Competition Policy: One Theory, Three Systems

Neither China nor Hong Kong are likely to adopt workable competition laws in the near future. The Taiwan experience is positive

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- 1 There are few subjects more important to governments than economic growth and development; the key question is how best to achieve them. The governments of China, Hong Kong and Taiwan are no different to other jurisdictions in this respect. All three entities now subscribe, to a greater or lesser extent, to market-orientated solutions to economic problems. But few governments are prepared to tolerate a complete *laissez faire* economy. All governments seek to regulate their economies to some extent or other. Socialist economics requires complete state domination of all the factors of production, whereas the majority of countries that subscribe to a capitalist model seek to ensure that the mechanism that delivers the optimal operation of markets, namely competition between rival businesses, is fostered and maintained.
- 2 Competition policy comprises a political commitment to markets, public education and advocacy campaigns, and the allocation of sufficient resources (both human and financial) to endow an enforcement body and administrative instruments to promote competition. These are the elements needed to achieve a competition culture. However, a competition policy cannot be effective without a legislative instrument that articulates the policy in normative terms, gives power to an enforcement body to investigate complaints, and an adjudicative mechanism to resolve disputed decisions and provide suitable penalties for those who break the law. The legislative tool to achieve the fulfilment of this policy choice is competition or anti-trust law ¹.
- 3 This article seeks to examine the present position of competition policy and law in mainland China, Hong Kong and Taiwan. It is not possible to microscopically examine this very large topic here ². However, a general survey, with illustrations of the most important facets of each system, will be attempted. The differing approaches to competition regulation resulting from the political and economic systems found in each jurisdiction will be analysed.

What is competition and competition law?

- 4 Competition is an economic concept that postulates that economic resources will be most efficiently deployed when any given product market is contested by rivals. The larger the number of competitors, the more efficient resource allocation will be. The efficiency of individual firms will also be enhanced by a threat of a loss of business to competitors. Society benefits as firms will bring new products to the market place in hope that their innovation will be rewarded with a larger market share and higher profits. Consumers also gain from the availability of choice. Thus, classical economics suggests that the closer an economy is to a state of perfect competition ³, the more likely is the optimal outcome of lower prices and greater choice.
- 5 While this microeconomic theory is laudable, the rational business owner will seek to avoid competition wherever possible as competition for an individual business is risky. If an individual firm is successful it will achieve a large market share and high profits, but if it is unsuccessful then bankruptcy looms. In order to play safe, a rational business will seek to reduce risk by combining with its rivals to suppress price and product competition by cartel arrangements to fix prices and/or to allocate markets.
- 6 Another strategy to promote stability and profitability is merger with rival firms to form a larger unit to concentrate the market power of the firm which might ultimately lead to a complete monopoly. Lastly, a business might, by organic growth, as a result of a superior product or business skill, obtain a position of dominance through its own merit; Microsoft might be an example of this phenomenon. But this might lead to abuses by the dominant firm in order to inhibit the development of rivals or destroy them by the use of market power before they can challenge the incumbent in the market where it is dominant, or in an adjacent market where it seeks to expand; Microsoft was condemned by the US Federal Court ⁴ for exactly these practices, when it sought to use its market power to prevent Oracle browser software having equal access to the initial screen that PC manufacturers pre-loaded as part of a package sale. Microsoft was not dominant in the browser market, but was dominant in the operating system market. Microsoft used its market power in one market to influence behaviour in the adjacent browser market. Microsoft sought to threaten manufacturers with a refusal to supply its Windows product if manufacturers also installed Oracle browser software and gave equivalent access to the Oracle product that was enjoyed by Microsoft's browser product.
- 7 Whatever the theoretical position that eulogises perfect competition, the reality is that such atomistic markets rarely, if ever, exist in our imperfect world. Consequently, if perfect competition is unobtainable, what then, should be the goal of a government seeking to maximise the benefit to be obtained from capitalism? The answer appears to be seeking to achieve a position where markets are contestable, that is, seeking to ensure that firms can enter or leave any given market, so that they have the possibility of competing with incumbent market operators. The primary goal of most countries' competition policy is to preserve the mechanism of competition, rather than to protect individual competitors, although competitors or consumers may benefit from enforcement of a pro-competition policy that maintains the competitive mechanism. This is because individuals injured by anti-competitive practices or abusive conduct by dominant firms, may receive protection or even financial compensation as a result of the protective provisions of a competition law.

- 8 However, no competition policy is entirely based on the maintenance of competition at any price. All systems allow overriding public interest reasons to trump purist competition policies and to condone the establishment of monopolies or cartels or collusive arrangements that might threaten or prevent competition. Such exceptions to the general law can include the development of new products through joint venturing, efficient utilisation of public assets, or the reward of innovatory behaviour by the grant of patent or copyright exclusivity for a fixed term.
- 9 It should be noted, however, that agreement on the aims of competition policy and law are by no means uniform—different countries pursue strikingly different political, economic and social objectives under the guise of competition law—and this may even be perverted to perform a protectionist function for domestic industries under the mantle of enforcing “fair” competition rules, as can also be the case with other trade remedies such as anti-dumping duties. The divergence of competition policy objectives is now less apparent in the two most important competition law jurisdictions, the United States and the European Union, than was previously the case; most observers now agree with Posner that the primary objective of competition policy is to promote economic welfare ⁵.
- 10 Having explained the nature and function of competition policy it is now necessary to consider the individual responses of the governments of the three jurisdictions under consideration here, namely, mainland China, Hong Kong and Taiwan.

China

- 11 For the last twenty-five years China has been moving from a socialist economic paradigm to a capitalist one. The euphemism used by the Communist Party of China (CCP) is that China is seeking to create a socialist-market economy ⁶. Such a creation defies definition and none is given in the constitution of the PRC. However, in moving the state away from a command and control philosophy towards a settlement where market forces tend to predominate in economic decision-making, the CCP has refused to countenance a concomitant political reform process. This stance may well mean that an effective pro-competitive policy is impossible, as will be suggested later. China has been working on a new comprehensive competition law for almost ten years to act as the means by which the socialist-market will be policed to promote competition. The desire to create a quasi-market but at the same time seeking to retain control of strategic or sensitive economic sectors, such as basic industries, banking and media, ineluctably means that the state will continue to have a major or even a predominant role in economic decision making. If so, this appears to be a fundamental impediment to the effective operation of a market system policed by a standard-model competition law regime. Added to this basic political-economy problem, the special features of China’s economic, political and administrative machinery make the successful adoption of competition law as the enforcement instrument of a pro-competition policy questionable.

