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Taiwan's Fair Trade Act: Achieving The "Right" Balance?

Dr. Pijan Wu & Caroline Thomas***

I. INTRODUCTION

Adopting competition laws is part-and-parcel of a global trend. Indeed, it is striking to see how many countries first implemented competition laws within the last twenty-five years. In 2000, Frédéric Jenny commented that "today between 80 and 100 countries have a competition law or are in the process of adopting one whereas ten years ago no more than 50 countries had such a law."¹ This compares to less than ten countries in 1960.² Promulgated by a Presidential Order on February 4, 1991 and coming into force one year thereafter, Taiwan's Fair Trade Act ("FTA") must be interpreted in this context.

Competition policy, however, is never pursued in isolation and the implementation of competition policies over the last twenty years tends to be part-and-parcel of deregulation and liberalization measures. Competition law is just one tool used by governments to try to achieve maximum sustainable growth in their economies. Anti-dumping, consumer protection, corporate governance, deregulation, industrial (i.e., promoting national industries), intellectual property ("IP") liberalization, privatization, and trade policies are generally pursued simultaneously and may at times conflict or concur with the aims of competition policy. Consequently, most

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¹ Frédéric Jenny, *Globalization, Competition and Trade Policy: Convergence, Divergence and Cooperation*, in INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES 31, 37 (Yang-Ching Chao et al. eds., 2001).

² Walter Winslow, *OECD Programmes for International Responses to Global Competition Issues*, in INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES, *supra* note 1, at 235, 240.

experts agree that there is no “one size fits all” competition policy. Rather, each country must balance the various policies it uses so as to match its individual needs and review the policy recipe when circumstances change. In this article we seek to identify some of the successes and challenges related to the implementation of competition law in Taiwan. We will examine this topic in three parts: first, in Section II, we will explain the historical background to the FTA so as to reveal the aims of Taiwanese competition law; second, in Section III, we will explain how the law is structured and its intent; and third, in Section IV, we will look at the effectiveness of the FTA to date.

II. BACKGROUND—WHY IMPLEMENT COMPETITION LAW IN THE FIRST PLACE?

As is the case in many Asian countries, international trade has fuelled Taiwan’s economy for over forty years. During this time, it has matured significantly, to the extent that in many respects, including GDP per capita, the country resembles a developed country more closely than a developing country. During the high growth years between 1950 and the mid-1980’s (during which growth averaged between 7% and 8%),³ Taiwan refocused its economy in the classical pattern from agriculture to manufacturing, and since 1986, the services sector has become dominant. These major changes made it necessary for government policy to adjust accordingly. In particular, during the 1980s, increasing local labor costs and currency appreciations linked to a huge trade surplus and increased competition in export products from low wage countries led to the deceleration of the economy. For this reason, and in line with a shift from protectionist policies to neo-liberal policies worldwide as well as pressure from abroad (particularly the United States) to open the economy to imports and to protect intellectual property, strategies of liberalization and internationalization were also adopted in Taiwan. In 1984, the government introduced a new guiding principle for economic development called “Liberalization, Internationalization, and Institutionalization of [the] Economy.”⁴ Soon thereafter the process was precipitated since Taiwanese economic liberalization coincided with major political changes, including the lifting of martial law in 1987 and the death of President Chiang Ching-kuo one year later.⁵ This process also involved a gradual eclipsing of the

³ Industrial Development & Investment Center Ministry of Economic Affairs, GDP Growth Rates of Major Countries, http://investintaiwan.nat.gov.tw/en/env/stats/gdp_growth.html (last visited Dec. 16, 2005).

⁴ OECD COMPETITION COMMITTEE, Annual Report on Competition Policy Developments in Chinese Taipei 2005 (forthcoming 2006).

⁵ For a brief overview of the Republic of China’s history see Politics of the Republic of China, http://en.wikipedia.org/wiki/Politics_of_Taiwan.

monopolies enjoyed by government enterprises such as China Steel, China Petroleum, China Airlines, Taiwan Sugar, Taiwan Fertilizer, as well as various banks and insurers.⁶

Liberalization and internationalization strategies are still being pursued in Taiwan today. Stimulus is provided both by the pressures from other countries and the progress made by them, as well as from international organizations such as the Organization for Economic Co-operation and Development ("OECD"), the World Trade Organization ("WTO"), and Asia-Pacific Economic Cooperation ("APEC"). Specific measures introduced include reducing tariffs, applying for membership in the General Agreement on Tariffs and Trade ("GATT") in 1990 (accession to the WTO took place in 2002), relaxing foreign exchange controls, allowing foreign participation in most industries, easing restrictions on foreign direct investment ("FDI"), and, of course, introducing a competition policy for the first time.

The legislative route that led to the FTA is as follows: the process was first implemented by the Executive Yuan (the Cabinet) which commissioned the Ministry of Economic Affairs ("MOEA") to draft a competition law. Once the draft was finished in 1986, it was submitted to the Executive Yuan, which then forwarded it to the Legislative Yuan (the Congress) to be promulgated and enacted.⁷ The motivation behind the FTA is best summarized in a statement attached to the draft by the Executive Yuan before it was forwarded:

As explained by the Ministry of Economic Affairs, due to the rapid economic development in recent years, the domestic economy is in transition. As such, the government has decided that economic liberalization and internationalization will be the key economic development strategies. However, these *economic development policies should be based on fair, reasonable and free competition rule and environment. Currently the country still lacks a competition law and it has been observed that business conduct frequently infringes "normal business behavior."* More specifically, in anticompetitive aspects, those infringing behaviors include: monopoly, oligopoly, mergers and acquisition and concerted action. In terms of unfair competition, those infringing behaviors include: counterfeiting other business's goods or business trademarks, false or misleading advertisements, "distorted" multilevel sale schemes, as well as other behaviors. *These conducts have not only seriously damaged the image of the country but also imposed trade barriers and have adversely affected consumer's interests.* As

⁶ Chung Kuo Insurance Company, Taiwan Fire & Marine Insurance Company, Central Insurance Co., Ltd., and Central Re.

