (1994) (addressed in a Japan-EC competition seminar in Tokyo, Japan on November 4, 1993) (analyzing how increased international trade is facilitating the convergence of international antitrust statutes).

50. *See, e.g.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

51. U.S. DEP'T OF JUSTICE, *ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS* 6 (1988).

52. For example, Article 10 of the FTL provides parameters which identify an enterprise as monopolistic. Kung Ping Jiau Yih Fa [Fair Trade Law], ch. 2, art. 10 (promulgated on February 4, 1991) [hereinafter FTL], *translated in FAIR TRADE LAW* (Lee & Li trans.) (on file with the *IND. INT'L & COMP. L. REV.*).

53. *Id.* ch. 1, art. 1.

vibrant while promoting productivity and innovation. Furthermore, antitrust laws seek to assure continued consumer choice of a wide variety of products offered at competitive prices while allowing U.S. industry to face the ever increasing challenge of the domestic and global marketplace.<sup>54</sup>

Most of the individual states comprising the United States have antitrust laws closely paralleling their federal counterparts. These state laws are generally applicable to violations that occur wholly within one state. They are enforced through the states' attorney generals offices, just as federal antitrust laws are a matter for the U.S. Attorney General.<sup>55</sup>

In addition to the various state antitrust laws, three major federal antitrust laws exist:<sup>56</sup> (1) Sections 1 and 2 of the Sherman Antitrust Act,<sup>57</sup> which make it a felony to attempt to monopolize an industry or restrain trade and commerce; (2) the Clayton Act,<sup>58</sup> Section 2 of which prohibits price discrimination, sections 4 and 5 which provide for a private right of action with treble damages and criminal section of up to four years of imprisonment, and Section 7 (the "Anti-Merger Act") which stops mergers early to prevent monopolies if "the effect of such acquisition may be substantially to lessen competition or tend to create a monopoly"; and (3) Section 5(a)(1) of the Federal Trade Commission Act,<sup>59</sup> which prohibits unfair or deceptive methods of competition.

Since 1890 the Sherman Antitrust Act<sup>60</sup> has represented the main law expressing the national commitment to a free market economy. This American ideal postulates that competition relatively free from private and governmental restraints leads to the best results for the consumers. The Congress which enacted the Sherman Act felt so strongly about this commitment to abolish anticompetitive practices that only one vote was cast

---

54. Letter from President Bill Clinton to the Antitrust Division of Department of Justice on the occasion of the Department's 60th anniversary (Jan. 6, 1994) (duplicate on file with the IND. INT'L & COMP. L. REV.).

55. Moreover, the Hart-Scott-Rodino Antitrust Improvements Act of 1976 empowers state attorney generals to file civil actions on behalf of resident customers who have been injured by a violation of the Sherman Act.

56. EUGENE M. SINGER, *ANTITRUST ECONOMICS: SELECTED LEGAL CASES AND ECONOMIC MODELS* 8 (1969).

57. The Sherman Act, 15 U.S.C. §§ 1-7, was subsequently amended by the Miller-Tydings Act in 1937.

58. The Clayton Act was amended by the Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13, 13a, 13b, and 21b (1936) and by the Celler-Kefauver Antimerger Act, 15 U.S.C. § 18 (1950).

59. The Federal Trade Commission Act was amended by the Wheeler-Lea Act, 15 U.S.C. § 41 (1938), and by the McGuire Act, 15 U.S.C. § 35 (1952).

60. See Sherman Act, 15 U.S.C. §§ 1-7 (1994).

against it.<sup>61</sup> The Clayton Act is a civil statute,<sup>62</sup> initially passed in 1914 and later amended substantially in 1950. It prohibits mergers or acquisitions that have significant potential to weaken the competitive force of the market. Under the Clayton Act, the federal government challenges mergers that a careful economic analysis shows are likely to result in increased consumer prices. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division and the Federal Trade Commission. Moreover, the Clayton Act also prohibits certain other business practices which have the potential to harm competition.<sup>63</sup>

The Federal Trade Commission Act,<sup>64</sup> enacted in 1914, prohibits unfair methods of competition in interstate commerce but carries no criminal penalties. It also created the Federal Trade Commission to police violations of the Federal Trade Commission Act. The goals of the Federal Trade Act are stricter and more narrow than those of the Sherman Act.

### B. *The Taiwan Fair Trade Law*

The ROC enacted the Fair Trade Law on January 18, 1991. The FTL, consisting of seven chapters and forty-nine articles,<sup>65</sup> was passed by the Legislative Yuan<sup>66</sup> and promulgated by President Lee Teng-Hui on February 4, 1991. The FTL became effective on February 4, 1992.<sup>67</sup> The one-year delay created the FTC and allowed companies to become acquainted with the new law and make the necessary adjustments.

Because Taiwan began with a *tabula rasa* regarding antitrust law, the Fair Trade Law was patterned primarily after the antitrust laws of advanced industrial states—notably Japan, South Korea, Germany, and the United

---

61. U.S. DEP'T OF JUSTICE, *supra* note 13, at 2-3.

62. The Clayton Act carries no criminal penalties. *See* Clayton Act, 15 U.S.C. §§ 12-27 (1994).

63. U.S. DEP'T OF JUSTICE, *supra* note 13, at 4.

64. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994).

65. The Fair Trade Law consists of the following seven chapters: Chapter One—Legislative Purpose and Definition; Chapter Two—Monopolies, Combinations and Concerted Actions; Chapter Three—Unfair Competition; Chapter Four—Fair Trade Commission; Chapter Five—Damages; Chapter Six—Penalties; and Chapter Seven—Supplementary Provisions.

66. *See supra* note 3.

67. Although the FTL was the product of four decades of impressive economic growth in Taiwan, under a policy of strong government intervention in the economy, it is believed that the policy trend now is clearly toward increased market liberalization. As the domestic economy became less restrained, policymakers increasingly felt that antitrust and unfair competition legislation was needed in order to ensure adequate competition in the marketplace and restrain unfair or excessive competitive practices.

The original FTL was drafted by the Ministry of Economic Affairs in 1985. The following year it was sent to the Legislative Yuan but was not passed until 1991, becoming effective in February 1992.

States.<sup>68</sup> It is widely perceived that the decisions of the FTC have done little to establish the level of legal predictability necessary in commercial transactions. This has been because the FTL lacks a coherent economic theory with which to define the parameters of antitrust rules. The consequent ad hoc determinations have resulted in commercial uncertainty for the development of Taiwanese industry. As a result, the FTL and Taiwanese courts should espouse the relevant foreign precedents and experiences as guidance and judicial reference to accord realistic demands.

The primary purpose of enacting the FTL was to maintain order in transactions, protect the interests of consumers, ensure fair competition, and promote the stability and prosperity of the national economy.<sup>69</sup> It limits business monopolies and prohibits collusion and unfair competition. In addition, it forbids a wide range of practices intended to damage other businesses, including the use of force, bribery, or similar methods in order to obtain technology or business secrets, and the dissemination of false reports to damage the commercial reputation of another company.

The Fair Trade Law, like its American counterpart, the Sherman Act, provides both civil and criminal penalties for violations. Under the FTL, both an enterprise itself and its officers are subject to such sanctions. Significantly, however, according to Taiwanese legal tradition, criminal violations must be stated with specificity because an overarching principle of Chinese law is that a person may act within the limits of conduct not forbidden by a particular law.<sup>70</sup> In this context, the decisions of the FTC are limited to civil remedies and administrative fines, not including criminal sentences which are within the exclusive jurisdiction of the courts.

Similar to competition statutes in other countries, such as the United States,<sup>71</sup> the FTL is more ambitious in protecting customer welfare and economic order. The FTL contains two major legal regimes:<sup>72</sup> antitrust law<sup>73</sup> and unfair competition law,<sup>74</sup> including provisions on misappropriation of

---

68. See FAIR TRADE COMM'N OF THE ROC, EXPLANATION OF THE ARTICLE AND LEGISLATIVE PURPOSE FOR THE FAIR TRADE LAW 1 (Aug. 1993).

69. FTL, *supra* note 52, ch. 1, art. 1.

70. Article 1 of the Criminal Code of the ROC, which was promulgated on January 1, 1935, and effective July 1, 1935, also amended effective November 7, 1948; July 21, 1954; October 23, 1954; December 26, 1969; and May 16, 1992 states: "[a]n act is punishable only if expressly so provided by the law in force at the time of its commission."

71. The United States has three major federal antitrust laws to complete an antitrust system: the Sherman Antitrust Act, the Clayton Act, and the Federal Trade Commission Act.

72. 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, 147 (1993).

73. FTL, *supra* note 52, chs. 2-3, arts. 10-19.

74. *Id.* ch. 3, arts. 20-24.

trade secrets,<sup>75</sup> copying of trade dress,<sup>76</sup> and other forms of unfair trading that are more closely related to the field of intellectual property law.<sup>77</sup> The antitrust provisions, which prohibit the abuse of market power and the creation of horizontal affiliations, along with other conventional kinds of restraints of trade, were viewed at the time as the primary obstacle to the enactment of the FTL.

The FTL also bans multi-level sales schemes,<sup>78</sup> making it illegal for participants to obtain commissions, monetary awards, bonuses, or other economic benefits merely from inducing others to join in the sales in such scheme rather than from the marketing or sale of the goods or services at reasonable market prices.<sup>79</sup>

Because of the substantial role of foreign investment in Taiwan, and in order to nurture foreign-owned companies located in Taiwan,<sup>80</sup> under Article 47 of the FTL, even unrecognized foreign legal persons and entities who are not registered to do business in Taiwan may nevertheless bring an action

---

75. The legislative history of the FTL recognizes that trade secrets represent a form of intellectual property. Any valuable business information which has independent commercial value will be soundly protected. Therefore, owners of valuable trade secrets can seek compensation from infringers or persons leaking such trade data under Article 19 of the FTL. But the rule is still not up to standards set by the GATT. Thus, the Ministry of Economic Affairs of the Republic of China is drafting a new set of laws protecting trade secrets in order to not only protect the owners of trade secret but also to reach the standards of GATT.

76. Article 19(5) of the FTL prohibits the use of unfair practices to obtain trade secrets, trade information, or other kinds of related technical information. Although Articles 316-318 of the Criminal Code presently include the appropriation of a rival's trade secrets, this provision focuses on the conspiracy aspect of the dissemination of commercial information and is generally viewed as an insufficient remedy against a party who receives and uses the trade secret information.

Article 21 of the FTL prohibits misleading the public and commercial misrepresentations regarding the price, quality, use, country of origin, manufacture, or place of processing. The sale, export, import, or transportation of goods that violate this Article are also forbidden. See also Glenn P. Rickards, *New Fair Trade Law Will Strengthen Intellectual Property Protection*, Int'l Bus. Daily (BNA) (Apr. 3, 1991), available in LEXIS, World Library, ALLWLD File.

77. Article 20 of the FTL complements Articles 2, 21, and 34 of the Trademark Law on infringement. This Article protects against the unauthorized use of a similar trade name, individual's name, trademark, product container, package, product appearance, or other trade indicator which might cause confusion with the products or services of another. The sale, export, import, and transportation of a product as described above is also prohibited.

78. Supervisory Regulation of Multi-Level Sales, promulgated on February 28, 1992. Its legitimacy is derived from an express grant of regulatory power to the Fair Trade Commission pursuant to Article 23(2) of the Fair Trade Law.

79. FTL, *supra* note 52, ch. 3, art. 23(1).

80. See, e.g., Statute for the Investment by Foreign Nationals, protecting and administrating of investments by foreign nationals within the territory of the ROC, promulgated on July 14, 1954, as amended on May 26, 1989 (amended nine times between 1954 and the present).

under the FTL on the basis of reciprocity.<sup>81</sup> Since diplomatic recognition is a prerequisite for foreign companies to transact business in Taiwan, this provision potentially gives foreign companies not doing business in Taiwan equal standing to sue.

Traditionally, many of the monopolies<sup>82</sup> in Taiwan are run by state-owned enterprises or state-sanctioned private monopolies and have been an integral part of Taiwan's economy since the Japanese colonial era.<sup>83</sup> Under certain circumstances, discussed later, monopolies are exempt from the anti-monopoly law until February 1996.<sup>84</sup>

Critics of the FTL contended that the legislation was spurred by three factors.<sup>85</sup> (1) Taiwan's desire to enter international conventions and organizations, such as the GATT/WTO and the United Nations;<sup>86</sup> (2) pressure from major trading partners, including Japan, Europe, and especially the United States;<sup>87</sup> and (3) recognition by local authorities of the positive impact of strengthened protection for intellectual property on the development of local industry and commerce.<sup>88</sup>

Other provisions that deal with unfair competition are somewhat commonplace.<sup>89</sup> The FTL outlaws boycotts, along with false advertising of prices, quality, origin, or manufacturing formulae,<sup>90</sup> spreading false

---

81. Article 47 of the FTL states that unrecognized legal persons or groups may file a complaint, private prosecution, or civil action with respect to the matters specified in this Law provided, however, that nationals or groups of the ROC are entitled to the same privileges in their countries under treaties, laws and regulations or customary practices of such countries, or mutual protection agreement(s) entered into by and between groups or organizations with the approval of the central competent authority. FTL, *supra* note 52, ch. 7, art. 47.