The economic legacy

- 12 China’s transformation into a leading trading nation in just over twenty years, now ranked sixth trading nation in the world, is a major achievement ⁷. The huge surge in exported goods, in many ways masks the weaknesses of the domestic economy. Most export-orientated business is owned and operated by non-mainland interests such as private Hong Kong/Taiwan/Singapore compatriots⁸ or by non-Chinese foreign investors. Until recently this group of producers was either totally prohibited or

allowed only limited access to domestic Chinese markets, so while the export processing and export-orientated sectors of the economy boomed as a result of cheap labour and land costs, the domestic market was largely the preserve of the state-owned enterprises (SOE) and to a smaller extent private domestic businesses, protected from the thrust of international competition by tariffs, quotas or other administrative measures.

- 13 Since WTO accession, all this has changed. Quotas will be abolished, tariffs substantially reduced, and the foreign-owned export industries will be able to sell on the domestic market without restriction. Thus, the previously protected domestic sector will face increasingly serious challenges over the next few years. The Maoist legacy of industrial duplication of many factory facilities (for example, there are over one hundred vehicle manufacturing plants in China most of which have a capacity of less than 50,000 units, and other industrial sectors have the same problem) creates huge overcapacity and waste ⁹. This policy adopted for strategic/military reasons, coupled with a state guarantee of full employment means that the SOE sector that still employs a large percentage of urban residents, is likely to suffer from the onslaught of new foreign competition.
- 14 The economic stress of failing SOEs may also imperil China's banking system which again is dominated by the state. The effect of policy landing without regard to commercial indicators of risk has created a vast and dangerous load of bad debt that could bring down the whole financial system in China ¹⁰. Reducing the bad debt problem is not only complex but also hugely expensive as it would require the recapitalisation of the whole system. This has now been attempted twice since 1998 and a further effort is apparently now underway ¹¹. The government has established "asset management" bodies to relieve the banks of this burden but, the amount of debt transferred is only a small percentage of that owed by the SOE sector. Unthinkable as it may be, insolvency of a major state bank is a real possibility which would have grave consequences for not only financial and economic stability but also could threaten the political structure too. Thus, the introduction of competition may be a very mixed blessing for the domestic Chinese economy. The medicine of competition to force improvements in domestic productivity may yet kill the patient.

Political issues

- 15 The Leninist structure and ideology of the CCP has been largely untouched by twenty-five years of increasing economic liberalisation. The CCP can tolerate no challenge to its political hegemony. But with this monolithic structure has come severe strain as a result of rampant corruption at all levels of government ¹². This cancer results from a political settlement to ensure internal Party peace; by *de facto* allowing considerable latitude to provincial and other subordinate levels of government to pursue their own local economic policies that can and often do conflict with central government policy, corruption on an heroic scale has been fostered.
- 16 A further pernicious result of this decentralisation of policy is that it has retarded the creation of a unified single market in China. This is the result of two phenomena, the existence of local protectionism and administrative monopoly.
- 17 Local protectionism takes many forms—differential taxation of non-local products, physical barriers at local borders, arbitrary inspection or safety certification procedures—all designed to protect local production from "outside" competition.

- 18 The motivation behind such measures is often that the local government owns or controls the local producer, or receives tax revenue from them which would be lost if “foreign” goods displaced the local product.
- 19 Administrative monopoly (AM) relates to the use of administrative powers to monopolise economic sectors or to prevent competition with a favoured producer or supplier. Both these phenomena can be seen at national as well as local level, when government departments seek to protect their turf from new entrants to their markets¹³. Examples include telecommunications, railways and energy supply.
- 20 In some respects both these phenomena are familiar to students of the drive to create a single market within the European Union¹⁴. The difference is that China is, in theory, a single economy.

Legal system issues

- 21 China’s legal system is generally considered to be immature and underdeveloped¹⁵.
- 22 The professionalism of legislative drafting, the promotion of legislative initiatives by government, enactment by the National People’s Congress (NPC) or its Standing Committee (NPCSC), and implementation by government departments, all need radical improvement. Personnel in all parts of the government legislative process are in need of improved skills, and the qualities of lawyers and judges may well not be adequate to deal with the highly technical and complex interdisciplinary issues that arise from competition law. China’s capacity to create and enforce competition law is doubtful.
- 23 The active enforcement of any new competition statute would depend on a suitably powerful executive body staffed with competent and expert personnel. Even if suitable candidates could be found, the political and administrative structures in China are all too likely to prove intractable when it comes to the enforcement of competition decisions that threaten entrenched sectoral lobbies or equally powerful local interests that have monopoly positions in relevant markets.

Current legislation

- 24 The 1993 Anti-Unfair Competition Law is not a true competition statute as the majority of its provisions deal with consumer protection measures against counterfeit goods or trade-consumer fraud¹⁶. The law is not a complete competition code. It addresses a miscellany of issues including passing off (Art 5), business bribery (Art 8), false and disparaging advertising (Art 9), protection of confidential business information and trade secrets (Art 10), and false prize sales (Art 13). However, it does have something to say about pure competition issues. Monopolists are forbidden to use predatory pricing policies to destroy embryonic competitors (Art 6), other businesses are also forbidden to engage in similar tactics (Art 11), and forced tie-in sales of unrelated goods is prohibited (Art 12) as are bid-rigging (Art 15), and AM conduct (Art 7). Government organs are enjoined against restricting freedom of choice of product suppliers, restricting arbitrarily the business freedom of operators and abusing administrative powers to prevent or restrict the marketing of non-local products within their administrative area. Consequently, it can be seen that one of the most pressing issues for China, the AM problem, was already identified as a significant issue in 1980 when State Council regulations addressed the same matter. However, in China there is a world of difference between the expression of legislative will and execution in practice¹⁷. The recurrent and intractable nature of AM is emphasised yet again by the promulgation on April 21st 2001 of another administrative circular¹⁸ outlawing AM

practices; presumably it has been enacted because the previous measures were ineffective. The new regulations largely set out which organ can overrule the decisions of other manifestations of the state but do little to provide a remedy to those who suffer from administrative abuse as a result of illegal conduct. If the provisions of Article 7 of the 1993 Law had been effectively enforced, the issues alluded to in the 2001 regulations would not be of importance today. However, they remain a nested problem of major significance because, while the national legislative will is apparent, the mechanisms of enforcement provided by the statute are weak and are incapable of overcoming the realities of local political power.