⁷ Gee San & Changfa Lo, *A Decade of Fair Trade Law Legislation and its Enforcement in the Republic of China*, in INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES, *supra* note 1, at 82.

such, the Executive Yuan has carefully taken into consideration the country's present economic policy and environment. In addition, it has also examined competition laws as found in nations such as the ones of the United States of America, West Germany, Japan and South Korea to draft the proposed Fair Trade Law.⁸

This statement was concise and, in retrospect, very telling of the ensuing development. It shows that the government recognized the need to implement a competition policy to complement its liberalization policies. In economic terms such reasoning is sound, since there is no point in rolling back government influence on the economy only to allow private players to exercise market power in its stead. Even more importantly, the statement recognized that infringing behavior was "frequently" damaging the interests of local consumers as well as Taiwan's reputation abroad.⁹ Furthermore, the sources of inspiration—namely the competition laws of the United States of America, West Germany, Japan, and South Korea—are clearly identified.

A salient point to note about the FTA is that it required over ten years of preparation. Indeed, even after the draft was provided to the Legislative Yuan in 1986, it still took almost six years to implement.¹⁰ According to an article written by Gee San and Changfa Lo, two former Commissioners of the Fair Trade Commission ("FTC"), several legislators were worried that the act would hamper Taiwan's economic development.¹¹ In particular, many critics pointed out that as Taiwan's economy was dominated by small and medium-sized enterprises ("SMEs") these were still "infant" industries that would not be adequately protected by the FTA. According to San and Lo, the most disputed aspects of the FTA were its provisions for merger control.¹²

III. ANATOMY OF THE FAIR TRADE ACT

To date, the FTA has already been amended three times—in 1999, 2000, and 2002. It is the current version to which we refer, unless otherwise specified. In regards to the purpose of the FTA, Article 1 reiterates the principles of the statement by the Executive Yuan quoted above. It clarifies that the purposes of the law are to maintain trading order, protect consumers' interests, ensuring fair competition, and promote economic stability and prosperity.¹³ The FTA is divided into seven

⁸ *Id.* at 81–83 (quoting *The Legislation Record of the Fair Trade Law*) (emphasis added).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.* at 85–86.

¹³ Fair Trade Act of 1992, Faigui Huibian, art. 1 (amended 2002).

chapters: Chapter I includes general principles and definitions; Chapter II relates to unfair business practices, namely monopolies, mergers and concerted actions; Chapter III deals with unfair competition; Chapter IV provides for the establishment of the FTC; Chapter V prescribes compensation for damages; Chapter VI relates to punishment for violation of the act; and Chapter VII contains miscellaneous supplementary provisions. Some of the more important provisions of the law are outlined and analyzed below.

A. Broad Coverage of Competition, Consumer Protection, and IP Issues

The FTA covers an unusually wide range of acts. Most countries tend to have separate laws for competition, consumer protection, and intellectual property.¹⁴ For example, Article 6 of the UN Model Law on Competition provides for consumer protection elements but states clearly that “in a number of countries, consumer protection legislation is separate from restrictive business practices legislation.”¹⁵ In the FTA there is a certain degree of overlap. Protecting consumers’ interests is specifically included as one of the FTA’s aims listed in Article 1. This was done deliberately, as there was a great deal of discussion about whether consumers’ interests should be included.¹⁶ Furthermore, a number of provisions in Chapter III of the act (which deals with unfair competition) can be seen as specific consumer protection and IP law measures.

One example of such a provision is Article 23.¹⁷ This prohibits the conduct of multi-level sales if the participants receive commissions, bonuses, or other economic benefits primarily from inducing others to participate, rather than from the marketing or sale of the goods or services at reasonable market prices.¹⁸ Multi-level sales are defined in Article 8 as

the promotion or sales plan or organization pursuant to which the participants pay a certain consideration to obtain the right to promote or sell goods or services and the right to introduce other persons to participate in the plan or organization, thereby receiving a commission, bonus, or other economic benefit.¹⁹

¹⁴ U.N. CONFERENCE ON TRADE & DEVELOPMENT [UNCTAD], *The Model Law on Competition—UNCTAD Series on Issues in Competition Law and Policy*, U.N. Doc. TD/B/RBP/CONF.5/7/Rev.2 (2004).

¹⁵ *Id.*

¹⁶ See Chien-Te Fan, *Consumer Protection of the Fair Trade Law in Taiwan*, INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES, *supra* note 1, at 447, 449–50.

¹⁷ Fair Trade Act, *supra* note 13, at art. 23.

¹⁸ *Id.*

¹⁹ *Id.* at art. 8.

In substance, this refers to pyramid schemes in which products are sold to multiple tiers of (generally untrained) distributors—each of whom hopes to make a sizable profit—before finally reaching the consumer. In the 1980's, there were a number of scandals involving such schemes and legislators realized how quickly a large number of people could be embroiled. As a result, Article 23 was enacted to protect the public and, in particular, participants (people involved in such schemes).²⁰ Participants are given a fourteen-day period during which they can rescind the participation agreement and recover all payments for goods made upon purchase and any other fees paid within thirty days of rescission.²¹ After the lapse of the fourteen-day period of entitlement to rescind the agreement, the participant may still terminate the multi-level sales agreement, in which case the operator is required to buy back all goods sold to the participant at ninety percent of the original purchase price.²² Any person violating the provisions of Article 23 will be subject to the disposition pursuant to Article 41 and may be subject to an order for dissolution, suspension, or termination of business operation by the FTC.²³

Another example of the overlap with consumer protection contained in the FTA is Article 21, which deals with misleading representations, symbols and advertisements. This article includes the following provisions:

No enterprise shall make or use false or misleading representations or *symbol* as to price, quantity, *quality*, *content*, production process, production date, valid period, method of use, purpose of use, *place of origin*, *manufacturer*, place of manufacturing, processor, or place of processing on goods or in advertisements, or in any other way making known to the public. *No enterprise shall sell, transport, export or import goods bearing false, or misleading representations* referred to in the preceding paragraph.²⁴

Clearly these provisions, while preventing business from unfair competition, also protect consumers from being misled by illegal copycat products and help businesses maintain their IP rights.