82. The major monopolies in Taiwan are: railway transport, life insurance, securities, television, sugar, alcohol, tobacco, petroleum, natural gas, fertilizer, salt, flat glass, electric power, and water supply. See GAZETTE OF THE FAIR TRADE COMMISSION OF THE ROC, Jan. 1993.

83. The Japanese colonial period began in the Treaty of Shimonoseki in 1895, under which Taiwan and the Pescadores islands were ceded to Japan by the Manchu imperial government. The colonial era ended at the close after Second World War in 1945. LIANG SHIH-CHIU, A NEW PRACTICAL CHINESE-ENGLISH DICTIONARY 1236 (1991).

84. Article 4 of the FTL states the provisions of this Law shall not apply to any act performed by an enterprise in accordance with other laws. The acts of a governmental enterprise, public utility, or communications and transportation enterprise approved by the Executive Yuan shall not be subject to the application of this Law until the elapse of five years after the promulgation of this law.

85. See *Update on Intellectual Property Rights Protection in Taiwan*, E. ASIAN EXECUTIVE REP., June 15, 1987, available in LEXIS, World Library, ALLWLD File.

86. *Id.*

87. *Id.*

88. *Id.*

89. FTL, *supra* note 52, ch. 3.

90. *Id.* art. 21.

information about competitors,<sup>91</sup> pyramid marketing schemes,<sup>92</sup> preferential treatment of specific enterprises without adequate and proper reason,<sup>93</sup> coercion, or other improper means to force dealer, distributors, or retailers into business relations,<sup>94</sup> and industrial and commercial espionage.<sup>95</sup>

### C. *The Taiwan Enforcement Rule of Fair Trade Law*

According to Article 48 of the FTL, the FTC enacted the Enforcement Rule of Fair Trade Law.<sup>96</sup> It is difficult to assess at this time which provisions of the Fair Trade Law are likely to be modified by the Legislative Yuan. Moreover, in order to implement the Fair Trade Law, the Enforcement Rule of the Fair Trade Law also provides more clarity and objectivity to the requirements of the Fair Trade Law.<sup>97</sup> Consequently, in order to alleviate the FTL's vague provisions and provide useful guidelines to private-sector companies and relevant authorities, the Taiwanese Fair Trade Commission promulgated the Enforcement Rule of the Fair Trade Law on June 24, 1992, which has 32 articles and became effective immediately. Therefore, the FTL and ERFTL together comprise the primary rules governing antitrust law and unfair competition in Taiwan.

Many entrepreneurs worry that compliance with the FTL will increase the cost of operations to businesses. Some even consider the FTL a kind of "martial law" for manufacturing industries.<sup>98</sup> Therefore, besides the ERFTL, several other related regulations also need to be enacted clearly and promptly. For example, there is a need for regulations for setting, determining, and calculating a company's market share. Without defined standards, the company will have no way of knowing in advance whether its market share has reached the threshold established by the FTL.<sup>99</sup> Under this circumstance, the FTC must play a role by supplementing the FTL and

---

91. *Id.* art. 22.

92. *Id.* art. 23.

93. *Id.* art. 19.

94. *Id.*

95. *Id.* See also *Rules of Competition-General*, INVESTING LICENSING & TRADING, Mar. 1, 1989, available in LEXIS, World Library, ALLWLD File.

96. FTL, *supra* note 52, ch. 7, art. 48 and Kung Ping Jiau Yih Fa Shih Hsing Hsi Tsé [Enforcement Rules of Fair Trade Law], art. 1 (promulgated on June 24, 1992) [hereinafter ERFTL], translated in ENFORCEMENT RULES OF FAIR TRADE LAW (Lee & Li trans.) (on file with the IND. INT'L & COMP. L. REV.) (indicating the FTC, as the promulgator of the FTL, is in charge of the enactment of the ERFTL).

97. Lawrence S. Liu, *Draft Fair Trade Law*, E. ASIAN EXECUTIVE REP., July 15, 1986, available in LEXIS, World Library, ALLWLD File.

98. See *1991's Top 10 Domestic Economic New Events*, BUS. TAIWAN, Dec. 30, 1991, available in LEXIS, World Library, ALLWLD File.

99. See Osman Tseng, *Understanding the Fair Trade Law*, BUS. TAIWAN, Jan. 27, 1992, available in LEXIS, World Library, ALLWLD File.



explaining to the public how to follow the goals of the FTL. Regardless of whether it is desirable or undesirable, the FTL and ERFTL represent a significant legal consideration for anyone seeking to do business in Taiwan.

### III. ENFORCEMENT OF THE ANTITRUST LAWS

There are three main ways in which the federal antitrust laws of United States are enforced:<sup>100</sup> criminal and civil enforcement actions brought by the Antitrust Division of the Department of Justice, civil enforcement actions brought by the Federal Trade Commission, and lawsuits brought by private individuals asserting damage claims.<sup>101</sup> As a consequence of the dual jurisdiction of the Department of Justice Antitrust Division and the Federal Trade Commission, there is a potential duplication of effort. Both the Federal Trade Commission and the Justice Department generally attempt to negotiate consent decrees prior to instituting litigation to prevent duplication of activities.<sup>102</sup> However, the cross-agencies' participation often was deemed inefficient to bring antitrust cases to trial.

Unlike the dual agency system of the United States, the ROC established the Fair Trade Commission to enforce all relevant antitrust law cases and uncompetitive practices. Such enforcement power is somewhat limited by the FTC's structure.<sup>103</sup> Although the FTC has sole authority to institute antitrust cases in Taiwan, its actual mandate is limited to the imposition of administrative penalties. Failure to comply with its determination subjecting the perpetrator to higher dollar penalties set forth by other relevant agencies, and ultimately, criminal sanctions are handed down for the most blatant violations.

#### A. *The Antitrust Division of the U.S. Department of Justice*

The U.S. Congress authorizes the Antitrust Division of the U.S. Department of Justice to initiate criminal and civil prosecutions for violations of the Sherman Act and Clayton Act.<sup>104</sup> The Justice Department, the sole agent enforcing criminal antitrust cases, uses a variety of techniques in the

---

100. See GENERAL ACCOUNTING OFFICE, JUSTICE DEPARTMENT: CHANGES IN ANTITRUST ENFORCEMENT POLICIES AND ACTIVITIES 10 (Oct. 1990) [hereinafter GAO].

101. Clayton Act § 4, 15 U.S.C. § 15 (1994) (Action for Damages) authorizes private individuals who suffer "injury in business or property by reason of anything forbidden in the antitrust laws" to recover damages, including treble and actual damages, court costs, and attorneys' fees. See also WARREN F. SCHWARTZ, PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS: AN ECONOMIC CRITIQUE 1 (1981).

102. See GAO, *supra* note 100, at 14.

103. FTL, *supra* note 52, ch. 1, art. 9.

104. Thane D. Scott et al., *Antitrust Analysis of Mergers, Acquisitions and Joint Ventures* 149, 158 in ANTITRUST UNDER THE CLINTON ADMINISTRATION (Mass. CLE ed. 1993).

investigation and prosecution of criminal antitrust violations under Sections 1 and 2 of the Sherman Act. Meanwhile, the Justice Department in cooperation with the Federal Bureau of Investigation or other relevant investigative agencies and the attorneys of the Justice Department ferret out evidence of antitrust violations. Violators of the FTL are subject to substantial fines and potential incarceration.<sup>105</sup>

Violation of Section 4 of the Sherman Act<sup>106</sup> and Section 15 of the Clayton Act<sup>107</sup> confer jurisdiction on the federal courts and permit the government to institute proceedings in equity to prevent and restrain antitrust violations. Therefore, the Antitrust Division, in the areas of mergers and acquisitions, is authorized to enforce the Sherman and Clayton Acts with the power to institute a civil action. Section 15 of the Clayton Act<sup>108</sup> empowers the Antitrust Division of the Justice Department with numerous enforcement mechanisms, including injunctions, divestiture, and other ancillary equitable relief.<sup>109</sup>

#### B. *The U.S. Federal Trade Commission*

The Federal Trade Commission, created in 1914, was designed to prevent unfair methods of commercial competition, referred to as "trade busting."<sup>110</sup> The FTC's initial authority was derived from two Congressional acts dating from 1914—the Federal Trade Commission Act and the Clayton Act. Since that time, Congress has expanded its authority by passing additional laws to give the Federal Trade Commission broader power to police unfair methods of commercial competition. However, the Department of Justice Antitrust Division is unable to enforce the Federal Trade Commission Act.<sup>111</sup>

Congress has since passed several additional acts to broaden the Federal Trade Commission's authority in dealing with unfair or deceptive

---

105. Robert H. Lande, *Are Antitrust "Treble" Damages Really Single Damages?* 54 OHIO ST. L. J. 115, 122-23 (1993).

106. Sherman Act, 15 U.S.C. § 4 (1994).

107. Clayton Act, 15 U.S.C. § 15 (1994).

108. Section 15 of the Clayton Act states: "[t]he several district courts of the United States are invested with jurisdiction to present and restrain violations of this Act, and it shall be the duty of the several United States attorneys . . . to institute proceedings in equity to prevent and restrain such violations. Such proceeding may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited." *Id.*

109. Scott, *supra* note 104, at 158.

110. The Federal Trade Commission's work is divided up among the Bureaus of Consumer Protection, Competition, and Economics.

111. GELLHORN & KOVACIC, *supra* note 29, at 29.

trade practices, including the Wheeler-Lea Amendment,<sup>112</sup> the Fair Packaging and Labeling Act,<sup>113</sup> and the Equal Credit Opportunity Act.<sup>114</sup>

Furthermore, Congress passed the Magnuson-Moss Act<sup>115</sup> in 1975, providing the Federal Trade Commission with the necessary authority to adopt trade regulation rules defining unfair or deceptive acts in particular industries. Such trade regulation rules have the force of law. However, the Federal Trade Commission is limited in authority and allowed solely to issue "cease and desist" orders.<sup>116</sup> These orders restrain further unlawful action but do not impose civil or criminal penalties. Section 11 of the Clayton Act provides for Federal Trade Commission enforcement of Sections 2, 3, 7, and 8 of the Act. The Federal Trade Commission may enforce the Sherman Act indirectly under Section 5 of the Federal Trade Commission Act.<sup>117</sup>

The Federal Trade Commission has concurrent jurisdiction with the Antitrust Division of the Justice Department to enforce Section 7 of the Clayton Act.<sup>118</sup> According to Section 13(b) of the Federal Trade Commission Act, the Federal Trade Commission is allowed to pursue preliminary relief as well as permanent injunctive relief.<sup>119</sup>

### C. *The Taiwan Fair Trade Commission*

The FTL is administered by the Fair Trade Commission which was established by the Executive Yuan.<sup>120</sup> The FTC, an independent agency<sup>121</sup> with quasi-judicial authority under Article 25 of the FTL, plays a major role in the enforcement of the FTL. In the context of the Fair Trade Law, the FTC is empowered to investigate possible violations<sup>122</sup> and impose administrative sanctions.<sup>123</sup> The FTC may issue executive decrees ordering

---

112. 15 U.S.C. §§ 41 (FTC Established), 44-45 (Terms Defined and Unfair Methods of Competition and Unfair or Deceptive Acts or Practices), 52-58 (1994).

113. 15 U.S.C. §§ 1451-61 (1994).

114. 15 U.S.C. § 1691 (1994).

115. 15 U.S.C. § 2301 (1994).

116. U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, ANTITRUST FOR SMALL BUSINESS 9 (1985).

117. Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 239-40 (1980).

118. Clayton Act, 15 U.S.C. § 7 (1994).

119. Federal Trade Commission Act, 15 U.S.C. § 13(b) (1994).

120. FTL, *supra* note 52, ch. 4, art. 25.

121. Article 28 of the FTL declares that the FTC operate independently subject to the FTL and relevant regulations and gives authority to the FTC to issue administrative orders. *Id.* art. 28.

122. *Id.* art. 26.

123. According to Chapter Six (Penalties and Regulations) of the FTL, the Fair Trade Commission penalized 71 local businesses for violations of the Fair Trade Law during the first three quarters of 1993. Violations included, inter alia, false or misleading advertising claims,

violators of the Fair Trade Law to correct unlawful activities or issue a fine<sup>124</sup> and then, if necessary, will refer the case to the courts for compulsory execution.<sup>125</sup>

Under this provision, an enterprise engaged in monopolistic or unfair competitive practices will first be served with an administrative order to cease and desist the infractions. If the violations persist, the FTC may then impose administrative fines not exceeding one million New Taiwanese Dollars (NT) (approximately U.S. \$ 39,000) until the violating act is corrected or halted.<sup>126</sup> The responsible parties may be taken to court by the FTC if they refuse to comply with the executive orders and face a maximum of three years imprisonment.<sup>127</sup> In the meantime, the enterprise and responsible parties may face maximum fines of NT \$ 1 million.<sup>128</sup>

Unlike the Federal Trade Commission<sup>129</sup> and the Department of Justice Antitrust Division of the United States,<sup>130</sup> which has 200 attorneys reporting to the attorney general and utilizes a large number of attorneys and experts to deal with antitrust matters, the Fair Trade Commission of Taiwan thus far employs 120 workers. Almost all of the workers in Taiwan were transferred from the former Supervisory Board of Commodity Prices of the Ministry of

---

pyramid schemes, price fixing, and attempted mergers without prior permission. *Fair Trade Commission Finally Acts*, CHINA ECON. NEWS SERVICE, Oct. 21, 1993, available in LEXIS, World Library, ALLWLD File.