- 25 Enforcement of the 1993 Law is provided for in articles 16 to 19. Powers of investigation, the requirement for the subjects of investigations to co-operate and provide information and records as required by the inspectors are included. Penalties are set out in articles 20 to 29 and include both fines and injunctive powers to prevent the re-occurrence of prohibited conduct. Article 30 provides for higher levels of government to supervise lower levels, for example, for provincial governments to supervise municipal authorities.
- 26 The default enforcement authority is the State Administration of Industry and Commerce (SAIC), a national organisation answerable vertically to the State Council, the permanent executive arm of the Chinese government. However, this body is functionally organised at each lower level of government and is funded and partially responsible to that corresponding level of government. Therefore, if the municipal government of city X is imposing a blockade or a discriminatory licensing or taxation regime against “foreign”, that is non-local Chinese goods, it is the municipal branch of the SAIC that is responsible, in the first instance, to investigate its sponsoring local authority. Needless to say, few investigations are pursued with vigour, when the subjects of their potential investigations control the pay, promotion and privileges of the local SAIC staff ¹⁹. As regards anti-competitive acts by business, the enforcement is also weak for similar reasons: the protection afforded by local political interests normally trumps the ability of the SAIC to act. It can also be seen that this statute is incapable of dealing with many commonly found competition related problems—abusive conduct by monopolists, cartel operations, oligopoly situations, vertical restraints or mergers, as these phenomena are not regulated by the provisions of the Law.
- 27 Other statutes also have pro-competition provisions. The Law on Pricing (1997)²⁰ has some provisions aimed at competition issues. For example, Article 14 provides:
“Operators may not carry out any of the following unfair pricing acts:
collude with others in manipulating market prices, thereby harming the lawful rights and interests of other operators or consumers
(2) dump merchandise below cost in order to force out competitors or to monopolise the market, thereby disturbing the normal order of production and business and harming the interests of the state or the lawful rights of other operators except for the disposal of fresh produce, seasonal or over stocked merchandise”
- 28 The terms *manipulation*, *the test of harm*, *below cost*, *intent*, *monopolise*, and *normal order of production* are not defined. No suggestion of dominance as a requirement in (2) is made. The provisions are clearly unworkable and do not appear to comprehend basic micro-economic concepts. Penalties are provided in articles 40 and 41 provides a right of action to consumers who have suffered loss as a result of price-fixing conduct.

- 29 The enforcement mechanism, especially in relation to administrative monopoly abuses are weak, given that the SAIC local enforcement officials are paid by local, not central, government, and many complaints relate to government or quasi-government abuses. Chinese writers concur in this judgement ²¹.

Proposed legislation

- 30 China has been working on a new comprehensive competition law since 1994. First information was gathered about mainland economic structures. Then details of foreign competition law systems were studied, evaluated and reported upon to a co-ordination committee. By 1999, a first complete draft law was prepared for a conference which included overseas experts and facilitated by the OECD. The 1999 draft follows the EU model of a central administrative enforcement agency with comprehensive powers to penalise abuses of dominant position, agreement between market operators, merger control provisions as well as a unique set of rules on the abuses of administrative powers by government.
- 31 By 2001, a further draft emerged which made various modifications but nothing is yet finalised and further amendments can be expected before the ultimate draft of the law emerges, so speculation at this stage as to the detail of the future statute is futile. The only certainty, at this stage, is that political lobbying by special interest groups for exemption or special treatment will change the final form of the legislation to some extent or other.
- 32 The wholesale change of the top leadership of the CCP and government in 2003 saw the reorganisation of the economic departments of state as a result of which the Ministry of Foreign Trade and Economic Co-operation (MOFTEC) was expanded to administer internal as well as foreign trade. The now Ministry of Commerce (MOC) will be the driving force in finalising a comprehensive law and the new Minister of Commerce has given a public commitment to early enactment ²².
- 33 However, problems may still arise, as has been demonstrated by the promulgation of a standalone set of merger and acquisition rules in final form in March 2003 ²³. These regulations have very odd provisions governing jurisdiction to approve mergers and which apply only to foreign entities seeking to acquire Chinese businesses. Chinese-Chinese mergers are exempt. It might be arguable that these discriminatory rules breach China's commitment to most-favoured nation treatment and national treatment as enshrined in the WTO accession agreement ²⁴.
- 34 This new development seems to suggest that any new competition statute may not be used even-handedly to promote economic efficiency, but rather as a weapon to restrict the growth of foreign businesses in the Chinese market by the acquisition of Chinese-owned rivals. Nationalistic, rather than economic, ends are thus served and so the commitment of the Chinese government to market-based solutions to economic problems may be brought into question.

Hong Kong

- 35 Colonial Hong Kong was traditionally seen as a bastion of free market capitalism uninhibited by intrusive government controls, publicly-owned enterprises or import controls or tariffs. The post-1997 Special Administrative Region (SAR) Tung government has been anxious to burnish this image.
- 36 Hong Kong's perceived minimal state intervention in economic matters is often hailed as creating the freest ²⁵ economy in the world. The HKSAR government uses this

perception of the Hong Kong economic environment to make a logical jump from a “free” economy to a competitive one. In the government’s view, as Hong Kong is a free economy, it must also be a competitive one. Further, this analysis is used to justify the government’s policy that a comprehensive competition law is not only unnecessary but would be harmful in stifling the business freedom that has served Hong Kong so well in the past. The government sees no generalised competition problems in Hong Kong and this reinforces its policy stance of substantive non-intervention, or, *in extremis* a limited sector-specific approach. Enactment of a comprehensive competition law is rejected outright.

Propaganda and reality—Is economic “freedom” synonymous with economic competitiveness?