Other provisions where overlaps are obvious are Articles 20 and 22. Article 20 looks more like an IP law provision protecting against passing off (pretending that the goods or services were actually rendered by another company) and trademark infringement than a competition law measure.²⁵ Similarly Article 22, which prevents competitors from making or

²⁰ *Id.* at art. 23.

²¹ *Id.*

²² *Id.* at arts. 23–1, 23–2.

²³ Fair Trade Act, *supra* note 13, at arts. 41, 42.

²⁴ *Id.* at art. 21 (emphasis added).

²⁵ *Id.* at art. 20.

disseminating false or misleading statements that might damage business reputation (defamation), is not a typical competition law provision.²⁶ In addition, Article 24, which prohibits deceptive or obviously unfair conduct that affects trading order, is a catch-all provision.²⁷

B. Traditional Competition Law Provisions

Since most of the actual competition law provisions contained in the FTA are broadly similar to those in other countries, we will give a very basic outline of these only.

1. Monopoly

Under Article 10, monopolistic enterprises are banned from:

1. Directly or indirectly preventing competition by unfair means;
2. Improperly setting, maintaining or changing prices or remuneration;
3. Giving unjustified preferential treatment to trading partners; and
4. Otherwise abusing its market power.²⁸

There is a rebuttable presumption that a company is not a monopolist enterprise unless its market share of the relevant market is greater than or equal to fifty percent, or the combined market share of two or three enterprises reaches two-thirds to three-quarters of the relevant market respectively.²⁹ “Relevant market” is very broadly defined as a geographic area or coverage area where enterprises compete in particular goods or services.³⁰

2. Merger

Article 11 of the FTA provides that the FTC must be notified of mergers in advance if:

1. The resulting company will have one third of the market share;
2. One of the companies involved has a quarter of the market share or;
3. Sales for the preceding fiscal year of one of the enterprises involved exceed a threshold amount.³¹

²⁶ *Id.* at art. 22.

²⁷ *Id.* at art. 24.

²⁸ *Id.* at art. 10.

²⁹ Fair Trade Act, *supra* note 13, at art. 5-1.

³⁰ *Id.* at art. 5.

³¹ The threshold amounts are NTD 10 billion in sales volume for an acquiring enterprise (raised to NTD 20 billion for financial institutions) and, as a cumulative condition, NTD 1 billion for the acquisition target. See Press Release, Fair Trade Commission Executive Yuan,

Mergers are defined as situations where:

1. Two enterprises are merged into one;
2. One enterprise holds or acquires the shares or capital contributions representing over one third of the total voting shares or total capital of another;
3. One enterprise leases from or is assigned the whole or a major part of the business or properties of another enterprise;
4. Enterprises operate jointly on a regular basis or one enterprise is entrusted to operate the other's business or;
5. One enterprise directly or indirectly controls the business operation or appointment or discharge of employees of another enterprise.³²

If the FTC neither responds within thirty days of the application being properly filed nor officially approves the merger, the merger can proceed.³³ The guiding principle is that there will be no prohibition if the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. Moreover, the FTC can attach conditions or require undertakings to its decisions.³⁴ Failure to comply with the merger procedure could have serious consequences. The FTC might prohibit or reverse the merger, remove certain persons from their positions or order the suspension or even dissolution of the company.³⁵

3. Horizontal Restraint—Collusion

While concerted actions are generally banned under Article 14, there are a number of exceptions to this general rule. Where the following requirements are fulfilled and the FTC has approved the application, concerted actions will be allowed:

1. Unifying specifications or models of goods so as to reduce costs, improve quality or efficiency;
2. Joint research and development (R&D) on goods or markets in order to upgrading technology, improving quality, reducing costs, or increasing efficiency;
3. Each developing a separate and specialised area so as to rationalise operations;

Public Notice of the "Thresholds of Sales Monetary Amount" Above Which Enterprises of a Merger Shall File with the Fair Trade Commission (Feb. 25, 2002) (on file with author).

³² Fair Trade Act, *supra* note 13, at art. 6.

³³ *Id.* at art. 11.

³⁴ *Id.* at art. 12.

³⁵ *Id.* at art. 13.

4. Entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports;
5. Joint acts relating to imports so as to strengthen trade;
6. Joint acts limiting price, quantity of production and sales, or equipment during an economic downturn; or
7. Joint acts to promote operational efficiency or to strengthen the competitiveness of SMEs.³⁶

While some of these exceptions are also used in other countries (particularly the R&D exception), many reflect the Taiwanese government's specific policies. In particular, because local companies have historically been original equipment manufacturers ("OEM") of major multi-nationals, the FTA permits some forms of cooperation among enterprises, for a limited period of time, to strengthen their collective bargaining position vis-à-vis their foreign counterparts.³⁷ Furthermore, the exceptions clearly reveal the government's ambition to promote local SMEs and to promote exports.

However, companies are not automatically exempt; rather, they need to apply for permission from the FTC.³⁸ After receipt of an application the FTC must make its decision within three months unless it extends the timeframe.³⁹ Under Article 15 of the FTA, the FTC is entitled to make approval subject to conditions. Furthermore, approval is granted for a maximum of three years, which the enterprises may apply to have extended for a further three year period.⁴⁰

4. Vertical Restraint—Fixing Resale Prices

Under Article 18, when goods are sold, the trading counterpart and third parties are free to decide the resale price. Any agreement attempting to fix resale prices is void.

5. Abusive Behavior

Article 19 bans the following behavior:

- (1) causing another company to stop dealing with third company in order as to damage the third company; (2) discriminating against another company for no reason; (3) inducing or coercing the trading

³⁶ *Id.* at art. 14.

³⁷ Margaret Huang & Victor I-Hsiu Chang, *Antitrust Regulation in Taiwan*, ASIA PAC. ANTITRUST REV (2004), available at http://www.globalcompetitionreview.com/apar/tai_overview.cfm (last visited Dec. 16, 2005).

³⁸ Fair Trade Act, *supra* note 13, at art. 14.