124. See, for example, Article 41 of the FTL states:

[w]here an enterprise violates the provisions of this Law, the FTC may order the said enterprise to discontinue its act or set a time limit for it to take corrective action. In the event the enterprise fails to discontinue its act or to take corrective action within the given time limit after having been ordered to do so, the FTC may continue to give orders and, in addition thereto, the said enterprise shall be punished successively by a fine of not exceeding one million New Taiwan dollars until its violating act is discounted or corrected.

FTL, *supra* note 52, ch. 6, art. 41.

125. *Id.* art. 44.

126. *Id.*

127. *Id.* art. 35.

128. Article 38 of the FTL states:

[i]n the event that the violator referred to in any of the three preceding Articles [meaning an act violates articles 10, 14, 19, 20, 22, or 23(1) of the FTL], is a legal person, in addition to the punishment to be imposed upon the person committing the act, the said legal person shall be subject to the fine specified in the respective Article.

*Id.* art. 38.

129. The Federal Trade Commission is headed by five Commissioners, nominated by the President and confirmed by the Senate, each serving a seven-year term. Currently, the Federal Trade Commission has 200 attorneys, 75 economic experts, and 200 consumer protect works.

130. The Department of Justice Antitrust Division has 200 attorneys who report to the U.S. Attorney General.

Economic Affairs.<sup>131</sup> By and large, these workers lack the specialization and experience required for complex antitrust investigations. The FTC utilizes a civil service organization made up of persons who passed a public examination held by the Examination Yuan. Merely passing a civil service examination is not indicative of a person's ability to master a complex area such as antitrust law.

Consequently, these individuals must learn as they go, which lessens the effectiveness of the FTC. Therefore, in order to compensate for the lack of specialization and experience, the Organic Statute of the Fair Trade Commission provides that the FTC may, if necessary, invite scholars and experts to work as advisors or consultative members.<sup>132</sup>

Further complicating the efficient administration of the FTC are the vagueness and ambiguity inherent in the language of the FTL. Many ill-defined phrases such as "improperly determining"<sup>133</sup> and "without proper reason"<sup>134</sup> are so vague that they could be arbitrarily invoked by the FTL's enforcement authorities to either prosecute businesses or overlook anticompetitive practices. Present efforts at establishing enforcement rules are far from satisfactory. The FTC must therefore resolve these problems by setting and implementing clear enforcement rules which are still in the drafting process.

#### IV. EXEMPTIONS FROM THE ANTITRUST LAWS

Because the United States and Taiwan have differing economic policies and political needs, their antitrust law exemptions tend to differ.<sup>135</sup> Since 1914, the U.S. Congress' focus has been on writing exceptions to the Sherman Act's coverage and other American antitrust statutes. This has led to the isolation of several industries and activities from the reach of U.S. antitrust laws.<sup>136</sup>

Similarly, the Fair Trade Law of Taiwan allows for legal patent, trademark, and copyright monopolies, as long as they are granted by the government and operated in accordance with the Trademark Law, Copyright Law, and Patent Law of Taiwan.<sup>137</sup> For the first five years after the

---

131. Organic Statute of the Fair Trade Commission, art. 21, Jan. 13, 1992.

132. *Id.* art. 22.

133. *See, e.g.*, FTL, *supra* note 52, ch. 2, art. 10(1)(2).

134. *See, e.g.*, *id.* art. 15(2).

135. *See* Thomas E. Kauper, *The Treatment of Cartel under the Antitrust Laws of the United States*, in INTERNATIONAL HARMONIZATION OF COMPETITION LAWS 75, 90 (Chia-Jui Cheng, Lawrence S. Liu & Chih-Kang Wang eds., 1995).

136. For example, public utilities, broadcasters, common carriers, banking and financial enterprises, as well as professional baseball organizations, have been held largely exempt from antitrust laws.

137. Hsu, *supra* note 6, at 377.

enactment of the Fair Trade Law, the government has also allowed for exemptions of certain public utilities,<sup>138</sup> government-owned enterprises, transportation enterprises, and acts approved by the Executive Yuan.<sup>139</sup>

### A. *Relevant U.S. Regulations*

Several statutory exemptions found in the Sherman Act, the Clayton Act, and the Federal Trade Commission Act protect certain categories of business behavior from antitrust liability. To enforce these Acts, the Supreme Court now requires that antitrust plaintiffs satisfy two prongs in order to recover damages: first, the injury must have resulted from the alleged antitrust violation, and second, it must be shown that the injury was one which the antitrust laws are intended to prevent.<sup>140</sup>

Restraints on trade are shielded by the so-called state action exemption as long as: (1) state policy plainly requires it, and (2) the action is actively supervised by the state.<sup>141</sup> Moreover, this state action doctrine appears to cover permissive conduct as well as conduct compelled by state policy.<sup>142</sup> The state exemption will be applied even if it is the product of an anticompetitive conspiracy and not in the public interest, and even if it involves bribery of a public official.<sup>143</sup> Such conduct, however, violates the Supremacy Clause<sup>144</sup> of the United States Constitution.<sup>145</sup>

---

138. Such exemptions apply to electric utilities, the post office, mining enterprises, insurance companies, and certain tobacco enterprises.

139. Article 46(2) of the FTL states: "[t]he acts of a government enterprise, public utility or communications and transportation enterprises approved by the Executive Yuan shall not be subject to the application of this Law until the lapse of five years after the promulgation of this Law." FTL, *supra* note 52, ch. 7, art. 46.

140. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) (holding for the defendant and stating the plaintiff failed to prove "antitrust injury, which is to say injury of the type the antitrust laws were designed to prevent and that flows from that which makes defendant's act unlawful").

141. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

142. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985).

143. *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344 (1991). *See also* Robert M. Buchanan, *Antitrust Overview, in ANTITRUST UNDER THE CLINTON ADMINISTRATION* 1, 24-25 (Mass. CLE ed. 1993).

144. Article VI of the U.S. Constitution declares that all laws made in pursuance of the Constitution and all treaties made under the authority of the United States shall be the "supreme law of the land" and shall enjoy legal superiority over any conflicting provision of a State constitution or law. BLACK'S LAW DICTIONARY 1004 (6th ed. 1991).

145. *See, e.g., Schwegmann Bros v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980).

The business of insurance is expressly exempted from the Sherman and Clayton Acts by the McCarran-Ferguson Insurance Regulation Act.<sup>146</sup> But the scope of this Act only reaches the aspects of the business which are regulated by state law. Whether or not activities are considered business of insurance activities under this exemption has recently been addressed by the Court, and the application has been increasingly narrowed.<sup>147</sup> Even when activities fall under the business of insurance, if it involves boycotts or intimidation aimed at policy holders or competitors, it is not protected by the McCarran-Ferguson Act.<sup>148</sup>

The Webb-Pomerene Export Trade Act of 1918 (Webb-Pomerene Act)<sup>149</sup> limits "antitrust exemption for the formation and operation of associations of otherwise competing businesses to engage in collective export sales."<sup>150</sup> In contrast to the 1982 Export Trading Company Act (ETC Act),<sup>151</sup> the Webb-Pomerene Act cannot be applied to the export of services, including intellectual property rights licensing.<sup>152</sup>

Many activities have been placed beyond the scope of the antitrust laws by the U.S. Congress. Partial exemptions (statutory and judicial) from antitrust liability are granted to labor union activities<sup>153</sup> and cooperative agricultural activities.<sup>154</sup> Additionally, limited liability is sometimes available for joint research and development<sup>155</sup> ventures and joint production ventures.<sup>156</sup> Additionally, these exemptions are applied to banking, public

---

146. McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1013 (1994).

147. Buchanan, *supra* note 143.

148. Hartford Fire Ins. Co. v. California, 113 S. Ct. 2891 (1993).

149. Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (1982), is administered by the Federal Trade Commission. The Act provides a qualified exemption for an export association from the prohibitions of the antitrust laws.

150. See U.S. DEP'T OF JUSTICE, *supra* note 51, at 4. The exemption of the Webb-Pomerene Act applies only to the export of goods, wares, or merchandise.

151. Exports Trading Company Act of 1982, 15 U.S.C. §§ 4001-4003, 4011-4021 (1994) [hereinafter ETC].

152. The purpose of the ETC Act is to increase U.S. exports of goods and services by enacting more efficient provisions of export trade service to U.S. producers and suppliers.

153. Clayton Act §§ 6, 20, 15 U.S.C. §§ 17, 52 (1994) (Exemption of Labor, Agricultural, and Horticultural Organizational and Injunctions in Labor Disputes).

154. The Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1994), provides a limited antitrust exemption for price fixing and other joint marketing activities of farm cooperatives. However, the Supreme Court has added the further requirement that to qualify for the exemption, the challenged joint action must be reasonably related to bona fide collective marketing efforts and must not consist of predatory or anticompetitive practices extending beyond the legitimate needs of collective marketing. See *United States v. Borden*, 308 U.S. 188 (1939) and *Maryland & Virginia Milk Prod. Assoc. v. United States*, 362 U.S. 458 (1960).

155. The National Cooperative Research Act of 1984 (NCRA), 15 U.S.C. §§ 4301-4305 (Supp. II 1984), clarifies substantive application of the U.S. antitrust laws to joint research and development activities.

156. See U.S. DEP'T OF JUSTICE, *supra* note 51, at 25-26.

utilities, the Newspaper Preservation Act of 1970,<sup>157</sup> export joint ventures, health care, organized baseball,<sup>158</sup> professional sport television contracts,<sup>159</sup> and intellectual property.

B. *The Exemption under the Taiwan Fair Trade Law §§ 45-46*

The Fair Trade Law represents a form of an "Economic Constitution" for Taiwan, which includes not only traditional anti-trust provisions, but also specific regulations governing intellectual property rights.<sup>160</sup> Consequently, in addition to the exemption of patents from the FTL,<sup>161</sup> Article 46(1) of the FTL also exempts activities otherwise in violation of the FTL if they are authorized by law, which literally means statutes enacted by the Legislative Yuan.<sup>162</sup> The FTL offers no clear guidance as to what other regulated activities will be exempt from the FTL. A structural problem arises in the application of the FTL which reflects the cultural preference of the Taiwanese to avoid purely legal, rule-driven remedies. Given the lack of clear standards in the drafting of the FTL, conflicts regarding unfair competition or practices in restraint of trade are often resolved by the use of

157. 15 U.S.C. §§ 1801-1804 (1994).

158. Professional baseball is at least partially exempt from the antitrust laws by *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, Inc.*, 259 U.S. 200 (1922). See also Buchanan, *supra* note 143, at 26. However, this exemption has been recently criticized in the 1994 baseball strike and two recent decisions: *Piazza v. Major League Baseball Clubs*, 831 F. Supp. 420 (E.D. Pa. 1993) and *Butterworth v. National League of Professional Baseball Clubs*, 644 So.2d 1021 (Fla. 1994). This latter case ruled that baseball's exemption was an invalid defense to suits challenging Major League Baseball's decision.

159. Sport Broadcasting Act of 1961, 15 U.S.C §§ 1291-1294 (1988) (indicating professional sports leagues could choose the sponsored television broadcasts of their sports games without violating antitrust laws). See Kathleen L. Turland, *Major League Baseball and Antitrust: Bottom of the Ninth, Bases Loaded, Two Outs, Full Count and Congress Takes a Swing*, 45 SYRACUSE L. REV. 1329, 1350-51 (1995).

160. A critical theme in the background of the enactment of Article 45 of the FTL was the goal of avoiding being pressured into changing the Patent Law in order to protect the foreign intellectual property rights of trading partners, in particular the United States, while respecting the decision to maintain the existing Patent Law as drafted by the Legislative Yuan.

It has been suggested that the combination of anti-trust and intellectual property regulations in the Fair Trade Law are a result of the Executive Yuan's desire to comply with western pressure for more rigorous intellectual property protection while avoiding the political cost of being seen to "knuckle under" to American business interests. Consequently, parallel provisions governing, for example, patent law appears in both the Fair Trade Law and the Patent Law.

161. "The provisions of the Law shall not apply to the proper exercise of the right(s) under the Copyright Law, Trademark Law, or Patent Law." FTL, *supra* note 52, ch. 7, art. 45.