- 37 The government conflates two quite distinct economic sectors in Hong Kong—the domestic market sector and the export-oriented sector. The external sector is subject to competition from producers worldwide who actively compete in the international markets that Hong Kong exporters seek to sell to. These include textiles and clothing, electrical and electronic goods, toys and footwear. Hong Kong manufacturers gain orders worldwide, process them at Hong Kong headquarters, manufacture in China, and then export through mainland ports or Hong Kong. Few, if any, of these products are destined for the Hong Kong market. The external market segment is undoubtedly competitive.
- 38 However, the second part of the Hong Kong economy is the domestic market for goods and services. This market is not nearly as competitive as the external sector. In fact, many parts of the market are dominated by private monopolists—electricity, gas; duopolies—ports, supermarkets; oligopolies—petroleum; cartels—stock-broking, bank interest rates, professional services, travel agents, school textbook publishing ²⁶.
- 39 Evidence of the ubiquity of these anti-competitive practices have been documented by the Hong Kong Consumer Council ²⁷ and many other observers and commentators ²⁸. Notwithstanding this mountain of actual and anecdotal evidence, the Hong Kong government suffers from wilful blindness in refusing to acknowledge these deficiencies, ostensibly to buttress its “free market” philosophy but in reality because the Hong Kong government is dominated by businessmen who directly or indirectly have vested interests in these uncompetitive markets. As an example, the Chief Executive Tung Chee-hwa, was the CEO of the family shipping company OCCL when the company was convicted of illegally participating in a land transport cartel by the EU authorities ²⁹.
- 40 The legislature is effectively controlled by pro-government and pro-business interests that have no political incentive to injure the powerful business interests of Hong Kong, and attempts to debate a general competition law have been defeated by pro-government/pro-business elements in the Legislative Council ³⁰. In any event the pro-business faction have an effective veto of legislation as a result of the peculiar voting mechanism in the legislative that requires the effective consent of the functional constituencies that directly represent business interests ³¹. This exercise of political power is the real reason why the Hong Kong government refuses to see a problem and to legislate for a comprehensive competition law.
- 41 Unsurprisingly, the government pays lip-service to a pro-competition stance in its policy pronouncements and through the fig-leaf of its Competition Advisory Group (COMPAG) ³². This body is legally powerless to investigate alleged anti-competitive

market structures or practices by business: it also has no power to penalise and so is entirely impotent as a protector of the competitive mechanism in the private sector.

- 42 Oddly, given the open hostility of government to a general competition law, full regulation of abuse of dominant, restrictive agreements, and control of mergers does exist in two industries—telecoms and broadcasting³³. Why these two industries have been singled out for special treatment is something of a mystery but it is probably because the government wanted to encourage new entrants into the market to make Hong Kong a telecommunications and broadcasting hub to ensure that Singapore did not dominate these emerging technology-orientated sectors in the future. The official explanation is that Hong Kong adopts a sector specific policy and that full competition provisions are appropriate for telecoms and broadcasting. But no reason for this assertion is provided; beyond a repetition of the mantra of the government's pro-competition policy pronouncements and that the policy is sector specific. This obviously is an entirely unconvincing explanation and adds nothing to the debate, so laying bare the intellectual paucity of the government's reasoning and typifies the government's shallow and illogical policy-creation process.
- 43 If this were not bad enough, most competition policy experts worldwide accept that sector specific regulation should be minimised as it creates anomalies and distortions caused by the different regulatory requirements, potential industry capture of the regulator who ends up promoting industry interests and not those of the community at large and because competition may be only one of the issues a regulator needs to be concerned with. As a minimum, sector specific regulation needs to be integrated with an overarching commitment to the goal of increasing competition between the incumbent operator(s) and new entrants, wherever possible. This has been one of the primary goals of recent changes in alignment of regulatory and competition policy and law in the UK³⁴.
- 44 In Hong Kong individual sectors continue to be regulated by contradictory regimes with no overall commitment to competition as a primary goal. The result is regulatory overlap and inconsistent goals with little thought of an integrated approach or any clear commitment to competition.
- 45 Hong Kong competition policy stance has been criticised by the EU parliament³⁵, the WTO³⁶, the Hong Kong American Chamber of Commerce and the United States Consulate General³⁷, *the Economist*³⁸, and domestic commentators³⁹, but the government refuses to shift its policy position, showing a complete unwillingness to listen to public opinion from within Hong Kong or from external commentators. This method of policy formation is exactly what led to the huge demonstration on July 1st 2003 against the proposed new national security laws. The government's myopic and short-sighted policy may well have intensified Hong Kong's six years of economic malaise since 1997. By supporting rent-seeking, inefficient and over-protected domestic monopolists and cartel operators, the government may have made Hong Kong's economy more rigid and resistant to change. This policy is likely to result in ossified, outdated economic structures and practices. Persisting in its refusal to enact a general competition law may restrict Hong Kong's ability to react speedily and efficiently to the undoubted economic challenges that lie ahead.
- 46 Whether the government will practice a *volte-face* on a general competition law remains to be seen. The government is quite capable of unpredictable changes in policy, without warning, as was the case over the secret abandonment of a pledge to build 80,000 new

flats in 1998, the decision in June 2003 to enact comprehensive race discrimination legislation⁴⁰ (which the government had resisted for years on the basis that there was no serious race discrimination problem), and by the abrupt withdrawal of the national security legislation in August 2003. Thus, it is possible, though unlikely, that the government might shift its position suddenly and without warning on competition legislation.

Taiwan

- 47 Competition policy in Taiwan has quite a different history to that in the PRC or Hong Kong. Following the retreat of the Kuomintang (KMT) to Taiwan in 1949 the economy developed for the next thirty-five years largely under the guidance of the Party-state. Direct state ownership of industry was minimal but the KMT had strategic interest in many industrial sectors. Thus political intervention in the economy was much greater than in Hong Kong but clearly less than the mainland.
- 48 A manufacturing base developed whereby large-scale industries were fostered and protected by the Party-state, and which was mainly domestic in character. Smaller scale manufacturing and technology-based businesses were mainly in the hands of family-controlled businesses which relied on export markets.
- 49 Thus, most large-scale domestic businesses were in the hands of a smaller number of large firms part owned and financed by the KMT and protected by government, while family firms concentrated on the export market. Domestic industry of both types was protected by external tariffs from foreign competition. Taiwan's economic success was substantially facilitated by economic and military assistance from the United States that granted crucial preferential access to the American market for Taiwanese goods in the Cold War era ⁴¹. To understand the development of competition policy in Taiwan it is necessary to outline both the political and economic background.