³⁹ *Id.*

⁴⁰ *Id.*

partners of the competitor to do business by improper means; (4) causing another company to refrain from competing in price or taking part in a merger or concerted action by improper means; (5) acquiring trade secrets improperly and (6) limiting the business activity of trading partners.⁴¹

C. The FTC—The “Competent Authority”

Article 9 of the FTA clarifies that the “competent authority” is “the Fair Trade Commission, Executive Yuan, at the central level.”⁴² It is worth pointing out that it was initially suggested that the FTC be subordinate to the MOEA, the very body that had drafted the Act. Instead, however, the FTC was made directly subordinate to the Executive Yuan, which theoretically gives it a great deal more clout. Furthermore, it was legislated to be independent.⁴³ There are nine Commissioners, each of whom serves a three-year term that is renewable once.⁴⁴ Compared to other countries, the duration of tenure is actually rather short.⁴⁵ While Commissioners must be recommended by the Premier and are appointed by the President, several provisions exist to safeguard their independence: Commissioners are required to act free of the influence of any political party⁴⁶ and the number of Commissioners within the same political party cannot exceed fifty percent of the total number of Commissioners.⁴⁷ Unlike in most countries, however, the Chairman of the FTC is effectively a Minister and a member of the Cabinet meeting. This allows for discussion of competition policies at weekly Cabinet meetings and makes obtaining government support easier.⁴⁸ Furthermore, only persons who are well versed and experienced in law, economics, finance, tax, accounting, or management can be appointed as Commissioners.⁴⁹ A visit to the FTC website confirms that all Commissioners do indeed hold academic titles in these disciplines from American, German, Taiwanese, and Japanese universities.⁵⁰

The FTC is in charge of preparing and formulating fair trade policy,

⁴¹ *Id.* at art. 19.

⁴² *Id.* at art. 9.

⁴³ *Id.* at art. 28.

⁴⁴ The Organic Statute of the Fair Trade Commission of 1992, art. 11 (2002).

⁴⁵ See San & Lo, *supra* note 7, at 114.

⁴⁶ The Organic Statute of Fair Trade Commission Executive Yuan, Faigui Huibian, art. 13.

⁴⁷ *Id.* at art. 11.

⁴⁸ Helmut Schroetter, *The Reform of EC Competition Policy*, in INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES, *supra* note 1, at 157, 173.

⁴⁹ The Organic Statute of the Fair Trade Commission of 1992, art. 12 (2002).

⁵⁰ About FTC: Commissioners and the Commissioners Meeting, Fair Trade Commission, <http://www.ftc.gov.tw> (follow “About FTC” hyperlink; then follow “Commissioners and Commissioners Meeting” hyperlink) (last visited Dec. 16, 2005).

reviewing fair trade matters related to the FTA, investigating enterprises and economic activities, investigating and disposing of violations of the FTA, and any other matters related to fair trade.⁵¹ This broad mandate allows it to review laws and industries and to suggest changes that would promote competition. One example is the 46-1 Project Task Force that examined regulations inconsistent with the FTA in 1994.⁵² Other examples include the Deregulation Task Force established in 1996 to identify and correct anti-competitive behavior and the Project for Review of the Enforcement of the "Green Silicon Island Vision and Promotion Strategy" Regulations of 2001.⁵³

With regards specifically to the FTA, either upon receiving complaints or *ex officio*, the FTA is empowered to investigate and handle any violation of the FTA that harms public interest.⁵⁴ Once a case falls within the FTC's jurisdiction, it is passed on to the relevant FTC department for investigation. The FTC has the power to notify parties that they must appear to make statements as well as submit relevant information.⁵⁵ Furthermore, it is entitled to send staff to carry out onsite inspections.⁵⁶ Decisions are taken by majority vote at the meetings of the Commissioners, the highest policy making organ of the FTC, which must take place at least once a week.⁵⁷ With regards to the corrective measures, the FTC has teeth—it can issue cease and desist orders, require correction of illegal practices, and impose fines directly.⁵⁸ Furthermore, where there are repeated violations, it may recommend the imprisonment of offenders.

IV. CHALLENGES OVERCOME AND HURDLES YET TO SURMOUNT

A. Introducing Competition Policy for the First Time

The challenge of introducing competition policy for the first time should not be underestimated. As we have explained above, there was the concern that the FTA would damage rather than promote Taiwan's economy. This led to considerable resistance to and the eventual delay of the legislation. Since there were no precedent provisions in place, many businesses were involved in activities that would have suddenly become

⁵¹ Fair Trade Act of 1992, art. 25 (2002).

⁵² See Annual Report on Competition Policy Developments in Chinese Taipei 2005, *supra* note 4, at 9.

⁵³ *Id.* at 10–12.

⁵⁴ Fair Trade Act, *supra* note 13, at art. 26.

⁵⁵ *Id.* at art 27.

⁵⁶ *Id.* at art. 27.

⁵⁷ About FTC: Commissioners and the Commissioners Meeting, *supra* note 50.

⁵⁸ Fair Trade Act, *supra* note 13, arts. 35–44.

illegal once the FTA came into force. Clearly such a drastic change might have had undesirable effects. Hence, a number of interim measures were introduced, including an initial one-year grace period from promulgation (Article 49) and an ongoing initiative to educate FTC staff, enterprises, and the general public.⁵⁹

Another example of a transitory provision is the second part of Article 46 which—until it was completely amended in 1999—read: “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.”⁶⁰ Until this provision expired in February 1996, Chinese Petroleum Corporation and Taiwan Sugar Corporation were to supply the military with petroleum and sugar products, respectively, at preferential prices contrary to Article 19.⁶¹

Some of these preliminary difficulties have not been entirely surmounted. According to a 2004 article in the Asia Pacific Antitrust Review, the most common inefficiencies of the current competition law system result from an incomplete integration of the FTA into the day-to-day practice of the civil court system.⁶² It cites anecdotal evidence that, due to a lack of familiarity with its precedents and methods defining “relevant markets,” some judges are still slow in deciding cases based on the FTA.⁶³ The authors believe that this problem will be resolved once judges have more experience with the FTA and that this process can be catalyzed using further training.⁶⁴

B. Can the FTA be Overridden?

As discussed above, the FTC is independent, has wide competences, and is subordinate only to the Executive Yuan. In addition, the FTA contains a provision for consultation: “[F]or any matter provided for in this Law that concerns the authorities of any other ministries or commission, the Fair Trade Commission, Executive Yuan shall consult with such other ministries or commissions to deal therewith.”⁶⁵ However, as originally drafted, the FTA also contained a provision that weakened the FTC. This

⁵⁹ Background Competition Policy Information and Research Center, <http://www.ftc.gov.tw> (follow “Competition Policy Information Center” hyperlink; then follow “Background” hyperlink) (last visited Dec. 16, 2005).