162. Article 46(1) of Fair Trade Law states: [t]he provisions of the law shall not apply to any act performed by an enterprise in accordance with other laws. *Id.* art. 46(1).



administrative guidance or moral suasion,<sup>163</sup> which are informal compromises proposed by judges or by the relevant authority under the FTC, before the controversy reaches the formal adjudicative stage. As a result, many practices, which arguably are themselves violative of the FTL, are tolerated as acceptable trade customs. This has the obvious effect of limiting commercial certainty as to acceptable business practices.<sup>164</sup>

Article 46(2) of the FTL provides exemptions for activities of public utilities,<sup>165</sup> government-owned enterprises, and transportation enterprises upon approval of the Executive Yuan for a maximum of five years. This exemption for government enterprises is seen by the private sector as particularly controversial because it effectively creates an uneven playing field for public and privately owned enterprises. Moreover, exemptions for public utilities and transportation enterprises also overlap in part with the exemption under Article 46(1) of the FTL, further complicating the interpretation of these exemptions.<sup>166</sup>

## V. MONOPOLIES AND OLIGOPOLIES

A monopoly provides peculiar advantage to individuals or companies.<sup>167</sup> This privilege consists of the exclusive power to operate in a particular business or time, including the production and sale of particular commodities.

By contrast, a perfectly competitive market is one which has numerous sellers, each of whose participation is so small that individual sellers perceive themselves as being unable to affect the product's price. Firms in perfectly competitive markets are "efficient," producing goods at the lowest cost possible ("productive efficiency") while providing society with the total amount of goods in question that it desires ("allocative efficiency").<sup>168</sup>

A monopoly enterprise is able not only to create barriers restricting the entry of potential competitors, but may also restrict output thereby raising

---

163. Liu, *supra* note 72, at 148.

164. *Id.*

165. Article 144 of the ROC Constitution states that "[p]ublic utilities and other enterprises of a monopolistic nature shall, in principle, be under public operation."

166. Liu, *supra* note 97.

167. There are three different approaches to measuring market power (or "monopoly power"): performance, determining how much a firm's prices depart from its marginal cost, or the amount that a firm's net profits exceed the industry average; rivalry, focusing on the sensitivity of the firm's sales or output to changes in its rivals' sales and prices; and structure, counting the number of firms within a market and comparing the sales volume controlled by each firm and taking into account entry barriers and product differentiation among other concerns.

168. Lande, *supra* note 31 (addressing that market competition increases economic efficiency).

prices above competitive levels to the detriment of its customers. Professor Robert H. Lande recognizes that a monopolized market will result in a market having no incentive to be innovative, to produce efficiently, and to allocate resources efficiently. With no prospect of elastic response in a monopolistic market, wealth transfers into the hands of the monopolist, producing few social benefits and perpetuating defective competition.<sup>169</sup> Therefore, except for certain legal monopolies<sup>170</sup> and natural monopolies,<sup>171</sup> all monopolies are prohibited under the relevant national statutes.

An oligopoly is defined as a market in which there are a few producers which do not engage in price competition among themselves.<sup>172</sup> The pricing decisions of each member is interdependent with those of its competitors. Economics postulate that if a high percentage of sales volume, employment, or value added is concentrated in a select group of entities in an identified industry, rivals will behave more like a monopolist than a competitor. Professor Lande assumes that on the average, few firms providing essentially the same goods or services will price their output at competitive levels, or at monopoly level, but will tend to fall in between the two polar levels.<sup>173</sup>

Nevertheless, U.S. antitrust laws fail to deal explicitly with oligopolies. They concentrate instead on monopolies.<sup>174</sup> For example, monopolies are prohibited by Section 2 of the Sherman Antitrust Act, which provides that no

---

169. *Id.* at 432-40.

170. Legal monopoly refers to an exclusive right granted by a governmental unit to business to provide such services as electric and telephone service. The rates and services of such utilities are in turn regulated by the government. BLACK'S LAW DICTIONARY 696 (6th ed. 1991).

171. A "natural monopoly" results where one firm of efficient size can produce all or more than the market can take at a remunerative price. One which is created from circumstances over which the monopolist has no power. For example, a market for a particular product may be so limited that it is impossible to profitably produce such product except by a single plant large enough to supply the whole demand. *Id.* at 696-97.

172. In an oligopoly economic conditions exist whereby only a few companies sell substantially similar or standardized products. Oligopoly markets often exhibit the lack of competition, high prices, and low output of monopoly markets. *See id.* at 750. *See also* Michael L. Freedman, Note, *Predatory Pricing After Brook Group: Economic Goals Prevail*, 58 ALB. L. REV. 243, 250 n.69 (1994).

173. This reflects the difficulty of attempting to maintain a fixed percentage conception of the term "oligopoly." For example, if four top firms representing 55 percent of the market share or cooperate to the detriment of their competitors, this may represent an oligopoly, while eight firms controlling 70 percent of a similar market absent such agreement may not be deemed oligopolistic. Lande, *supra* note 23 (lecture from March 14, 1994).

174. Frederick M. Rowe, *The Delusions of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72 GEO. L. J. 1511, 1524-29 (1984) (describing the U.S. Supreme Court's use of the Oligopoly Model for a decision).

person shall monopolize, attempt to monopolize, or combine or conspire to monopolize any part of interstate or international commerce.<sup>175</sup>

The FTL prohibits a monopolistic enterprise from unfairly excluding others from the market, unjustifiably maintaining or modifying prices, or unjustifiably requesting favored treatment.<sup>176</sup> The mere possession of monopolistic power, however, is not in and of itself objectionable. Both predatory and monopolistic pricing may, conceivably, constitute a prohibited act under the FTL. Unlike the U.S. antitrust laws, which take a pragmatic approach using a variety of reasonable theories, principles, and market share statistics to assess monopoly cases, the FTL utilizes the simple percentage of an enterprise's market share and relevant regulations and guidelines to assess monopoly cases.<sup>177</sup>

#### A. *The Sherman Act § 2*

The U.S. offense of unlawful monopolization under Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in a relevant market (relevant product and geographic market); and (2) willful acquisition or maintenance of that power through anticompetitive or predatory acts (monopoly power creation and conduct), as opposed to growth or development as a consequence of superior product, business acumen, or "historic accident."<sup>178</sup> The offense of unlawful attempt to monopolize has three elements: (1) a specific intent to monopolize; (2) the use of anticompetitive or predatory means to that end; and (3) a dangerous probability of recoupment that the attempt will succeed.<sup>179</sup>

175. Sherman Act § 2, 15 U.S.C. § 2 (1994) (discussing monopolization, attempted monopolization, and conspiracies to monopolize).

176. Article 10 of the FTL states:

[a] monopolistic enterprise shall not engage in any of the following acts:

1. using unfair methods directly or indirectly to prevent other enterprises from taking part in competition;
2. improperly determining, maintaining or changing the prices of goods or the remuneration for services;
3. without proper reason, causing a trading counterpart to provide preferential treatment; or
4. conducting other acts by abusing its market standing.

The names of monopolistic enterprises shall be periodically announced to the public by the central competent authority.

FTL, *supra* note 52, ch. 2, art. 10.

177. ERFTL, *supra* note 96, arts. 4 and 5 (indicating the approaches to determine the percentage of market share as monopoly) (on file with the IND. INT'L & COMP. L. REV.).

178. *United States v. Grinnell Corp.*, 348 U.S. 563, 570-71 (1966).

179. Lande, *supra* note 23.

If it appears to the Department of Justice that there is a danger of achieving or sustaining monopoly power,<sup>180</sup> then it will not inquire further but rather will refer the case for adjudication. In assessing the probability of monopolization, the Department of Justice considers the market share of the firm, concentration in the market, and the probability that new competitors would enter the market in response to an anticompetitive price increase.<sup>181</sup> On the other hand, if the conduct only makes sense if it results in a monopoly with consequent monopoly profits, it is prohibited conduct.<sup>182</sup> However, if a proper motive for the conduct can be shown, it will not violate the Sherman Act.<sup>183</sup>

The Sherman Act outlaws all contracts, combinations, and conspiracies that unreasonably restrain interstate trade, including agreements among competitors to fix prices, rig bids, and allocate customers. The Sherman Act also makes it a crime to monopolize any part of interstate commerce. An unlawful monopoly exists when only one firm provides a product or service, and it has become the sole supplier not through the lack of other suppliers, but by suppressing competition through anticompetitive conduct.

#### B. *The Taiwan Fair Trade Law §§ 5, 10*

Similarly, the primary concern of the FTL of Taiwan is monopolies and attempts to monopolize. According to the definition of "monopoly" under Article 5 of the FTL,<sup>184</sup> a monopoly clearly includes two forms: classical monopoly<sup>185</sup> and oligopoly.<sup>186</sup> Under the FTL, the term monopoly refers to a condition where an enterprise faces no competition or has an overwhelming position enabling it to exclude other competitors in a

180. *United States v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377 (1956).

181. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).

182. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (Unlawful exclusionary practices gave rise to monopoly position for Alcoa.)

183. Lande, *supra* note 23 (lecture from Feb. 7, 1994).

184. Article 5 of the FTL states:

[t]he term 'monopoly' as used herein refers to a condition wherein an enterprise faces no competition or has an overwhelming position to enable it to exclude other competitions in a particular market.

When two or more enterprises do not in fact compete with each other in pricing and their relations as a whole with other entities are such as specified in the preceding paragraph, such situation shall be deemed a monopoly.

The term 'particular market' as used in the first paragraph of this Article refers to a geographic area or a sector wherein enterprises engage in competition in respect to a particular commodity or service.

FTL, *supra* note 52, ch. 1, art. 5.

185. *Id.* art. 5(1).

186. *Id.* art. 5(2).

particular market.<sup>187</sup> An oligopoly occurs when two or more enterprises do not, in fact, compete with each other in pricing and in their relations as a whole.<sup>188</sup> Under the policy expressed in the FTL, oligopolistic firms will be treated as if they were monopolies.<sup>189</sup>

The FTL requires the FTC to annually review data submitted to it by companies and publish a list of companies that meet the criteria of a monopoly, even if no legal action is pending against the firm.<sup>190</sup> In addition, the FTL must publish a list of companies that hold a one-fifth market share.<sup>191</sup> Both lists are to be issued each February.

The FTL defines a monopoly as a condition under which an enterprise<sup>192</sup> does not face competition or has such superior market power as to exclude competition in a particular market.<sup>193</sup> In defining a market, the FTL considers both the relevant product or service market and the relevant geographical market. This represents a functional definition on the part of the FTL in order to determine market power.

The Enforcement Rules of Fair Trade Law set forth guidance to this determination of market power. Under Article 4 of the ERFTL, a company may be investigated as a potential monopoly if it reaches fifty percent of a particular market share, with total sales in that market segment from the preceding fiscal year totalling more than \$40 million.<sup>194</sup> If the business in question fails to satisfy both prongs of this test, it will not be deemed to be a monopoly.<sup>195</sup>

---

187. *Id.* art. 5.

188. *Id.* art. 5(2).

189. *Id.*

190. *Id.* ch. 2, art. 10(2).

191. *Id.* art. 11(2).

192. Under Article 2 of the FTL, the enterprise refers to (1) a company; (2) an industrial or commercial firm owned by a sole owner or in the form of a partnership; (3) a trade association; or (4) any other person or organizations engaged in transactions by providing goods or services. *Id.* ch. 1, art. 2.

193. The Fair Trade Law further exempts from its provisions certain public utilities, government-owned enterprises, transportation enterprises, and other acts approved by the Executive Yuan. A "sunset clause" was included in Article 46(2) of the FTL by the Legislative Yuan exempting such state-owned enterprises from the effect of the FTL for a period of five years. There is also a provision that state-owned enterprises may be granted further exemptions from the FTL for five years after this statute is promulgated.

194. Unless otherwise indicated, all amounts listed are calculated in U.S. dollars, rather than New Taiwanese dollars (NT) at a rate of US\$ 1 = NT\$ 27.50, as of April 2, 1997 (Source: The Central Bank of China).

195. See *Taiwan's Fair Trade Commission Approves Monopoly, Merger Rules*, 9 Special Correspondent (BNA) No. 536 (Mar. 25, 1992), available in LEXIS, World Library, ALLWLD File.

In addition, the rules apply when several companies dominate a particular market.<sup>196</sup> If two or three companies enjoy a two-thirds share; or four or five companies dominate three-fourths of the market with each enterprise individually enjoying one-tenth market share; or each such enterprise's total sales in the preceding fiscal year was more than forty million U.S. dollars in sales,<sup>197</sup> the FTC could list those firms as monopolies.<sup>198</sup>

Moreover, Article 10 of the FTL addresses classical monopolies and oligopolies.<sup>199</sup> Basically, it does not prohibit all monopolies and oligopolies, unless such enterprises use unfair methods or acts to prevent other companies from competing. These include using unfair methods either directly or indirectly to prevent other enterprises from taking part in competition; improperly determining, maintaining, or fixing the prices of goods or the remuneration for services without proper reason; causing a trading counterpart to provide preferential treatment; or conducting other acts by abusing its market standing.<sup>200</sup>

The FTL provides its own unique definition of an oligopoly.<sup>201</sup> In theory, an oligopoly means a market that is not diverse, yet has more than a single enterprise, and in which the sellers in question perceive their pricing decisions as being interdependent with those of their competitors.<sup>202</sup> This reflects the concern of the Taiwanese government that converts anticompetitive acts have frequently been engaged in by many enterprises.