Taiwan politics

- 50 In 1949, as a result of losing the civil war in China, the nationalist KMT government decamped to Taiwan. Recognised, promoted and sponsored as the legitimate government of the whole of China, principally by the United States, Taiwan endured forty years of statist, authoritarian government. Slowly however, the politics of dictatorship were superseded by the politics of democracy. Upon the death of President Chiang Kai-shek in 1975, Yen Chia-kan took the reigns of power and was in turn replaced by Chiang's son Chiang Ching-kuo in 1978. He began moves towards democratisation in 1987 by lifting the state of martial law which had persisted since 1949.
- 51 Amendment of various repressive laws, the repeal of the Temporary Provisions of 1948 which had suspended the constitution and the ending of the "Period of National Mobilisation for the Suppression of the Communist Rebellion" in May 1990, all moved Taiwan away from the authoritarian stance of the KMT. The successor KMT president Lee Teng-hui permitted the establishment of civil society. Elections for the legislature were held in 1991 and 1992, and in 1996 the President of the Republic was elected by direct universal suffrage. In 2000, the leader of the opposition party, Chen Shui-bian became the first head of state in Chinese history to obtain office through a peaceful transition of political power. As a result of the 2000 election, the Taiwanese political system came of age; it marked "the 'consolidation' of the country's democracy, defined by most scholars as a transfer of political power to an opposition party" ⁴².

Taiwan economy

- 52 During the authoritarian phase of government, the KMT transformed Taiwan from an agricultural economy to an industrial one. GNP per capita rose from US\$196 in 1952 to US\$3,993 in 1986 and in overall terms grew from US\$1.674 billion to US\$77.296 billion over the same period⁴³. By the mid 1960s Taiwan had become a predominantly industrial products exporter and the contribution of private enterprises gradually overtook the previous predominance of state-owned firms. For example, in 1952 state enterprises contributed 57% of industrial production but in 1980 less than 20%. However, many strategic enterprises were monopolised by the state—petroleum, electricity, gas, water, steel, railways, shipbuilding, posts and telecommunications, tobacco, alcoholic spirits and banking. Further, the KMT had significant influence over and ownership of many strategic business sectors in Taiwan.
- 53 The Party owned or controlled over fifty enterprises via two very influential investment houses and so had the ability to directly intervene in a number of economic sectors. The private sector was divided into essentially two groups—the one hundred large-scale business conglomerates composed of some seven to eight hundred component firms accounting for 34% of GNP in 1988 but employing only 4.6% of the workforce and were concentrated in the high technology industry and the domestic economy. However, there were also a large number of small and medium-sized enterprises (SMEs), in 1961 there were 178,916 of them and in 1986 there were around 750,000. They had several distinguishing characteristics. They were predominantly in the commercial sector, concentrating on export markets, most have less than fifty employees, they utilise private capital, are family operated and were less supported and protected by government than the large-scale businesses⁴⁴.
- 54 The political-economy adopted by the KMT envisaged public control over certain key sectors of the economy but allowed ample room for the development of the private market economy. In some ways it mirrored the German Ordoliberal ideology⁴⁵, but with an emphasis on primary economic development and a greater role for the state in certain strategic industries and also a stronger co-ordinating role, whereby competition was not necessarily seen as beneficial. Hsiao and Cheng⁴⁶ have categorised Taiwan's economic development into four phases (1) the import substitution phase (1949-59) during which the embryonic industrial sector developed to out-grow both agriculture and textiles, (2) the export-orientated industrialisation phase (1960s) which was stimulated by a policy of devaluation, liberalising the foreign trade regime, allowing FDI to promote export processing in special zones and eliminating certain import restrictions. In some ways this policy was mirrored by the PRC some twenty years later. The 1960s also saw the expansion of the two tier economy—large firms dominated the domestic economy and SMEs concentrated on exports. (3) A further import substitution phase occurred in the 1970s as a result of the economic shocks of the oil crisis and the diplomatic isolation caused by the de-recognition of the KMT as the government of China. High inflation and world recession forced consolidation but by the end of the decade the large firms and state businesses had recovered and consolidated into various conglomerates, the SME sector had also weathered the storm in good shape. (4) The last phase identified by the authors was the liberalisation and globalisation of the economy in the 1980s. A free-market philosophy began to pervade policy-making in the 1980s. In 1984 the KMT government took an important economic policy decision to liberalise the domestic economy and to reduce protectionist tariffs. Capital flows were liberalised and foreign banks allowed to establish from 1989. The

results were impressive with Taiwan becoming the world's third largest supplier of computer hardware by 1995. The Party-state had been instrumental in guiding Taiwan's economic development but liberalisation of the economy went hand-in-hand with political change. As part of the economic liberalisation plan a comprehensive competition statute was proposed. This radical change in policy resulted from a realisation that cartels and monopolies were undermining Taiwan's competitive edge. Previously, a Price Supervision Council directly attempted to regulate supply and demand by co-ordinating suppliers' production levels by administrative *fiat* ⁴⁷.