⁶⁰ Fair Trade Act of 1992, art. 46 (1992).

⁶¹ See Annual Report on Competition Policy Developments in Chinese Taipei 2005, *supra* note 4, at 13.

⁶² See Huang & Chang, *supra* note 37, at 6.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Fair Trade Act of 1992, art. 9 (2002).

was the first part of Article 46, which read: "The provisions of this Law shall not apply to any act performed by an enterprise in accordance with other laws."⁶⁶ Clearly, this contradicted the wide powers of the FTC to formulate fair trade policy⁶⁷ and could have potentially undermined the FTA.

In 1999, Article 46 was amended to read: "Where there is any other law governing the conducts of enterprises with respect to competition, such other law shall govern; provided that it does not conflict with the legislative purposes of this Law."⁶⁸ According to the FTC, the objective of this redrafted provision is to direct each sector to a competition-based system.⁶⁹ One of the main aims of the provision is to expressly apply the principle of precedence of specificity over generality.⁷⁰ Therefore the FTA will apply it to competition law issues, unless there is a more detailed provision elsewhere (for example in banking or insurance law). However, even if the FTA is found to apply, the FTC recognizes the need for government to structurally regulate industries (i.e., use industrial policy) from time to time. In the Annual Report on Competition Policy Developments in Chinese Taipei 2005, the FTC suggests that in practice such issues be resolved using the consultation provision so that competition policy and industrial policy can be used complementarily.⁷¹

C. The Conflicting Aims of the Government's Merger Policy

An issue touched on previously in this paper is the fact that during legislation, one of the most contentious points was how mergers should be dealt with. In their article, Gee San and Changfa Lo list the three main arguments that were widespread at the time.⁷² These can be summarised as follows: first, the policy contradicted the government's own policy to encourage mergers; second, merger controls could prove to be cumbersome and cause delays, thus hindering mergers; and third, since the MOEA was asserting that the FTA would adopt "low standards" on anti-competitive behaviour, there was little point in including merger control provisions at all.⁷³

The interesting thing about the first argument is that it still holds true today. For the past few years, the government's policy—notably in the

⁶⁶ Fair Trade Act of 1992, art. 46 (1992).

⁶⁷ Fair Trade Act of 1992, art. 25 (2002).

⁶⁸ Fair Trade Act of 1992, art. 46 (1999).

⁶⁹ See Annual Report on Competition Policy Developments in Chinese Taipei 2005, *supra* note 4, at 8.

⁷⁰ See *id.* at 15.

⁷¹ See *id.* at 8.

⁷² See SAN & LO, *supra* note 7, at 84–86.

⁷³ *Id.*

banking and insurance industries—seems to be to liberalize industries while trying to beef up and to render internationally competitive Taiwanese companies.⁷⁴ The government is thus actively promoting mergers. Concrete examples of laws that promote mergers are the amendments to the Business Mergers and Acquisitions Law, the Company Law, and the new 2004 Financial Holding Company Act. The latter allows holding companies to own various different types of financial institutions. Furthermore, while there are currently fourteen holding companies, the government has openly requested that this number be reduced to seven by the end of this year—an ambition which if realized implies further consolidations.⁷⁵ Another measure that signalled the beginning of a new wave of mergers was the establishment of the cabinet level Financial Supervisory Commission (“FSC”) in 2004.⁷⁶ This body encompasses the regulators of most of the financial services industry and is charged with modernization. Consequently, it is not surprising to note that out of 6,186 merger cases received by the FTC, only four cases were disapproved and prohibited to date: three applications for merger were disapproved in 2000 and one merger was prohibited in 2002.⁷⁷

With regard to the second argument, it is important to note that as originally drafted, the FTA required companies, if they fulfilled certain criteria, to seek prior approval from the FTC.⁷⁸ Due to the sensitive nature of mergers, however, any delay could jeopardise a potential deal. In view of the resistance to the provision, the original FTC already specified that the FTC had to make its decision within two months of receipt of the application.⁷⁹ Changing the merger mechanism of Article 11 was one of the main aims of the 2002 amendment to the FTA.⁸⁰ Now, more mergers are exempt from the procedure and companies are required to notify the FTC instead of obtaining their prior approval.⁸¹ If they do not hear back from the FTC within thirty days, they may proceed with the merger.⁸² This “pre-merger notification system” also benefits the FTC, since it substantially lessens administrative burdens. The aims of the amendment are candidly described in the Explanatory Notes to the Amendment of the Fair Trade Act

⁷⁴ Joyce Huang, *Seven-percent limit has to go, FSC chairman says*, TAIPEI TIMES, Saturday, Jan. 1, 2005, at 10.

⁷⁵ *Id.*

⁷⁶ See FSC website, <http://www.fscey.gov.tw>.

⁷⁷ Statistics: Cases Received, Fair Trade Commission, <http://www.ftc.gov.tw> (follow “Statistics” hyperlink; then follow “Cases Received” hyperlink) (last visited Dec. 16, 2005).

⁷⁸ Fair Trade Act of 1992, art. 11 (1992).

⁷⁹ Fair Trade Act of 1992, art. 11 (2002).

⁸⁰ *Explanatory Notes to the Amendment to the Fair Trade Law (2002)*, available at <http://www.apeccp.org.tw/doc/Taipei/Policy/comemrra2002.htm>.