Merely possessing monopoly power is not objectionable per se under Article 10 of the FTL. Nevertheless, the FTL prohibits such monopolistic or oligopolistic businesses from unfairly excluding others from the market, maintaining or modifying prices without commercial justification, requesting favored treatment from the government without just cause, and engaging in similar activities that constitute an abuse of dominant market position.<sup>203</sup>

Although an entity may meet all of the requirements mentioned above, such an entity shall not be considered a monopolistic enterprise if each of the enterprises individually enjoys a market share that is less than one-tenth of

---

196. Due to the lack of sound, basic theory and methods however the real problem remains the definition of a market. The FTC is reportedly working on the problem of defining the various markets, but much of what the FTC will do will be based on a combination of regulations and internal rulings.

197. ERFTL, *supra* note 96, art. 4.

198. *Id.*

199. FTL, *supra* note 52, ch. 2, art. 10.

200. *Id.*

201. FTL, *supra* note 52, ch. 1, art. 5(2).

202. See Eleanor M. Fox, *The Future of the Per Se Rule: Two Visions at War with One Another*, 29 WASHBURN L. J. 200, 201 (1990).

203. Lawrence S. Liu, *Fair Trade Law and New Policy on Competition*, 13 E. ASIAN EXECUTIVE REP. 9 (Mar. 15, 1991), available in LEXIS, World Library, ALLWLD File.

total market share or if each such enterprise's total sales in the preceding fiscal year was less than about forty million U.S. dollars.<sup>204</sup>

If the establishment of one enterprise or the entry into the particular goods or services market is restricted subject to laws and regulations, technology, or other conditions which may impede competition, all such enterprises will not be deemed a monopolistic under Article 4(3) of the ERFTL.<sup>205</sup>

The issue of the monopoly of the FTL is not whether a company dominates any given market, but rather whether that company dominates the market because of illegal actions or unfair trade practices.<sup>206</sup> The purpose of the law is not to do away with monopolies but to make sure that fair competition is maintained.<sup>207</sup>

## VI. MERGERS AND ACQUISITIONS

In addition to issues regarding monopolies, merger actions also raise general anticompetition policy questions concerning market concentration arrangements.<sup>208</sup> Therefore, it is important to observe the measures by which firms integrate their operations, usually through the purchase of another corporations' stocks or assets.<sup>209</sup>

U.S. antitrust laws classify merger transactions into three categories: horizontal, vertical, and conglomerate.<sup>210</sup> Horizontal mergers occur when a firm, in an attempt to limit competition, acquires another firm that produces and sells an identical or similar product in the same geographic area.<sup>211</sup> Vertical mergers, on the other hand, occur when one firm acquires either a customer or supplier from another.<sup>212</sup> All other acquisitions are

204. ERFTL, *supra* note 96, art. 4.

205. Article 4(3) of ERFTL states that "[t]he central competent authority may find a business which, under the preceding two paragraphs should not be deemed a monopoly, nevertheless to constitute a monopolistic enterprise if the establishment of such enterprise is restricted by law and regulations, technology or other conditions that may impede competition." *Id.* art. 4(3).

206. *See* FAIR TRADE COMM'N OF THE ROC, *supra* note 68, at 11.

207. *Id.*

208. Wesley A. Cann, Jr., *The New Merger Guidelines--Is the Department of Justice Enforcing the Law?* 21 AM. B.L. J. 1, 33 (1983).

209. Antitrust law uses the terms merger and acquisition interchangeably to denote all methods by which firms legally unify ownership of assets formerly subject to separate control.

210. Cann, *supra* note 208, at 4.

211. *United States v. Bethlehem Steel Corp.*, 168 F. Supp. 576 (S.D.N.Y.) (stating an increase in concentration of an oligopolistic industry constitutes a substantial lessening of competition or tendency to monopolize).

212. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). *Brown* involves a vertical merger between two shoe companies, where one was a manufacturer, supplying the other a small amount of its shoes. Even though the foreclosure was small, it was the largest possible

viewed as conglomerate mergers. These include transactions which are purely conglomerate in which the merging entities have no economic relationships;<sup>213</sup> geographic extension mergers in which the purchasers produce the same commodities as the acquired company but in a different geographic market;<sup>214</sup> and product extension mergers in which a corporation producing one product buys a company whose products are different but require the application of similar manufacturing or marketing techniques.<sup>215</sup> Consequently, each merger transaction contains factors that contain unique anti-competitive aspects.

Sections 7 and 7A of the Clayton Act<sup>216</sup> and the Hart-Scott-Rodino Antitrust Improvement Act of 1976<sup>217</sup> are the major statutes to enforce anticompetitive mergers, along with the merger guidelines issued jointly by the Department of Commerce and the Justice Department,<sup>218</sup> and the Securities Exchange Commission regarding anticompetitive mergers and acquisitions.

Article 6 of the Fair Trade Law broadly defines "combination" to include mergers or acquisitions of more than one firm. In order to prevent the occurrence of potential monopolies, the FTL authorizes the FTC to review a merger, acquisition, and similar forms of economic integration by requiring pre-merger notification and approval.<sup>219</sup> Similarly, when any type of combination is proposed, prior notice and approval of the FTC is required.<sup>220</sup> Failure to obtain the FTC's prior approval may result in divestiture, compulsory divestment of assets, termination of business, and fines.<sup>221</sup>

This analysis is clouded, however, by the continued reliance on the simple percentage market share of an enterprise to assess merger and acquisitions cases.<sup>222</sup> Moreover, Taiwan's policy to increase competitiveness

---

within the context of this industry. Neither corporation was small or failing, and past conduct demonstrated that Brown would force the acquired entity to purchase its products.

213. For example, where a steel producer buys a petroleum refiner.

214. For example, where a baker in Atlanta purchases a bakery in Honolulu.

215. For example, where a producer of household detergents buys a producer of liquid bleach.

216. Clayton Act, 15 U.S.C. §§ 7, 7A (1994).

217. Clayton Act, 15 U.S.C. § 18a (1994).

218. *Horizontal Merger Guideline of Department of Justice and Federal Trade Commission*, 62 Antitrust & Trade Reg. Rep. Sp'l Supp't. (BNA) No. 1559 (Apr. 2, 1992); see also *infra* notes 230-31 and accompanying text analyzing the 1992 Horizontal Merger Guidelines.

219. FTL, *supra* note 52, ch. 1, art. 6(1).

220. *Id.* art. 6(2)-(5).

221. *Id.* ch. 2, art. 13.

222. *Id.* art. 11.



encourages merger by tax incentive. The result is commercial uncertainty for Taiwanese enterprises which contemplate such actions.

### A. *The Clayton Act § 7*

In 1950, Congress amended Section 7 of the Clayton Act, by enacting the Celler-Kefauver Act. This led to the prohibition of certain business acquisitions of other businesses, whether by way of stock or purchase of assets.<sup>223</sup> The reach of Celler-Kefauver Act extends to transactions which may lessen competition<sup>224</sup> or tend to create a monopoly but do not run afoul of Section 7 and are not illegal under the Sherman Act. Thus, Section 7 of the Clayton Act limits the acquisitions of a competitor which easily creates anti-competitive effects.<sup>225</sup>

If a merger creates a new firm having an undue percentage share of the relevant market, resulting in a significant increase in the concentration of firms in that market segment,<sup>226</sup> then that merger is deemed inherently likely

223. Section 7 of the Clayton Act states:

[n]o person engaged in commerce or in activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly.

224. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (The Court allowed a coal company merger despite the high market share number (31.1% + 21.8%) because of other factors, making the coal less important. Because coal is sold in long-term contracts, the actual numbers are less important.)

225. *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962). This case is not only noteworthy as the first merger case, but it also held that the Clayton Act protects competition, not competitors.

226. The Antitrust Division of the Department of Justice adopted Herfindahl-Hirschman Index [hereinafter HHI] (also called the "H index") to evaluate market concentration in the merger context. According to 1984 Merger Guideline § 3.1,

the Antitrust Division divides the spectrum of market concentration as measured by the HHI (ranging from near zero in an atomistic market to 10,000 in the case of a pure monopoly) into three regions that can be broadly characterized as unconcentrated (post-merger HHI below 1000), moderately concentrated (post-merger HHI between 1000 and 1800), and highly concentrated (post-merger HHI above 1800).

See U.S. Dep't of Justice 1984 Merger Guidelines, *supra* note 33, at 20.

Under this system, individual market shares (expressed in decimals—for example, a 50% share expressed as .50) are squared (.50 x .50 = .25) and the sum of the squared market shares of every firm in the industry equals the H index. A pure monopoly would have an H index of 1.0.

It will not challenge a merger that would result in an HHI of less than 1000

to substantially lessen competition.<sup>227</sup> Therefore, it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.<sup>228</sup>

A rule of reason analysis is employed on a case specific basis to consider factors relevant to merger conduct, such as entry barriers, the power buyer factor, trends toward market concentration, homogeneity of products, increase in the likelihood of collusion, adverse effects on competition, and efficiency defense.<sup>229</sup> Moreover, under the Clayton Act, the Federal Trade Commission has jurisdiction over both corporate mergers and acquisitions. The Bureau of Competition, the antitrust wing of the Federal Trade Commission, also reviews proposed corporate mergers and acquisitions of a corporation's stock or assets to determine if the merger would substantially lessen competition or tends to create a monopoly.

#### B. *The 1992 Horizontal Merger Guidelines*<sup>230</sup>

The Horizontal Merger Guidelines (Merger Guidelines) promulgated in 1992 by the Department of Justice and Federal Trade Commission have been updated to restate the policies on enforcement of horizontal mergers and acquisitions which were previously found in Section 7 of Clayton Act, Section 1 of the Sherman Act, and Section 5 of the Federal Trade Commissions Act. The policies reflect the view that strict oversight and enforcement of merger rules is essential to the continued vitality of the free market system and to the competitive position of American firms and their consumers. Enforcing merger rules, therefore, requires a balancing of the need to prevent anticompetitive mergers and to avoid deterring routine competitive or competitively neutral mergers.

When considering whether consumers or producers would be likely to undertake specific actions, reflecting on the economic incentive of the actor

---

because the structure of the market itself indicates that the successful exercise of market power by one or more firms is unlikely. Also, it will not challenge a merger that would result in moderate concentration if the level of concentration would increase by 100 HHI points or less, or a merger that would result in high concentration if the level of concentration would increase by 50 HHI points or less.

U.S. DEP'T OF JUSTICE, *supra* note 51, at 12; See Charles R. Laine, *The Herfindahl-Hirschman Index: a Concentration measure taking the Consumer's Point of View*, 40 ANTITRUST BULL. 423-32 (1995) (discussing how law enforcement agencies applied the HHI to determinate concentration rate).

227. Pitofsky, *supra* note 30, at 819.

228. See, e.g., *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

229. Lande, *supra* note 23, (lecture from Mar. 14, 1994).

230. See *Horizontal Merger Guideline of Department of Justice and Federal Trade Commission*, *supra* note 218.

is an important consideration throughout the Merger Guidelines. The focus, therefore, is on "economic profits" rather than accounting profits. Economic profits are defined as the excess of revenues over costs, where the costs include the opportunity cost of invested capital.<sup>231</sup>

### C. *The Clayton Act § 7A (Hart-Scott-Rodino Antitrust Improvement Act)*

In 1976, Article 7A of the Clayton Act was amended by the Hart-Scott-Rodino Antitrust Improvement Act of 1976 (H-S-R Act).<sup>232</sup> The H-S-R Act requires both parties to a merger or acquisition (or the acquiring party in the case of a tender offer) to file premerger notification of the transaction with the Federal Trade Commission and the Antitrust Division. Thus, the primary aim of Congress in passing the Act is to enable the government to stop anticompetitive mergers before they are consummated. Furthermore, in the case of mergers, the H-S-R Act requires a thirty-day waiting period after notification before the acquisition of voting securities or assets. A request for additional information by one of the Government agencies before the waiting period expires triggers an additional twenty-day waiting period (ten days for cash tender offers) after compliance with the request.<sup>233</sup> Notification depends on two factors: the size of the parties and the size of the transaction. Notification is required when a firm with sales or assets of \$100 million acquires voting securities or assets of a ten million dollar firm. Additionally, the acquiring firm must either hold fifteen percent or more of the voting securities or assets of the acquired firm, or the value of the acquired voting securities and assets must exceed fifteen million dollars. There are several exemptions from the notification requirement, including the acquisitions of bonds, mortgages, non-voting securities, acquisitions of limited amounts of voting securities solely for investment purposes, and transactions subject to approval by a federal regulatory agency.<sup>234</sup>

### D. *The Taiwan Fair Trade Law §§ 6, 11-13*

The FTL provides guidance on how the FTC should respond to companies wishing to merge.<sup>235</sup> Applications for a merger must be sent to the FTC if the merger will affect the company's percentage of market

---

231. *Id.*

232. Clayton Act, 15 U.S.C §§ 7a, 18 (1994) (discussing premerger notification and waiting requirements).

233. *Id.*

234. *Id.*

235. Articles 7-9 of the ERFTL guide the requirements and procedure for approval of mergers (known as a combination in the FTL). ERFTL, *supra* note 96, arts. 7-9.

share.<sup>236</sup> Besides the basic information on ownership of the companies involved, the FTC also requires information on companies' revenues in preceding years;<sup>237</sup> a list of companies operated as subsidiaries; the previous year's fiscal statements, production, or operation costs; product sales prices;<sup>238</sup> and an explanation of why the proposed merger would benefit the economy.<sup>239</sup>

Under Article 17 of the ERFTL, the FTC may require additional information, including fiscal data going back three years. It is then required to pass judgment on the proposed action within two months of receiving all the required data.