Competition policy and law

55 Thus, it appears to be no coincidence that the decision to adopt a competition policy and an effective competition law was part of the overall decision in the mid-1980s to liberalise both the political and the economic environment of Taiwan. However, that did not mean that adoption of the new fair trade law was easy to accomplish; on the contrary, there was a hard fought political battle by those who opposed the introduction of a competition law ⁴⁸. Initial instructions to prepare a draft law were issued in 1980 but a bill was not introduced into the legislature for six years and the statute was not in fact enacted until 1991. During the 1980s, as a result of substantial changes in the Taiwanese economy and the global economic and political climate, domestic monopolies and cartels (many sponsored by the KMT as sources of economic and political patronage) were seen to be less economically effective. These outdated structures could, it was thought, potentially hold back the next stage of economic development and liberalisation. The move towards liberalisation was also thought to be essential to support Taiwan's accession to GATT and the WTO⁴⁹. A new Fair Trade Act came into effect in 1992 containing comprehensive competition provisions, after a 12-year gestation. The Taiwan Fair Trade Act 1992 contains provisions to outlaw restrictive agreements, abuse of market dominance and provisions on merger control; it is also a comprehensive consumer protection statute. It has been amended on three occasions in 1999 to substantially increase penalties, in 2000 to amend administrative practices and 2002 to amend the merger notification system by raising thresholds and to increase the transparency of the procedure generally. A new authority, the Fair Trade Commission (FTC) ⁵⁰, was established to administer the new law and, by common consent, it has made substantial progress in promoting competition policies to the general population and effectively enforcing the new law, despite initial scepticism that it would be unable to operate ⁵¹. The FTC has taken part in regional and international discussions concerning competition issues, and the information provided on the FTC website gives credence to the notion that the authority is both vigilant and effective in detecting and punishing offending behaviour. These involved the whole range of competition-related problems, including monopoly, mergers, cartels, re-sale price maintenance and consumer protection cases. During the period 1992 to 2000 the FTC received 22,974 cases. There were 1,829 decisions that involved the imposition of a penalty, of which only 214 were competition cases involving monopolies, concerted practices or mergers. Most of the penalties cases involved consumer protection, of which almost half were related to untrue advertisements. As a result of limitations of space, no analysis of the Fair Trade Act will be attempted, save to say that it has comprehensive competition provisions as well as some unique features.

56 A selection of cases decided by the FTC is available on its website. They display the expected hallmarks of competent analysis and decision-taking. The penalties imposed on defaulters are significant. For example, a cylinder gas distribution cartel attracted

finest varying from NT\$1 million to NT\$15 million ⁵², trade associations suggesting concerted practices ⁵³, a ready mixed cement cartel ⁵⁴, abuse of dominant position (NT\$5 million fine) ⁵⁵. A semi-conductor manufacturing merger was allowed despite a concentration in the local production market due to benefits to the overall economy ⁵⁶. As regards implementation and enforcement of penalties, none of the difficulties identified in China now pose serious problems in Taiwan ⁵⁷. As for administration, the Commissioners of the FTC appear to be more than adequately qualified with experience in the legal and economics fields. There are nine full-time commissioners, with the chairman ranked at the apex of the government administrative hierarchy. They are all direct presidential appointees and appear to have adequate status, resources and independence. The staff of FTC consist of 218 civil servants, 25% of whom are qualified lawyers, 18% are economists, the balance of 57% being administrators. Over 35% have Master's degree qualifications and a further 55% have at least a Bachelor's degree ⁵⁸. In addition to investigative and enforcement work, the FTC undertakes public promotion and education concerning competition very seriously. It offers courses for judicial and other officials as well as promotional activities to enhance a competition culture within enterprises and Taiwanese society ⁵⁹. The FTC also has a consulting centre to offer advice and assistance on competition questions to the public and business. It also engages in international fora (APEC, OECD) and undertakes bi-lateral co-operation with other national competition authorities. The evidence suggests that the Taiwan experience of competition regulation is broadly positive, notwithstanding continuing problems of judicial quality and corruption in politics and judicial administration ⁶⁰.

- 57 China, Taiwan and Hong Kong have all reacted in markedly different ways to the regulation of their respective economies. China's socialist heritage and its embedded problems as an authoritarian state have to a large extent shaped its current competition policies. Moving towards markets from central planning is never easy, as can be so clearly seen in the other former socialist states of the defunct Soviet empire. The tentacles of authoritarian control of the economy, deep distrust of markets, lack of an adequate philosophical and educational infrastructure, corruption and xenophobic nationalism provide a toxic combination when policy choices on the regulation of the market have to be made.
- 58 In China's case, one must question the philosophical commitment of the CCP to full marketisation, as economic liberalisation without a matching commitment to political pluralism will probably mean that the full fruits of appropriately regulated capitalism may not be obtainable. But if pluralism is accepted, then it could spell the demise of the CCP as the government of China. This is the conundrum that Chinese leaders' face.
- 59 For Hong Kong, the dogged insistence of the Tung administration that all is well with the regulation of economic activity is profoundly myopic, not evidence-based and relies on a facetious mixture of propaganda and self-delusion. Evidence of a general failure of policy-making in many spheres is increasingly apparent, with the government lacking a coherent vision of Hong Kong's economic problems and a plausible and rational plan of how they might be remedied. The adoption of a general competition law would not be a panacea, but at least it would signal that the government was serious about promoting a more open and responsive domestic economy that is able to address the increasing regional and international economic challenges that Hong Kong faces now and will continue to face in the future.

- 60 The fundamental reason that neither Hong Kong nor mainland China are likely to adopt comprehensive, workable, fair and efficacious competition law is, at root, because of their respective political systems. The lack of properly functioning democratic systems of government in both jurisdictions means that, for very different and idiosyncratic reasons, neither Hong Kong nor the mainland will be able to adopt workable competition laws in the near future.
- 61 In China's case, the whole political-economy system, while having the ability to enact a law (should the Party hierarchy decide to do so) is unable to ensure that fair and impartial enforcement of such a law will actually take place in practice. The lack of independence of any newly created enforcement body, due to China's political structures, from overt political interference by vested interests supported by political actors, widespread corruption and on the technical level, a lack of trained and qualified civil servants, economists and lawyers, will doom enforcement efforts to failure. Worse, as competition law concepts are inherently broad and subject to good faith, discretionary enforcement and competition law can be perverted to grant additional economic control powers to government over the non-state sector, which currently it does not possess. This phenomenon would, paradoxically, potentially extend state control and would likely inhibit the development of China's nascent market economy. An example of this danger has already occurred by the enactment of the discriminatory and baffling new rules on foreign-related mergers brought into force in 2003. The root cause of these anticipated problems in ensuring effective and impartial enforcement is the political environment; without political reform, which requires a fully functioning democracy with separation of powers, an effective judiciary, independent lawyers, respect for the rule of law, an active and free press, a civil society able to lobby for consumer interests and fair-trade rules, effective economic regulatory reform is not possible. Clearly, China is currently far from achieving these objectives, so an effective adoption of competition law is unlikely.
- 62 As regards Hong Kong, clearly most of the elements of successful adoption of a competition law are present. Hong Kong enjoys a common law system, low corruption rates, efficient government administration, a high degree of personal freedom and a free press. The appropriate and effective enforcement of the sectoral legislation on competition in the telecoms and broadcasting industries, shows that a general competition law could be made to work. The problem in Hong Kong is the implacable opposition of the Executive to the notion of enactment of a suitable law. This results directly from the domination of political power by members of the business elite who directly benefit from the current status quo that allows industry and commerce to adopt widespread monopoly and cartel practices, so benefiting business proprietors at the expense of consumers and potential new entrants to the domestic sector. Again, the root problem of adopting an effective competition law is political. The current debate over universal suffrage for the election of the Chief Executive and the Legislative Council are a more easily attainable objective than the outbreak of liberal democracy in China. Therefore, if Hong Kong manages to evolve towards democracy, a comprehensive competition law will surely shortly follow. Without such political evolution, competition law reform in Hong Kong will only occur only if outside agents—major trading partners (the United States and the European Union) or economic organisations (OECD or WTO) exert pressure on the Hong Kong government to put its house in order, as has recently been seen in respect of money laundering and