⁸¹ *Id.*

⁸² *Id.*

2002:

The current amendment relates to the situation where local enterprises have been encountered *enormous competitive pressure from economic globalisation in the 21st Century*, and the *competitive advantages of large multinational enterprises as well as the current structure of the economy have made acquisitions and mergers an important trend to competition*. To accommodate the aforementioned industrial restructure and the needs of current economic environment, secure market competition mechanisms, and meet the request made by consensus of the industrial sub-group of the Economic Development Advisory Conference (hereinafter the "EDAC") that the government should streamline procedures, remove barriers, and offer suitable incentives for mergers and acquisitions, the Commission, taking into account foreign legislation relating to merger regulation, drafted the current amendment in 2001, which was aimed to be in line with the international regulatory development and to establish a fair and reasonable competition mechanism.⁸³

This statement clarifies that one of the main aims of the amendment is to promote mergers and acquisitions in Taiwan so as to allow domestic companies to achieve a significant scale to compete globally. Furthermore, statistics clearly show that the merger-related work load of the FTC has fallen significantly since the amendment was introduced.⁸⁴

D. Could the Wide Scope of FTC Duties Cause Difficulties?

As we have seen, the FTA contains a number of provisions which are contained in separate IP and consumer protection laws in other jurisdictions. Chien-Te Fan, a Professor of Law at National Tsing Hua University, views FTA cases linked to soured real estate transactions (brought under Article 21) as disputes that "look more like consumer protection vis-à-vis competition cases."⁸⁵ In his opinion,

theoretically, the fundamental legal framework governing real estate transactions should be with the Civil Code and its related special legislation ... so the FTA should aim at the regulation of their competition related market performance yet the slow movement of judicial trials in enforcing the Civil Code and its related legislation tends to frustrate the consumer.⁸⁶

In this context, the pertinent question that must be raised is whether this

⁸³ *Id.*

⁸⁴ See Statistics: Cases Received, Fair Trade Commission, *supra* note 77.

⁸⁵ See FAN, *supra* note 16, at 456–57.

⁸⁶ *Id.*

overlap between promoting competition and protecting consumers is a problem.

Theoretically, it should not matter where law provisions are contained as long as they are enforced. However, problems might arise in situations where there are conflicting provisions in different laws and multiple enforcement bodies attempting to perform the same tasks. In Taiwan, consumer protection legislation, like competition law, is relatively new. The Consumer Protection Law has been effective since 1994 and was amended in 2003.⁸⁷ Furthermore, the Consumer Protection Commission ("CPC") does not have the same standing or power as the FTC. In the past, there were serious discussions on merging the FTC and CPC to reduce and simplify government structure.⁸⁸ However, the so-called "government re-engineering plan" has been put on hold following various controversies.

In practice, each of the two agencies deals with different aspects of consumer protection—the FTC strives to maintain trading order and avoid unfair competition and the CPC protects consumers as a whole and forces enterprises to correct illegal acts. Furthermore, the FTC generally makes use of the consultation provision and defers to the authority concerned before making its decision. Indeed, the Chairman of the FTC is a member of the CPC and is invited to the CPC's monthly Commissioners Meetings.⁸⁹ Hence, the overlap does not currently pose a challenge to competition policy.

E. Is the FTC Powerful Enough?

The FTC is potentially weakened by a number of factors which relate either to its role and/or to its structure. A point that relates to the above argument about the overlap of competition, IP, and consumer protection policies is that it seems that the FTC does not have the power to screen complaints based on the degree of public interest. This means that it must investigate all complaints that violate the FTA. Consequently, it spends much of its time and resources on reviewing smaller cases and thus tackling bigger, more decisive cases is rendered more difficult.⁹⁰ Another shortcoming relating to the role of the FTC is that in contrast to competition enforcement agencies in other countries (for example in the European Union) the FTC generally cannot take interim measures.⁹¹ This can

⁸⁷ Consumer Protection Law, available at <http://www.apeccp.org.tw/doc/Taipei/Comlaw/conprot.html> (last visited March 4, 2006).

⁸⁸ Yeong-Chin Su, *Competition Authorities in Competition*, in INTERNATIONAL AND COMPARATIVE COMPETITION LAWS AND POLICIES, *supra* note 1, at 176–77.

⁸⁹ See Annual Report on Competition Policy Developments in Chinese Taipei 2005, *supra* note 4, at 45.

⁹⁰ See San & Lo, *supra* note 5, at 114.

⁹¹ Experienced competition law practitioners at LCS & Partners have noticed this trend.

sometimes lead to parties suffering as a result of abusive business behavior (such as unfair trade terms being imposed by powerful trade partners) and being dissuaded from making a complaint to the FTC.

With regard to the structure of the FTC, the three-year terms of the Commissioners (renewable once) are relatively short and expire simultaneously. Furthermore, since most of the appointees are academics, they may be reluctant to continue for a second term. The high turnover rate could seriously undermine the continuity of policy and the ability to garner experience of the FTC. Another potential weakness is that while the FTC was expressly made to be independent, it must negotiate its annual budget with the government.⁹² This has consumed much of the Chairman's time in the past. In addition, some aspects of the decision making process can lead to delay. The fact that decisions are made by majority vote of the Commissioners meant that "it took too much time to come to a conclusion when the Commission had to deal with important cases."⁹³

F. Noteworthy Improvements

1. *Improved Protection of IP Rights*

Many multinational companies and their governments have complained about the protection of IP rights in Taiwan for some time. The topic tends to come up in American and European Chamber of Commerce reports and, since 2001, Taiwan has been on the United States' Priority Watch List.⁹⁴ In fact, however, the country has made visible progress on this front. An anecdotal example, which most Taiwanese citizens would confirm, is that while pirated videos were as easily available fifteen years ago as fake DVDs are in certain Asian countries today, this is no longer the case. Furthermore, while Taiwan is still on the United States' Priority Watch List, its position on the list was lowered at the end of 2004 "in recognition of Taiwan's successful passage of strengthened copyright legislation and improved intellectual property right enforcement."⁹⁵

2. *Innovative Ways of Collecting Evidence*

When investigating potential collusion cases, the FTC has found that the concept "any other form of mutual understanding" as defined in Article 7 is so vague that there are often practical difficulties in acquiring sufficient

⁹² See San & Lo, *supra* note 5, at 114.

⁹³ *Id.* at 113.