The law permits exemptions for companies proposing to operate joint ventures or share research and development programs (R&D), but those proposals must also be approved by the FTC.<sup>240</sup> Data must be submitted on the cost structure of the companies and the projected structure after the joint venture. In the case of R&D programs, the cost of each company conducting research must be compared with the cost and effectiveness of having a joint venture.<sup>241</sup> The same criteria holds true for import and export operations, control of production output,<sup>242</sup> or any action that will improve the efficiency and competitiveness of small- and medium-sized enterprises.<sup>243</sup>

Approvals for joint ventures or reverse approved mergers will be valid for another three years.<sup>244</sup> At that time, the company may apply for an extension. However, each extension is given in three-year increments, with no limit on the number of extensions a company may receive. At renewal time, the FTC may impose conditions or restrictions on the company to ensure that the new enterprise does not enjoy an unfair advantage over its competitors.

---

236. Article 5 of the ERFTL states:

[w]hen calculating the market share of an enterprise, information concerning the production, sales, inventory, import and export value (volume) of each enterprise and the relevant market shall be taken into account.

Information necessary for the calculation of the market share may be based on such information as obtained upon investigation by the central competent authority or that recorded in other government agencies.

*Id.* art. 5.

237. *Id.* art. 8(1)(3).

238. *Id.* art. 8(1)(4).

239. *Id.* art. 8(1)(5).

240. FTL, *supra* note 52, ch. 2, art. 14.

241. *Id.* art. 14(1)-(4).

242. *Id.* art. 14(5).

243. *Id.* art. 14(7).

244. Article 15(2) of the FTL states that "[t]he approval shall be valid for a limited period not exceeding three years. The enterprises involved may, with proper reasons, file a written application for an extension thereof with the central competent authority . . . however, that the term of each extension shall not exceed three years." *Id.* art. 15(2).

The FTC must use an economic cost benefit analysis in determining whether approval of a merger should be granted. If the combination's advantages<sup>245</sup> to the national economy outweigh its disadvantages, the combination may be approved. The FTC must act on an application for a combination within two months after it is filed.<sup>246</sup>

Similarly, Article 11 of the FTL governs the restriction of mergers. Mergers under certain conditions will be allowed providing that the benefits of the alliance outweigh the disadvantage of blocking competition.

The FTL is also concerned with the future contours of industrial organizations. In order to forestall the development of monopolies, the FTL, through the pre-merger notification and approval requirement, enables the FTC to review mergers and similar forms of economic integration. Where any "combination" of the following types is proposed, prior notice to and approval from the FTC will be required.

## VII. HORIZONTAL CONCERTED ACTIONS

Professor Phillip Areeda has stated that horizontal concerted actions—those agreements among competitors regarding price-fixing output restrictions or market allocation—have the potential of being the most socially repugnant actions undertaken by businesses in a market economy.<sup>247</sup> Such practices by their very nature are within the reach of the antitrust law of all modern commercial powers.

Even though the FTL never explicitly uses the terms horizontal and vertical restraints, "concerted action," as used in the FTL, has been defined in the broadest sense of the term. The official commentary to Article 7 of the FTL, promulgated by the FTC, states that in theory concerted action encompasses both horizontal and vertical concerted actions.<sup>248</sup>

### A. *The Sherman Act § 1*

Section 1 of the Sherman Act prohibits any contract, conspiracy, or combination from restraining trade. However, the primary role of the Sherman Act has not been to control single-firm monopolies, but rather to

---

245. Advantages include increased economy of scale, reduction of production costs, and rationalization of management.

246. Liu, *supra* note 203.

247. Phillip Areeda, *American Antitrust Law* 197, 203-08 in TALKS ON AMERICAN LAW (Harold J. Berman ed., 2d ed. 1973).

248. FTL, *supra* note 52, ch. 1, art. 7 (comment). Legislative section-by-section analysis of the FTL (FTC Aug. 1993); See also C.C. Lee & Joyce Fan, *Enforcement Rules for Fair Trade Law*, 14 E. ASIAN EXECUTIVE REP. 14 (1992), available in LEXIS, World Library, ALLWLD File.

deal with concerted efforts by competitors to fix prices, restrict output, divide markets, or exclude other rivals.

By definition, horizontal restraints require the actions of more than one person. Cooperation is required because a person cannot meaningfully boycott on his own. Moreover, a person cannot engage in price fixing on his own because the agreement to fix prices is crucial.<sup>249</sup> Note that it is impossible to disagree with a wholly-owned subsidiary.<sup>250</sup> As a general proposition, the U.S. Justice Department utilizes two modes of analysis: per se condemnation and case-by-case examination under a rule of reason. Also, the Supreme Court in recent years has continued to invoke per se rules for certain types of horizontal and vertical agreements.<sup>251</sup> The Court has retained this approach for maximum price fixing and vertical resale price maintenance despite substantial criticism contending that such arrangements can promote competition. Generally, the U.S. Supreme Court has expanded its use of the more extended rule of reason analysis and has reduced the frequency and scope of per se treatment.<sup>252</sup>

#### B. *Per Se Rule and Rule of Reason (as Applied to U.S. Precedents)*

The Sherman Act also stipulates that certain agreements are per se violative of antitrust law. For example, in *United States v. Socony-Vacuum Oil Co.*,<sup>253</sup> the Court concluded that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity . . . is illegal per se."<sup>254</sup> Other per se violations include output restrictions,<sup>255</sup> agreements to restrict bidding,<sup>256</sup> product allocation agreements,<sup>257</sup> market allocation agreements,<sup>258</sup> and group boycotts.<sup>259</sup>

249. See, e.g., *Hopkins v. United States*, 171 U.S. 578 (1898) (Only agreements whose main purpose was to fix prices were condemned.).

250. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

251. See, e.g., *United States v. Standard Manufacturing Co.*, 226 U.S. 20 (1911) (holding that it does not matter if a product is made pursuant to a patented process by a patented machine indicating per se rule in finding a violation of the Sherman Act).

252. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (overturning decade-old per se condemnation of non-price vertical restrictions on deals).

253. 310 U.S. 150, 223 (1940).

254. *Id.*

255. See, e.g., *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965) (holding that output restrictions are per se violative of Sherman Act).

256. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

257. See, e.g., *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945).

258. See, e.g., *United States v. Topco Assoc. Inc.*, 405 U.S. 596 (1972).

259. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

However, courts have moderated the rigidity of the per se rule through the adoption of the "rule of reason" doctrine. The judiciary will uphold agreements that are inherently efficient despite any unreasonable restraints on competition under the rule of reason test.<sup>260</sup> This pragmatic view recognizes the societal value of some business agreements. For example, agreements to exchange information,<sup>261</sup> establish product standards,<sup>262</sup> and engage in joint ventures<sup>263</sup> have been upheld.

C. *The Taiwan Fair Trade Law §§ 7, 14-17*

Under Article 14 of the FTL, enterprises in competition with each other may not engage in horizontal concerted actions, such as agreements entered into by two or more competing companies to determine prices, restrict prices, quantities, customers, and territories, or otherwise restrict each other's commercial activities, unless such actions can be proved to be beneficial to the overall economy or public interests and are approved by the FTC.<sup>264</sup>

---

260. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) (music licensing system justified as the only practical method of collecting royalty payments for composers, where other, less efficient methods were not explicitly excluded).

261. *United States v. Container Corp. of America*, 393 U.S. 333 (1969).

262. *See, e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988).

263. *See, e.g.*, *Associated Press v. United States*, 326 U.S. 1 (1945).

264. Article 14 of the FTL states:

[e]nterprises may not engage in concerted actions, unless the concerted action satisfies any of the following circumstances, is beneficial to the national economy as a whole and to the public interests, and has been approved by the central competent authority:

1. to unify the specifications or models of goods in order to reduce cost, improve quality or increase efficiency;
2. to jointly research and develop goods or market in order to upgrade technical skills, improve quality, reduce costs or increase efficiency;
3. to engage in specialized areas of business in order to achieve the enterprise's rational operation;
4. to enter into an agreement in respect of the competition in overseas markets in order to secure or promote exports;
5. to take concerted action in respect of the importation of foreign goods in order to strengthen trading capability;
6. to take concerted action in imposing limitations restrictions on the quantity of production and sales, equipment or prices in order to adjust to orderly demand when the enterprises in a particular industrial sector suffer hardship to continue their business operations or over-production due to the fact that the market price of goods remains at a level below the average production cost during economic recession; or
7. to take concerned action in order to improve the operational efficiency or strengthen the competitiveness of the small- and medium-sized enterprises concerned.

Accordingly, enterprises in Taiwan are prohibited from engaging in horizontal price-fixing, horizontal territorial allocation, and output restrictions.<sup>265</sup> As stated above, provided such actions are found to increase efficiency, unify standards, increase joint research and development, maintain orderly imports and exports, or avoid bankruptcy, they will be tolerated.<sup>266</sup> Only the FTC has the power to make such determinations.<sup>267</sup> Since the decisions of the FTC must be published in government gazettes,<sup>268</sup> a body of administrative precedents will become apparent and available as the FTC builds up its expertise in dealing with any concerted actions.

#### D. *Rule of Reason (as Applied to Taiwanese Precedents)*

The FTC initially employed the principle of a case-by-case approach, similar to the rule of reason, to evaluate application for exception approvals. Moreover, it was the unclear meaning of the rule of reason defense that caused the FTL to disregard the distinction between per se and "rule of reason" altogether and to add to the general prohibition principle in Chapter 2 of the FTL. Nonetheless, exceptions exist under Articles 14 and 7 of the FTL and Article 2 of the ERFTL. The FTL seems to expressly assign the burden of proof for the facts establishing a rule of reason upon the defendant. Professor Lawrence Liu, in his article on the impact and interpretation of the FTL,<sup>269</sup> states that with the exception of "combination actions," the "rule of reason" line of analysis will be employed as the test of legality for all business practices that have a potential anticompetitive effect.<sup>270</sup>

### VIII. VERTICAL RESTRAINTS

Vertical restraints occur when a manufacturer or other party higher in the chain of distribution imposes obligatory actions on the retailer. For

FTL, *supra* note 52, ch. 2, art. 14.

265. *Id.* art. 7.

266. *Id.* art. 14. The exception of horizontal concerted action in the FTL is similar to the European pattern requiring government approval and registration. See Jan Peeters, *The Rules of Reasons Revisited: Prohibition on Restraints of Competition in the Sherman Act and the EEC Treaty*, 37 AM. J. COMP. L. 521, 551 (1989).

267. FTL, *supra* note 52, ch. 2, art. 11 (guiding requirements and procedure for merger actions).

268. *Id.* art. 17 (ruling that the FTC proceed with applications for merger actions within a limited time and publish decisions in government gazette).

269. Liu, *supra* note 72, at 166.

270. *Id.*



example, tying agreements,<sup>271</sup> which require a buyer to purchase additional products from the seller in order to obtain the desired product, are violative of antitrust laws.<sup>272</sup> Other vertical restraints, such as territorial resale restrictions, are deemed to unreasonably limit competition.<sup>273</sup>

U.S. antitrust laws deal with a number of such vertical relationships, including the relationship between a manufacturer and a retailer and a wholesaler and a manufacturer. Anything less than a merger may involve vertical restraints. U.S. antitrust laws provide three categories of restraints: vertical price restraints such as Resale Price Maintenance (RPM); non-price restraints such as exclusive dealing; territory; and tying arrangements.<sup>274</sup>

Again, while the FTL does not explicitly refer to the term "vertical restraints" in the comments to Article 18 of the FTL, it is clear that the FTL is intended to regulate and prohibit both vertical restraints and exclusionary arrangements. Article 18 of the FTL will nullify resale price maintenance unless daily consumption goods are involved that may be readily substituted in the marketplace through free competition.<sup>275</sup>

#### A. *The Sherman Act § 1*

The Sherman Act clearly prohibits agreements which lead to restraint of trade. The Act states that every contract, combination (whether trust or otherwise), or conspiracy which leads to a domestic or international restraint of trade or commerce is illegal.<sup>276</sup>

---

271. Clayton Act, 15 U.S.C. § 3 (1994).

272. *See, e.g., Northwest Pacific R. Co. v. United States*, 356 U.S. 1 (1958); *see also Eastman Kodak Co. v. Image Technical Services, Inc.*, 112 S. Ct. 2072 (1992).

273. *See, e.g., White Motor Co. v. United States*, 372 U.S. 253 (1963).

274. Recently, the Antitrust Division of the Justice Department settled an important case involving software giant Microsoft. *United States of America v. Microsoft Corp.*, No. 94-1564 (SS). Under the terms of the agreement, Microsoft will change its royalty agreements from a "per processor" scheme and will not enter into a license of more than one year's duration. Microsoft's previous policy had been seen as effectively foreclosing competitors from entering the market for computer operating systems. The philosophy underlying the settlement was widely criticized by conservative, free market proponents.

275. *See Fair Trade Commission, Press Release* (Apr. 22, 1991).