terrorism. Short of these two scenarios, Hong Kong will not reform economic regulation.

- 63 Taiwan is in many respects, a textbook example of a successful transition from a highly regulated and restrictive economic model to one based on openness and a promotion of competition to benefit both private and commercial consumers. But this does not imply that problems do not remain. One might ask why this has occurred. In the author's opinion, the move towards a more open and competitive economy was inextricably linked to the parallel move in Taiwan towards a pluralist political system. Adoption of economic and political competition have gone hand-in-hand and the success of pro-competition policies is, it is submitted, dependent on that political change towards democracy.

NOTES

1. Where this is not possible, for example, in some public utilities, direct regulation may be employed.
2. A detailed analysis of current and prospective policies will be found in the author's new book, *Competition Policy and Law in China, Hong Kong and Taiwan*, to be published by Cambridge University Press in spring 2004.
3. Microeconomic theory on competition can be traced back to Adam Smith, *The Wealth of Nations*, 1770, as developed by David Ricardo in *Principles of Political Economy and Taxation*, 1817, and Alfred Marshall in *Principles of Economics*, 1890, during the nineteenth century.
4. *United States v Microsoft Corp.*, US District Court, Washington D.C. CA98-1232 <http://usvms.gpo.gov> The US Appeals Court subsequently upheld the main findings of fact by the trial court but adopted different remedies.
5. Richard Posner, *Anti-Trust*, University of Chicago Press, Second Edition, 2001, p. ix
6. See articles 11, 15 and 18 Constitution of the Peoples' Republic of China (as amended)
7. http://www.wto.org/english/res_e/statis_e/its2002_e/section1_e/i05.xls
8. In 2001, Hong Kong shared 36% of foreign direct investment (FDI), Taiwan 6.4%, Singapore 4.6%, and South Korea 4.6%. Up to the mid-1990s Hong Kong's share of total FDI was over 50% per annum, though a proportion of this was so-called "hot money", funds from the mainland being exported to tax haven jurisdictions and re-routed back to the PRC via Hong Kong to take advantage of various foreign investment incentives offered to FDI providers by the PRC government and not available to domestic investors. Since 1978 Hong Kong, Singapore and Taiwan cumulative FDI is at least 50% of all FDI received by the PRC. PRC National Bureau of Statistics, *China Statistical Yearbook*, 2002, p.630
9. "A leap over the cliff: are the big profits to be made in China blinding foreign carmakers to the risks ahead?", *Financial Times*, August 25th 2003.
10. See Nicholas Lardy, *China's Unfinished Economic Revolution*, Brookings Press, 1998; Gordon Chang, *The Coming Collapse of China*, Random House, 2001, especially Chapter 6.

11. 'Massive bailout proposed for banks' and 'Bank bailout will fail without deeper reform', *South China Morning Post*, August 26th 2003.
12. For example, 'The Swelling Cancer of Corruption', *South China Morning Post*, September 1st 2003 and for more detail and analysis, see *The Global Corruption Report 2003*. <http://www.globalcorruptionreport.org>
13. Saywell, "China's City Limits", *Far Eastern Economic Review*, October 14th 1999.
14. See Dan Goyer, *EC Competition Law*, 3rd Edition, Oxford University Press, 1998, especially chapters 2 and 3; and Steiner and Woods, *EC Law*, 7th Edition, Blackstone, 2000, Chapter 1.
15. A full analysis of the current state of China's legal system can be found in Randall Peerenboom, *China's Long March Toward Rule of Law*, Cambridge University Press, 2002.
16. An English translation can be found in *China Law and Practice*, November 18th 1999, pp. 31-39.
17. Many Chinese writers complain bitterly about the ubiquity and longevity of administrative monopoly problems, even though numerous legislative attempts have been made to deal with this pernicious problem. See Wang Xiaoye, "Anti-Monopoly Law Under the Conditions of the Socialist Market Economy", *Journal of Chinese Social Sciences*, Peking, Vol. 1, 1996; "Regulation of Administrative Monopoly", *Intertrade*, Peking, Vol. 4, 1998; *Investigation on Legislation to Control Mergers in China*, People's Publishing House, Peking, 1997; "Anti-Monopoly Law Should Regulate the Activities of Public Companies in the Market", *Chinese Academy of Social Science Journal of Law*, Vol. 5, 1997; *Studies in Competition Law*, China Legal System Press, Peking, 1999 [a collection of papers and articles]; *Necessity of and Conditions for an Anti-Monopoly Law in China*, (working paper in English) Institute of European Studies, Chinese Academy of Social Sciences, Peking, 2001; Wang Xiaoye, "Causes and Analysis of Administrative Monopoly and Legal Measures Against It", *Journal of Law*, Chinese Academy of Social Sciences, Vol. 4, 1999; Shi Jishun, *Intertrade*, Vol. 4, 1998, and *Frontiers of Jurisprudence*, Vol. 3, 1999; Wu Hongwei, "A Discussion on China's Administrative Monopoly and Avoidance", *Jurist's Journal*, Vol. 6, 2001; Huang Xin and Zhou Jun, "An Approach to the Legislative Control of Administrative Monopoly and Monopoly Practices", *China Jurists Journal*, National University of Politics and Law, Peking, Vol. 3, 2001.
18. *Regulations of the State Council Prohibiting the Implementation of Regional Barriers in the Course of Market Economy Activities*, Peking, April 21st 2001.
19. Information provided to the author by officials of the SAIC in Peking, May 2000.
20. Adopted at the twenty-ninth meeting of the NPCSC, December 1997.
21. See the views of Chinese writers cited above in note 17.
22. Reported in the *China Daily*, March 30th 2003
23. *Interim Provisions on Merger and Acquisition of Domestic Enterprises by Foreign Investors* promulgated jointly by Ministry of Commerce, State Administration of Taxation, State Administration of Industry and Commerce, and the State Administration of Foreign Exchange, March 7th 2003.
24. See a WTO secretariat briefing paper "The Fundamental WTO Principles of National Treatment, Most-Favored Nation Treatment and Transparency", WT/WGCP/114, April 14th 1999.
25. See the annual Fraser Institute Economic Freedom of the World report <http://www.fraserinstitute.ca> and the annual Heritage Foundation Index of Economic Freedom <http://www.heritage.org>