⁹⁴ 2005 Special 301 Report, Watch List, U.S. Consulate, <http://www.usconsulate.org.hk/ustw/economic/2005/042902.htm> (last visited Dec. 16, 2005).

⁹⁵ *Id.*

evidence.⁹⁶ Consequently, where the FTC is unable to produce enough evidence to prove concerted action, it will investigate the issue from the angle of Article 19 instead.⁹⁷

One concrete example of the FTC using innovative measures when tackling collusion is how it dealt with a series of simultaneous petrol price increases at Chinese Petroleum Corporation ("CPC") and Formosa Petrochemical Corporation ("FPC").⁹⁸ The FTC found that the advance and public communication of information on price increases by these two corporations was a meeting of minds and that equivalent and simultaneous price increases were sufficient to affect the price and supply mechanism of the oil market in Taiwan; this, consequently, violated the provision against concerted action contained in Article 14, paragraph 1 of the FTA. The problem was that the traditional way of proving conspiracy (uncovering written or oral agreement) was not available since communication between the parties was carried out by way of unspoken common interest. The innovative procedure that the FTC used was: (1) to warn the companies; (2) to accumulate data on the price increases; (3) to collect public announcements made by CPC which also served as disclosures of intention to Formosa; (4) to finally reach decisions.⁹⁹ Based on Article 36 of the Enforcement Rules to the FTA, the FTC imposed a fine of NTD 6.5 million¹⁰⁰ on each enterprise in accordance with Article 41 of the FTA.¹⁰¹

Another innovative measure the FTC is seriously considering introducing is whistle blowing.¹⁰² Such provisions (as are commonly used in the European Union) would facilitate the evidence collecting process and reduce investigation costs.

⁹⁶ See Annual Report on Competition Policy Developments in Chinese Taipei 2005, *supra* note 4, at 32.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ The decision was made after taking into account the motive, objective, expected improper benefits, degree of damage to trading order, duration of the action, benefits obtained, scale of business, business operations, revenue and market position, whether the competent authority had previously corrected or warned against such acts, type and number of previous violations, interval of violations, punishments incurred, conduct after the violation, cooperation during the investigation, and other factors. *See id.* at 7.

¹⁰⁰ New Taiwanese Dollar.

¹⁰¹ Newsletter of the Taiwan Fair Trade Commission, (Taiwan Fair Trade Commission), Oct. 31, 2005, at 6, *available at* <http://www.ftc.gov.tw> (last visited Dec.16, 2005).

¹⁰² See Annual Report on Competition Policy Developments in Chinese Taipei 2005, *supra* note 4, at 32–33.

G. Extraterritorial Application

1. *Can the FTC Make Decisions Relating to Mergers of Foreign Companies?*

Theoretically, the scope of the FTA allows the FTC to look into the behaviour of foreign companies where competition in Taiwan is affected. However, as the competition authority of a relatively small country with a complicated diplomatic status, the FTC is in a very different position than its equivalents in the United States and the European Union. The FTC itself acknowledges that cases involving foreign elements are extremely hard to handle because: (1) it is difficult to acquire evidence and information abroad; (2) it is difficult to verify the authenticity of foreign documents; (3) it is difficult to serve documents abroad; and (4) it is difficult to enforce sanctions abroad.¹⁰³ Nonetheless, the FTC has been taking steps to strengthen its international ties. In particular, it has entered into cooperation agreements with Australia, New Zealand, and France and obtained observer status at the OECD. Furthermore, in 2003, Taiwan was the first country apart from the United States to achieve a settlement with Microsoft (Taiwan).¹⁰⁴ For the FTC, this was a landmark case in international competition law. Even so, the long-term effects of the settlement are expected to be minimal and there has been considerable criticism that the terms of the settlement did not go far enough.¹⁰⁵

2. *The FTC's First Decision on International Cartels*

As outlined above, while the FTC has limited extraterritorial powers, it recently made a breakthrough decision. On December 15, 2005, the FTC issued a penalty order amounting to NTD 210 million (approximately USD \$6.3 million) against twenty-one cement enterprises for their anti-competitive practices.¹⁰⁶ Allegations had been made against cement manufacturers in Taiwan for quite some time. In particular, they were accused of jointly raising the list prices of products since 2001. The context within which this situation arose was the formation of an international cement cartel following the 1997 Asian financial crisis. In 2000, Cemex (an international cement group based in Mexico) proposed cooperation with

¹⁰³ See *id.* at 53.

¹⁰⁴ FTC Approves Microsoft's Settlement Proposal, What's New, Taiwan ROC News, Taipei Economic and Cultural Office, March 2003, <http://www.teco.org.au/whatnew/march2003/efc-approves-microsoft.htm> (last visited Dec.16, 2005).

¹⁰⁵ See Huang & Chang, *supra* note 37, at 5.

¹⁰⁶ Press Release, Fair Trade Commission, The Taiwan FTC Imposes Heavy Fine on Cement Cartel (Dec. 15, 2005), <http://www.ftc.gov.tw>.

domestic Taiwanese cement importers. Since its successful entry into the Taiwan market, Cemex slashed the market price of cement from NTD 1900 to NTD 1100 per metric ton. The company had a major impact on Taiwan's cement market and had been increasing its market share by means of takeovers and mergers.¹⁰⁷

After a four-year investigation, the FTC found that Taiwan's cement manufacturers reached an agreement to conduct anti-competitive practices in order to dominate the market and hike up the price of domestic cement.¹⁰⁸ Their conduct can be described as follows:

1. Domestic manufacturers reached an agreement to set up a joint venture to acquire the silo of harbor in order to prevent international cement groups from establishing domestic marketing channels.
2. In order to reduce price competition resulting from oversupply of cement, cement manufacturers negotiated the retreat of some enterprises from the market.
3. The international cartel and local manufacturers reached an agreement to carve up the marketplace, to stay out of each other's territories, and make compensation by using counterpart's silo to keep foreign enterprises out of the market.
4. Domestic cement manufacturers and importers reached an agreement to sell domestic cement to each other instead of importing from other countries at lower prices for the purpose of restricting market competition and inflating the cement price.
5. By reducing their production capacity and supply quantities, shortening the effective term of order, and fixing their final selling price, cement suppliers managed to jointly increase the price of cement substantially—from NTD 1300 to the present NTD 2250 per metric ton.
6. Viewing that slag, a substitute product for cement, is inversely related to the sales of cement, domestic cement enterprises reached an agreement or understanding with steel enterprises in Japan to reduce the annual exporting volume of slag to Taiwan.¹⁰⁹