276. Sherman Act, 15 U.S.C. § 1 (1994).

### B. *The Clayton Act § 3 (Tying Arrangement)*

The scope of Section 3 of the Clayton Act<sup>277</sup> is restricted to arrangements involving "commodities." Therefore, tying and exclusive dealing restrictions which involve service, real estate, intangibles, or other non-commodities need to be challenged under other provisions such as Section 1 of the Sherman Act.<sup>278</sup>

According to Section 3 of the Clayton Act, tying arrangements occur when sellers insist that purchasers take unwanted products (tied products) as a prerequisite to purchasing at all, at the best price, or to purchase the desired products. Essentially, this prohibition of tying arrangements is helpful to competitors of the seller attempting to force the unwanted purchase and to purchasers who are forced to take the unwanted tied product.<sup>279</sup> The Supreme Court recently restated its view that tying arrangements can be classified as per se antitrust violations.<sup>280</sup> Just as in other categories of non-price vertical restraints, tying arrangements may be looked at under the "rule of reason" analysis. This occurs when the seller has less than thirty percent of the tying product's market.<sup>281</sup>

### C. *The Taiwan Fair Trade Law § 18*

Article 18 of the FTL prohibits resale price maintenance (vertical restraints) by an enterprise unless the goods involved are daily consumption goods and substitutes are readily available in the marketplace.<sup>282</sup> However, the FTL provides for no criminal liability for a violation of this provision,

277. It shall be unlawful for any person . . . to lease or make a sale . . . of goods . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor . . . of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly . . . .

15 U.S.C. § 14 (1994).

278. WILLIAM C. HOLMES, *ANTITRUST LAW HANDBOOK 1994 EDITION* § 4.02, 479481 (1994).

279. Buchanan, *supra* note 143, at 17.

280. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984) (Because the seller has 30 percent of the tying product market, the Court assumed the effect of the tie "may be to substantially lessen competition[.]"); *Eastman Kodak Co. v. Image Technical Service, Inc.*, 112 S. Ct. 2072 (1992) (Although there was a market power problem, the Court assumed that Kodak tied the servicing of its copying machine to the sale of parts for those machines, a market that Kodak dominated.)

281. Buchanan, *supra* note 143, at 18.

282. Article 18 of the FTL states that "[a]n enterprise which supplies goods to its trading counterpart shall allow its trading counterpart to freely decide the prices at which such goods will be resold to a third party by the trading counterpart or at which such goods will be resold by the said third party." FTL, *supra* note 52, ch. 3, art. 18.

reducing the incentive not to engage in such anticompetitive activities. These daily consumption goods are to be listed and published in the FTC press release for enterprises and customers,<sup>283</sup> and the FTC has hinted that the list of goods that can be subject to an RPM will be short. On the other hand, the FTC has also taken the position that, in the case of an agency or consignment sale, an RPM will be permitted because no resale of goods occurs.<sup>284</sup> In addition, the FTC has indicated that nonbinding resale price suggestions should be acceptable.<sup>285</sup>

### IX. UNFAIR COMPETITION AND EXCLUSIONARY PRACTICES

Both the United States and Taiwan impede unfair competition and exclusionary practices. In 1914, the U.S. Congress legislated the Federal Trade Commission Act to focus on blocking unfair methods of competition under the enforcement of the Federal Trade Commission.<sup>286</sup> In the meantime, Congress also enacted the Clayton Act dealing with price discrimination, tying and exclusive supply agreements, mergers, and interlocking directorates, with enforcement authority given to both the Department of Justice and the Federal Trade Commission. These two statutes compensated for the weakness of the Sherman Act by preventing appropriate antitrust activities.

In general, the Taiwanese FTL's unfair practices provision are much less controversial than its antitrust provisions. Primarily, the FTL prohibits unfair competition practices.<sup>287</sup> For example, it prohibits false statements on or in connection with the distribution of goods,<sup>288</sup> and it prohibits trade libel where the aim is to obtain a competitive advantage.<sup>289</sup>

The FTL also prohibits certain exclusionary practices<sup>290</sup> which include boycotts, discrimination, unfair inducement, and breaches of confidence. Violators who are found to be unreasonable would suffer a maximum imprisonment of two years.<sup>291</sup> Obviously, similar to the evaluation of the

---

283. Article 18(1) of the FTL states that "[a]ny agreement contrary to this provision shall be null and void except for daily products to be used by general consumers which are subject to free competition with similar kinds of goods available in the market." *Id.* art. 18(1).

Article 18(2) of the FTL states that "[t]he items of daily products referred to in the preceding paragraph shall be publicly announced by the central competent authority." *Id.* art. 18(2)

284. *Id.*

285. *Id.*

286. Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1994).

287. FTL, *supra* note 52, ch. 3.

288. *Id.* art. 21.

289. *Id.* art. 22.

290. *Id.* art. 19.

291. *Id.* ch. 6, art. 36.

horizontal concerted action exception, a "rule of reason" technique is generally applied by the FTC which usually adopts a case-by-case approach.

A. *The Clayton Act § 2 (Robinson-Patman Act of 1936)*

The Robinson-Patman Act, amended the Clayton Act in 1936, prohibits sellers from changing different prices to competing customers.<sup>292</sup> Section 2 of the Clayton Act also deals with violations of discrimination in the provision of allowances from advertising and other services. However, there are two lawful exceptions to price discrimination. Price discrimination will be allowed either if the distinction specific costs are associated with particular buyers or the discrimination results from a seller's ability to match a competitor's price or services.<sup>293</sup>

B. *The Clayton Act § 8 (Interlocking Directorates and Officers)*

According to Section 8 of the Clayton Act,<sup>294</sup> an individual is prohibited from serving in a dual role as a director or officer of two competitive non-banking conglomerations if both companies have a net worth greater than ten million dollars. The crucial determination is the identification of the companies as competitors. Typically, the issue exists if a non-competitive agreement between the two would violate the antitrust laws. However, the potential violators will be exempt if either the business' annual sales are less than two percent of that corporation's total sales or if the competitive sales of each corporation are less than four percent of that corporation's total sales.<sup>295</sup>

C. *Federal Trade Commission Act § 5*

The Federal Trade Commission, established by Congress in 1914, is exclusively responsible for Section 5 of the Federal Trade Commission Act

---

292. Clayton Act § 2(a), as amended by the Robinson-Patman Act § 51(a)(1), 15 U.S.C. § 13 (1936) (price discrimination).

293. *Id.*

294. Section 8 of the Clayton Act, 15 U.S.C. § 19 (1994) (interlocking directorates and officers).

295. See EARL W. KINTNER, AN ANTITRUST PRIMER 110 (2d ed., 1973).

which prohibits unfair methods of competition.<sup>296</sup> The Federal Trade Commission also shares enforcement jurisdiction over Clayton antitrust violations with the Department of Justice. This jurisdiction is complementary and not exclusive.<sup>297</sup> The Federal Trade Commission effectively enjoys a broad range of latitude in attacking any action which would constitute a violation under the Sherman Act.<sup>298</sup> Essentially, this "unfairness" rubric has created a type of equity power of enforcement.

In 1990, the Supreme Court upheld a Federal Trade Commission determination that a group boycott by attorneys violated antitrust law.<sup>299</sup> The Supreme Court has extended this ruling to other professional groups, including boycotts by the state medical association and its member doctors regarding insurers' abilities to affect the fees paid to competing doctors<sup>300</sup> and agreements among auto dealers to restrict their hours of operation.<sup>301</sup>

The Federal Trade Commission Act also prohibits a wide range of uncompetitive practices including those which would not, by themselves, be considered sufficient to invoke the Sherman or Clayton Acts.<sup>302</sup>

Unlike the Sherman Act, the Federal Trade Commission Act is generally not directly enforceable in federal court. Rather, the Act is enforced through administrative proceedings before the Federal Trade Commission that issues a civil injunctive order, termed a "cease and desist" order.

#### D. *The Taiwan Fair Trade Law § 19-24*

Article 19(5) of the FTL prohibits the use of unfair practices to obtain the trade secrets, trade information, or other kinds of related technical information of another. Although the Criminal Code presently contains a prohibition on the intentional disclosure of information known to include

---

296. Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §45 (1994), states that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

297. Note, however, that the Justice Department cannot enforce the Federal Trade Commission Act.

298. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683 (1948) (The Court interpreted "unfair methods of competition" to include any practice violative of the Sherman Act.)

299. *FTC v. Trial Lawyer's Ass'n*, 493 U.S. 411 (1990); *FTC v. Superior Court Trial Lawyers*, 493 U.S. 426-27 (1994).

300. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986).

301. *In re Detroit Area Auto Dealer's Ass'n*, 955 F.2d 457 (6th Cir. 1992), cert. denied, 113 S. Ct. 461 (1992).

302. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953), *FTC v. Sperry Hutchinson Co.*, 405 U.S. 233 (1972). See also Buchanan, *supra* note 143, at 22-23.

another's trade secrets,<sup>303</sup> this provision is generally viewed as not providing any remedy against a party who receives and uses the trade secret information, so long as the information is not received as part of a conspiracy with the disclosing party.<sup>304</sup>

Article 20 of the Fair Trade Law complements the Trademark Law provisions on infringement. This Article protects against the unauthorized use of a similar trade name, individual's name, trademark, product container, package, product appearance, or other trade indicator so as to cause confusion with the products or services of another. The sale, export, import, and transportation of a product as described above is also prohibited.<sup>305</sup>

The use of a commercial symbol that is identical or similar to the commercial symbol of others constitutes an act of unfair competition.<sup>306</sup> "Use" is also defined to include the sale, transportation, and import and export of goods or services bearing such symbol.<sup>307</sup>

To prevent unfair competition, the FTL stipulates that a manufacturer will allow traders to freely set the prices at which its goods will be sold to third parties and at which the third parties will sell the goods to retailers.<sup>308</sup>

## X. CIVIL REMEDIES AND CRIMINAL PENALTIES

Enforcement of the U.S. antitrust laws is primarily by the Department of Justice, which brings both criminal and civil cases and shares enforcement

---

303. Article 317 of the Criminal Code (ROC) states that a person who is required by law, order, or contract to preserve the commercial or industrial secrets of another which he knows or possesses because of his occupation and who disclosed such secrets without reason shall be punished with imprisonment for not more than one year, detention, or a fine of not more than 1,000 *yuan* (1 Yuan = NT \$ 3.00).

304. Furthermore, because the illicit use of trade secrets need not be preceded by illicit disclosure, the protection afforded by this provision is incomplete. The new Article 19 thus supplements the Criminal Code by prohibiting the obtaining of trade secret information through unfair practices such as industrial espionage or bribery.

305. The prohibition need not be on a product directly associated with the protected trademark. For example, dress shirts and jewelry bearing the names of well-known luxury automobiles might fall within the scope of Article 20 of the FTC even though the goods may not be related. Distinctive packaging might also receive protection.

306. FTL, *supra* note 52, ch. 3, art. 20(1)(b).

307. *Id.* art. 20(1)(c).

308. *Id.* art. 18(1).

responsibility with the Federal Trade Commission and state attorney general.<sup>309</sup> Additionally, private individuals harmed by the violation of antitrust laws may file civil suits in federal district courts. Criminal sanctions are stiff—fines of up to ten million dollars for corporations and jail sentences of up to three years, plus fines of up to \$350,000 for individuals.<sup>310</sup> Federal Trade Commission enforcement also can result in injunctive relief, including divestiture of assets acquired by merger and orders of restitution to consumers. Private plaintiffs can seek treble damages, attorneys fees, and injunctive relief for antitrust violations.<sup>311</sup>

A unique aspect of the traditional societal orientation of the Chinese character is the fear that a period of imprisonment will destroy the reputation of a person's family. Moreover, criminal remedies may be the most effective means of curbing violations of the law at the earliest possible date. In the case of relatively judgment-proof defendants, the possibility of imprisonment could be a powerful deterrent.

In this process, the FTL adopts civil remedies<sup>312</sup> and criminal sanctions for violators of the FTL.<sup>313</sup> In the meantime, it may be possible to address the problem very quickly through a policy authorizing, an injunctive relief, and the seizure and forfeiture of products found to violate this provision of the law.<sup>314</sup>

#### A. *Relevant U.S. Regulations*

Violations of the Sherman Act may be prosecuted as a civil or criminal offense depending on the nature of the violation. Criminal violations of the Sherman Act are punishable by fine and imprisonment. Violations of the Clayton Act and the Federal Trade Commission Act only provide civil remedies to compensate for the injured person's damages and maintain the fair economic order.<sup>315</sup>

---

309. See Robert H. Land, *When Should State Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047, 1054 (1990).

310. Sherman Act, 15 U.S.C. § 1 (1994).

311. Clayton Act, 15 U.S.C. § 15 (1994). See also Buchanan, *supra* note 143, at 3.

312. Chapter 5 of the FTL directs that civil remedies be awarded to the victims of FTL violations at the discretion of the courts. FTL, *supra* note 52, ch. 5.

313. Chapter 6 of the FTL regulates the penalties for violators of the FTL, which include civil remedies and criminal sanctions. *Id.* ch. 6.

314. Rickards, *supra* note 76.

315. However, Section 3 of the Robinson-Patman Act does provide criminal penalties in the case of certain international price discrimination violations.