26. The legally sanctioned cartels in bank interest rates and minimum stock-broking commissions have been abandoned recently.
27. See various reports written since 1994 on housing, gas supply, oil supply, bank interest rates, supermarkets, driving instruction, television broadcasting, telecommunications, school text-book publishing, some of which are available at <http://www.consumer.org.hk>
28. For example a major series of workshops on competition policy in Hong Kong was conducted by Civic Exchange, a public policy think-tank in 2003 see http://www.civic-exchange.org/n_pub_cont_03_competition.htm
29. "Competition would make waves in the shipping trade", *South China Morning Post*, July 4th 2002; see also judgements of the European Court of Justice, Court of First Instance (Third Chamber), in cases T-395/94, T-86/95 and T-18/97, all dated February 28th 2002.
30. For example, in 2000 the Democratic Party attempted to introduce a Fair Competition Bill into the Legislative Council but it was blocked by the president of the Legislative Council on the basis that it was a private members' bill and involved public expenditure so breaching Article 74 of the Hong Kong Basic Law (the post-1997 constitutional document of the HKSAR).
31. Legislative Council Rules of Procedure, Part J, Voting-Rules 46 and 47, see <http://legco.gov.hk/general/english/procedure/content/partj.htm>
32. For details of COMPAG's work and to obtain its annual reports see, <http://www.compag.gov.hk/about/>
33. See Telecommunication Ordinance (Cap.106) and Broadcasting Ordinance (Cap.562). Mergers and acquisition in the telecoms industry were brought under direct control by the Telecommunications (Amendment) Ordinance 2003.
34. The Competition Act 1998 and the Enterprise Act 2002 completely overhauled the UK competition system and also sought to align competition policy and law with sector specific regulatory regimes in various utility industries. See the UK Department of Trade and Industry web site for full details at <http://www.dti.gov.uk/ccp/>
35. Report on the Hong Kong SAR to the European Parliament , October 2000, doc A5-0284/2000 <http://www2.europarl.eu.int>
36. Hong Kong Trade Policy Review, December 2002, document no. WT/TPR/M/52 <http://www.wto.org>
37. "Anti-monopoly body still on drawing board", *South China Morning Post*, November 18th 1997
38. "In few hands", *The Economist*, November 2nd 2000
39. Editorial, *South China Morning Post*, September 11th 1999; David Dodwell, *The Hong Kong Service Economy*, Vol. 7, February 1999; Professor Richard Schmalensee, Dean MIT Sloan School of Management, *The Standard* (Hong Kong) July 15th 2002.
40. See Legislative Council Brief HAB/CR/1/19/102Pt.2, Home Affairs Bureau June 19th 2003.
41. See Keith Maguire, *The Rise of Modern Taiwan*, Ashgate Publishing (1998), especially Chapter 4.
42. J. F. Cropper, "Taiwan: democracy gone awry?", *Journal of Contemporary China*, 2003, 12 (34), pp. 145-162.
43. Marsh, Blondel and Inoguchi (Eds.), *Democracy, governance and economic performance: East and South Asia*, United Nations University Press, (Tokyo), Chapter 5, Taiwan by Michael Hsiao and Cheng Hsiao-shih at p. 111

44. The factual information in this paragraph is a précis of Chapter 5, Taiwan, pp. 110-115, *ibid*.
45. See Razeen Sally, *Classical Liberalism and International Economic Order*, Routledge, London (1998)
46. See Marsh *et al.* above at pp. 117-121.
47. Information on the pre-1992 position was provided to the author by Liu Chien-hsuen of the Taiwan Fair Trade Commission during an interview with the author on September 15th 2002
48. See Gee San and Changfa Lo, *A decade of Fair Trade Law Legislation and Its Enforcement in the ROC*, in *International and Comparative Competition Law and Policies*, Chao *et al.* (eds), Kluwer Law International, The Hague (2001) for a detailed description and analysis of the legislative battles and adoption process in Taiwan.
49. Lawrence Liu, *In Search of Free and Fair Trade-The Experience of The Republic of China on Taiwan as an Asian Model Of Implementing Competition Law and Policy*, paper delivered at Conference on Competition Regulation within the APEC Region: Commonality and Divergence, Georgetown University Law Centre, Washington D.C., May 1st-3rd 1995
50. See <http://www.ftc.gov.tw>
51. *Ibid*.
52. South Taiwan Cylinder Gas Distributors Case (2001) see www.ftc.gov.tw
53. Chia Yi City Clock and Optometry Association Case (2001), *ibid*.
54. Ilan District Ready Mix Concrete Case (1998), *ibid*.
55. China Petroleum, *ibid*.
56. Acer-Taiwan Manufacturing Corp. and Worldwide Semi-Conductor Manufacturing, *ibid*.
57. Confirmed by Liu Chien-hsuen of the Taiwan FTC.
58. *Statistical Yearbook of the Taiwan Fair Trade Commission (2001)*, Taipei, Taiwan, p. 128.
59. OECD Global Forum on Competition, *Contribution from Chinese Taipei*, February 11th 2002 CCNM/GF/COMP/WD(2002)16.
60. Taiwan offers a glimpse of what may be achieved when a government philosophically accepts pluralism in both politics and economic management.