The FTC further noted that while the production capacity of cement producers exceeded market demand and production costs remained

¹⁰⁷ *Id.*

¹⁰⁸ The investigation process included more than one thousand man-hours, collecting relevant data from other government institutions, and taking testimony from associated enterprises. Relevant documents of over 20,000 pages were accumulated, with at least 100 files related to the collusion of cement manufacturers. In addition, in order to examine that case more thoroughly before the final decision, the FTC formed several task forces according to each commissioner's expertise. *Id.*

¹⁰⁹ *Id.*

unchanged, the domestic price rose substantially in recent years.¹¹⁰ The anti-competitive practices and agreements constituted economic infringements designed to maximize the profits of the participating enterprises. The harmful effects for the markets and consumers were particularly serious in the cement sector since they are passed on to the construction and housing sector and to the real estate market in general. Therefore, the FTC imposed one of the heaviest administrative fines it ever issued since its inception in 1992. We believe that an appeal to the Administrative Appeals Commission to have the FTC's decision reversed is likely.

This ground-breaking FTC decision on an international cartel is yet another step in the direction of building a competitive market at home and abroad. While competition agencies in other countries have already taken steps against international cartels,¹¹¹ the FTC's move against cement producers is remarkable. Clearly it is a bold move to clarify that the FTA, which theoretically can be applied extraterritorially where the Taiwanese market is affected, will also be applied extraterritorially in practice. This is in line with the powers claimed by competition authorities in other countries. For example, the antitrust law of the United States is extraterritorially applicable when certain conditions are met. Similarly, in 2002, Korea's FTC announced that the condition for extraterritorial applicability of the Korean Competition Law is satisfied if the cartel's actions have an actual or potential impact on the Korean market.¹¹²

Following the FTC's decision on the international cement cartel, we can start to review and examine to what extent Taiwan's FTA is extraterritorially applicable and what circumstances will prompt enforcement by the FTC in the future. It seems that while the FTC acknowledges that cases involving foreign elements are extremely hard to handle because of the difficulty of acquiring evidence and information abroad, it is taking bold steps to overcome these challenges.

V. SOME STATISTICS

Having outlined some of the challenges, it is worthwhile to examine what the FTC has achieved to date. Between 1992 and November 2005, the FTC handled 27,667 cases. Of these, the vast majority (19,035) were

¹¹⁰ *Id.*

¹¹¹ The United States, the European Union, Canada and several developed countries have made efforts to punish international cartels. In 2002, the Korea Fair Trade Commission made its decision to impose penalties on several foreign producers. See Woo Yun Kang Jeong & Han, *Competition—Korea, First Case of Extraterritorial Application of Antitrust Law*, <http://www.internationallawoffice.com/newsletters/detail.aspx?r=5098> (last visited Dec. 20 2005).

¹¹² *Id.*

received as complaints, 6,186 were mergers, 2,314 were requests for explanation, and 132 were applications for concerted action. The complaints resulted in over 2,060 decisions that the accused enterprise violated regulations and was thus subject to disciplinary action. In over 303 cases, the FTC took administrative action.¹¹³ As discussed above, very few merger cases resulted in action being taken. Similarly, only ten applications for concerted action were refused outright. However, instead of outright refusal, the FTC can make approval for concerted action and merger subject to conditions and undertakings from the enterprises concerned. An interesting point to draw out is that a majority of the FTC's decisions related to unfair trade practices rather than restrictive business practices. In particular, a large number of decisions related to misleading advertisement under Article 21 (1001 decisions), deceptive or obviously unfair actions under Article 24 (805 decisions), or illegal multilevel sales under Article 23 (332 decisions).¹¹⁴ These statistics highlight that the FTC plays a very important consumer protection function.

VI. CONCLUSION

The Taiwanese Fair Trade Act does not stem from a purely domestic development. Rather, it is an amalgam of legal notions imported from the United States, Japan, and Europe. Its adoption reflects the increasingly sophisticated Taiwanese economy which, following decades of domination by the Kuomintang party ("KMT")¹¹⁵ enterprises, is now essentially privatized and integrated into the world economy. Local consumers have become aware of their rights and the Taiwanese legislature acknowledged that the balance of power between consumers and their suppliers has shifted. In addition, the Taiwanese legislature has recognized international obligations in the field of intellectual property rights.

While the FTC has never been a very outspoken or aggressive agency in Taiwan and has never vigilantly challenged all mergers, we believe that it nonetheless provides a good basis for promoting competition in Taiwan. By making decisions prudently and finding innovative solutions to tough issues (such as concerted gas price rises), it has built up a solid reputation. It is pushing steadily towards professionalism (providing staff with training), internationalism (employing foreign educated commissioners), and extraterritorial applicability of the FTA (as is evidenced by the recent international cement cartel case). Furthermore, the FTC has gained recognition from consumers and the public alike. The fact that many of the

¹¹³ See Statistics: Cases Received, Fair Trade Commission, *supra* note 77.

¹¹⁴ *Id.*

¹¹⁵ The KMT was in control of the government from the arrival of Chiang Kai-shek's troops in Taiwan after World War II until its electoral defeat by the Democratic Progressive Party (DDP) in 2000.

FTA provisions are drafted widely may contribute to future successes of the FTC by allowing it to flexibly adapt its policy in line with the continuing dynamic development of the Taiwanese economy. However, such future flexibility also carries the risk of not providing enough guidance to regulated enterprises as to how their behavior might be judged in the future. This phenomenon of pendulum swings is similarly observed in the United States where the current Republican administration is also trying to reduce government intervention with regard to antitrust laws. Indeed, we urge that creating uncertainty in this way should be avoided and that the FTC should continue to sustainably expand its expertise and influence.