Section 4 of the Sherman Act<sup>316</sup> and Section 15 of the Clayton Act<sup>317</sup> confer jurisdiction on district courts to prevent and restrain violation of the respective acts by means of injunctions and direct the government to institute proceedings in equity to prevent further violations.

Section 4 of the Clayton Act permits private parties who are injured by an antitrust violation to sue in federal court for treble damages plus court costs and attorneys' fees. However, the U.S. antitrust statutes do not allow individuals to sue subject to the FTC Act.<sup>318</sup> Furthermore, Section 16 of the Clayton Act establishes that any person, firm, corporation, or association shall be entitled to sue for injunctive relief against threatened loss or damage by a violation of antitrust laws.

### B. *The Taiwan Fair Trade Law Chapters 5 and 6*

The FTL provides a strong regime of both civil and criminal remedies to achieve the purpose of protecting customers and market order.<sup>319</sup> Criminal penalties include fines of up to about \$37,000 for violations of monopolies and mergers and about \$18,300 for violations of unfair competition.<sup>320</sup> Violators may also face prison sentences of up to three years for the commission of illegal acts under Article 20<sup>321</sup> and up to two years for illegal acts under Article 19.<sup>322</sup> There are no criminal penalties attached to Article 21 violations.

The foregoing offer legal and equitable remedies for any person who is injured by an anticompetitive act or an unfair method of competition under the FTL. In this sense, such a person could seek both injunctive relief

---

316. Sherman Act, 15 U.S.C. § 4 (1994).

317. Clayton Act, 15 U.S.C. § 15 (1994).

318. U.S. SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, *supra* note 116, at 9.

319. FTL, *supra* note 52, chs. 5 & 6.

320. Article 36 of the FTL provides that

[a]nyone violating the anticompetitive restrictions of Art. 19 who nevertheless continue the violation after having been ordered by the central competent authority to cease and desist shall be punished by imprisonment of not more than two years, detention, or in lieu thereof or in addition thereto, a fine of not more than five hundred thousand New Taiwan Dollars.

*Id.* ch. 6, art. 36.

321. *Id.* art. 35.

322. *Id.* art. 36.



against further illegal acts<sup>323</sup> and recovery of damages to compensate for provable economic injury<sup>324</sup> following a civil verdict.

In addition to these remedies, the injured party may also be able to seek discretionary treble damages.<sup>325</sup> The amount may be increased based on the benefit obtained by the defendant from his illegal activity.<sup>326</sup> For example, the court may use the unfair advantage gained by the unlawful act as the measure of compensation, implicitly recognizing a misappropriation theory of recovery. In such a case, if monopoly profits are NT \$1 million, a court could find that actual damages are NT \$3 million by applying the misappropriation theory of recovery. It could treble this amount at its discretion, resulting in a penalty of NT \$3 million. As a practical matter, however, the absence of discovery procedures make it difficult to prove the defendant's unjust enrichment to the satisfaction of a court.

#### XI. DECISIONS UNDER THE TAIWAN FAIR TRADE LAW DECISIONS

The Fair Trade Law, even with its current limitations, has already made a significant impact on commerce in the Republic of China on Taiwan. In a seminal case, the Taipei District Court invoked the Fair Trade Law to impose seven months imprisonment on an individual convicted of selling fake Nintendo machines imported from Hong Kong. Previously, the case would have been brought under the Trademark Law which only provides civil fines.<sup>327</sup>

---

323. Article 30 of the FTL states that "[i]f an enterprise violates any provision of the FTL and infringes upon another person's rights or interests, the injured party may petition to eliminate such infringement. If there is a likelihood of infringement, the party may petition for prevention thereof." *Id.* ch. 5, art. 30.

324. Article 31 of the FTL states that "[a]n enterprise which infringes upon the rights and interests of another person as a result of its violation of the FTL shall be liable for the damages arising therefrom." *Id.* art. 31.

325. Article 32(1) of the FTL states "[i]n the case of an intentional act, a court may, at the request of the injured party referred to in Article 31 of the FTL and based on the extent of infringement, award a compensation greater than the amount of damages actually incurred; provided, however, that the amount so awarded may not exceed three times the amount of proven damages." *Id.* art. 32(1).

326. Article 32(2) of the FTL regulates that "[i]n case the infringing party gains any profits from his act of infringement, the injured party may request to have the amount of damages calculated based exclusively on such profits." *Id.* art. 32(2).

327. *Game Pirate Does Time*, CHINA ECON. NEWS SERV. (Oct. 21, 1993), available in LEXIS, World Library, ALLNWS File; *Taiwan Nationals Sentenced to Jail for Pirating Microsoft Programs*, AFX NEWS (Oct. 19, 1993), available in LEXIS, World Library, ALLWLD File.

In late February 1994, the FTC issued its first order against a government agency,<sup>328</sup> stating that Taipei's Department of Rapid Transit System (DORTS) illegally used a narrow eligibility criteria in qualifying bidders for a procurement contract of building the new metro system in violation of Article 19(2) of the Fair Trade Law.<sup>329</sup> DORTS tried to justify its restrictive procurement practice because of the perceived need for specialized construction. Nevertheless, the FTC asserted that open bidding was required.

Also, the FTC ruled that AMP Inc., an American leader in the manufacturing of electronic connectors, violated the FTL by its "overaggressive" tactics in attempting to combat counterfeit products. It stated that AMP had insufficient evidence to back up its allegations which had an adverse effect on a Taiwanese supplier, Hon Hai Precision Machinery Co.<sup>330</sup>

The Fair Trade Commission has taken numerous actions to protect against FTL violations. Recently, the FTC ruled that the Shang Ta Company, a shipping firm purporting to be a "privately operated post office" had to cease using the name "post office" in its activities or face the termination of its business license. The FTC ruled that the use of these terms had a potential to unfairly mislead consumers in violation of Art. 20(2) of the FTL.<sup>331</sup> Similarly, in the first decision under the FTL, the FTC ruled that promoters using the term "Super Auto/Motorcycle Show '92" were required

---

328. See Sally Gelston, *Crackdown on Public Transit System Procurement in Taiwan*, E. ASIAN EXECUTIVE REP., Vol. 16, No. 16, Mar. 15, 1994, at 4, available in LEXIS, World Library, ALLWLD File.

329. The order made based on Article 19(2) of the FTL states that an enterprise shall not commit any of the following acts which is likely to impede fair competition: treating another enterprise discriminately without due cause. It was also based on Article 36 of the FTL. The DORTS must open the bid to the public. If DORTS continues its procedure, it could be punished by imprisonment of not more than two years, detention, or in lieu thereof or in addition thereto, a fine of not more than five hundred thousand New Taiwan dollars.

330. *FTC Slams US Firm*, CHINA ECON. NEWS SERVICE, June 17, 1994, available in LEXIS, World Library, ALLWLD File. Apparently, AMP's actions violated Article 22 of the FTL, with potential penalties of imprisonment for up to one year and/or a fine of not more than NT \$500,000. Article 22 states that [a]n enterprise shall not, for the purpose of competition, make or publish any false statements which is likely to cause damage to another's business reputation.

331. *FTC Rules Delivery Firm's Name Violates Fair Trade Law*, CHINA ECON. NEWS SERVICE, Dec. 16, 1993, available in LEXIS, World Library, ALLWLD File. Article 20(2) of the FTL states: "[a]n enterprise shall not . . . use in an identical or similar manner the name of any other . . . corporate name or other symbols . . . that are commonly known to the relevant public, if such use causes confusion."

to revise their advertising to avoid misleading consumers who were angered at the lack of "super" cars and motorcycles on display at the exhibition.<sup>332</sup>

The FTC has also issued orders regarding violations of the FTL's prohibition against concerted action in cases involving warehouses,<sup>333</sup> regional credit corporations,<sup>334</sup> tire manufacturers,<sup>335</sup> and container manufacturers.<sup>336</sup> In addition, the FTC has warned manufacturers having a dominant market position that they may face potential liability under the FTL if they abuse their position to restrict trade. Firms receiving a warning included Cathay Life Insurance Co. Ltd. and Yamaha Motorcycle Co. Taiwan, a subsidiary of a well-known Japanese industrial conglomerate.<sup>337</sup>

## XII. CONCLUDING OBSERVATIONS: THE FUTURE OF ANTITRUST LAWS IN TAIWAN

The implementation of the Fair Trade Law has opened a new era of law and business ethics for the Taiwanese economy.<sup>338</sup> The Fair Trade Law also has become an incentive to encourage Taiwan's economic liberalization and internationalization.<sup>339</sup> Meanwhile, the FTL has introduced the Taiwanese people to recognition of competition as a key factor in the maintenance of the free enterprise system.

In the coming years, the Fair Trade Law will undoubtedly have a major impact on the business practices of firms competing in Taiwan. Due to its lack of specificity and predictable rules, however, it is an imperfect guide, offering little to predict whether a proposed merger violates its provisions or not. Furthermore, in the past three years the Taiwanese Fair Trade Commission has been inadequate in fulfilling its responsibility to

---

332. *FTC Issues First Ruling on Violation of Fair Trade Law*, CHINA ECON. NEWS SERVICE, Sept. 7, 1994, available in LEXIS, World Library, ALLWLD File. Article 21 of the FTL states that: "[a]n enterprise shall not make . . . in advertising . . . any false or misleading presentation which may likely cause confusion or mistake by consumers."

333. *FTC v. E-Fa Warehouse et al.*, *Order Kung-Yen-008047*, (Aug. 17, 1992).

334. *FTC v. Kaohsiung First Credit Corp. et al.*, *Order Kung-Yen-08331* (Sept. 10, 1992).

335. *FTC v. Taiwan Province Tire Mfg. Ass'n*, *Order Kung-Tsu 030* (Oct. 2, 1992).

336. *FTC v. Taiwan Province Commercial Container Ass'n*, *Order Kung-Yen 09277* (Dec. 17, 1992).

337. *Taiwan Warns 40 Companies Over Fair Trade*, REUTERS, Feb. 4, 1993, available in LEXIS, World Library, ALLWLD File.

338. J. W. Wheeler, *Comparative Development Strategies of South Korea and Taiwan as Reflected in Their Respective International Trade Policies*, 11 MICH. J. INT'L L. 472, 489-90 (1990).

339. *Premier Lien Advocates Fair Trade*, CENTRAL NEWS AGENCY, (Mar. 12, 1994), available in LEXIS, World Library, ALLWLD File.

prevent unfair trade activities because it is entrusted only with the right to investigate alleged illegal activities.

Determining how to solve the FTL's many vague and controversial provisions has become the first step in the smooth enforcement of the law. Many terms used in the FTL are so vague that they could be invoked arbitrarily by law enforcement authorities to prosecute businesses.<sup>340</sup> Several other related regulations also need to be enacted clearly and promptly. For example, there is a need for regulations to determine a company's market share. Without such a standard, companies will have no way to know in advance whether their individual "market share"<sup>341</sup> has reached the limit set by the FTL.<sup>342</sup> Moreover, it is critical for the FTL to provide a legal framework for the prosecution of companies that joined with competitors to fix prices.

It therefore becomes much more important for the Taiwanese Fair Trade Commission to get support from other agencies such as the police, prosecutor's office, investigative authorities, and other relevant agencies in order to help the FTC conduct timely searches and lawful seizures of products or documents relevant in its investigations.

To reiterate, in order to facilitate the function and enforcement power of the Fair Trade Commission, amending the Fair Trade Law might be the most effective way to accomplish the intent of the Legislature—to limit business monopolies and prevent collusion and unfair competition. On April 21, 1994, the Executive Yuan of the ROC on April 21, 1994, approved a draft revision of the Fair Trade Law to allow the Fair Trade Commission to immediately impose penalties and fines on enterprises in violation of the rule.<sup>343</sup> This draft represents a recognition of some of the shortcomings of the Fair Trade Law and attempted enforcement by the Fair Trade Commission after three years.

The new changes will allow the watchdog agency to take administrative actions before legal actions are completed. They are designed to impose timely and effective penalties against violators so that they will not continue any illegal practices during the prolonged legal procedures.

This draft revision, which was prepared by the Fair Trade Commission and forwarded to Legislative Yuan for ratification by the Executive Yuan also exempts the commission from the ineffective and time-consuming responsibility of identifying and publicizing monopoly enterprises and

---

340. Tseng, *supra* note 99.

341. FTL, *supra* note 52, ch. 2, art. 11 (1)-(2) and ERFTL, *supra* note 96, art. 5.

342. *Id.* art. 5(1).

343. *Executive Yuan Approves Draft Revision of Fair Trade Law*, CHINA ECON. NEWS SERVICE, Apr. 22, 1994, available in LEXIS, World Library, ALLWLD File.

regularly announcing those enterprises that have large market shares of more than twenty percent.<sup>344</sup>

While these efforts represent an important step toward effectuating the goals of the FTL, it remains obvious that the Republic of China on Taiwan needs to continue to identify and adopt effective models of modern antitrust law, such as those employed by the United States, Germany, and other advanced countries, in order to facilitate the future reform of its Fair Trade Law. In the meantime, the FTL must not be applied rigidly; rather, the "rule of reason" must guide its judicious shaping of the Taiwanese economy.

---

344. *Id.*

