In the Name of Fair Trade: A Commentary on the New Competition Law and Policy of Taiwan, The Republic of China

On the evening of January 18, 1991, just hours before the Allied Forces bombed Baghdad, the Legislative Yuan of the Republic of China in Taiwan (ROC) passed the Fair Trade Law (FTL). Without doubt, the United Nations' sanctions against Iraq were related to concerns about the Iraqi aggression's adverse impact on the global crude oil supply. In a similar vein, passage of the FTL, which became effective on February 4, 1992, reflected the ROC legislators' concern regarding the effect of monopolies, cartels, and market manipulation on the ROC's economy. Insofar as the Gulf War affected geopolitical balance and global economic stability, so too will the enforcement of the FTL by the Fair Trade Commission.

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(FTC) and the new competition rules and policy contained in the FTL have a parallel far-reaching impact for Taiwan and international firms conducting business there.\(^2\)

Already the world’s twenty-fifth largest economy and thirteenth ranked trading nation, Taiwan has had one of the fastest growing “dragon economies”\(^3\) in Asia. It recently embarked on a Six-Year National Development Plan (Six-Year Plan) entailing infrastructure and other projects that will cost more than U.S. $300 billion. Despite uncertainty in reaching a rapprochement, or even unification, with Mainland China, which still can be a military threat to the ROC, companies in Taiwan have made substantial investments in China and inroads into its domestic markets, fostering a subtle process of economic integration toward a Greater China. Although it has always been prone to intervene in the economy,\(^4\) Taiwan epitomizes the Chinese entrepreneurial spirit.\(^5\) Moreover, after four decades of impressive economic development, Taiwan is now clearly headed for liberalization.\(^6\) This process has revealed a need for a competition law to ensure adequate competition in the marketplace through antitrust measures and to contain overzealous and unfair business practices through rules against unfair competition law.\(^6\)

This article describes in part I the salient features of the antitrust rules in the FTL. Part II is devoted to the FTL’s rules governing unfair competition. Part III addresses remedies and enforcement under the FTL. The article concludes with part IV, in which the author assesses the FTL’s potential impact on the competitiveness of the business environment and on firms, whether domestic or foreign, doing business in Taiwan.

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2. Proponents of a correlation between the passage of competition laws and armed conflicts would be vindicated. See Theodore P. Kovaleff, Preface to a Symposium on the 100th Anniversary of the Sherman Act and Upon the 75th Anniversary of the Clayton Act, 35 ANTITRUST BULL. 1, 6 (1990), in which he noted that the United States Clayton Act was enacted shortly before World War I.

3. WORLD L. COMPETITION (MB), Unit D, § 1.02 (Julian O. Von Kalinowski, ed. 1986) (contribution by Lawrence S. Liu) [hereinafter WORLD LAW OF COMPETITION].


6. Article 4 of the FTL defines competition to mean the act of soliciting business opportunities by two or more enterprises in the market on the basis of better prices, quantities, quality services, or other terms.
I. Antitrust Rules

A. Scope and Supremacy of the FTL

Article 1 of the FTL provides that where not set forth in the FTL, provisions of other laws shall apply. This apparent boilerplate legislative language has fueled debates since the FTL bill was drafted. Should the FTL be an economic Magna Carta that takes precedence over other statutes regulating business and commerce? This supremacy issue, thus far still unresolved, could determine the role of the FTC, itself a new enforcement agency.

The FTL sets forth lofty goals: protection of consumer welfare, maintenance of orderly market functions, fair competition, and facilitation of economic stability and prosperity in the ROC. Unlike piecemeal competition statutes in other countries, such as the United States, the FTL is more ambitious in scope. It incorporates into one statute two major legal regimes: antitrust law and unfair competition law. The antitrust provisions of the FTL, being more controversial, have delayed its enactment, while the unfair competition provisions are perceived to be much more urgently needed.

To this end a wide range of business practices have been made subject to the FTL: monopolies, oligopolies, monopolization, combinations and mergers, discriminatory treatment, horizontal concerted actions, vertical restraints, exclusionary practices, pyramid sales programs, passing off, false advertising, and other acts that may confuse consumers. The FTL also addresses trade libel, misappropriation of trade secrets, and other deceptive and unfair practices that prevent the market from functioning in an orderly manner. Generally, competition in both goods and services is subject to the FTL.

Another salient feature of the FTL is that it defines enterprises and applies to them primarily. Enterprises include companies, sole proprietorships, partnerships, trade associations, and other persons or groups engaged in transactions and the sale of goods and services. Enterprises covered by this definition could also include privately and publicly supported foundations (which are similar to nonprofit, tax-exempt corporations in the United States) such as hospitals. Incorporated government-owned enterprises certainly are within this definition. Conceivably, government agencies should not be classified as enterprises. Indeed,
the FTC has taken the position that, while taking action pursuant to public laws, an agency is not an enterprise. Arguably, however, an inference can be drawn that where an agency engages in activities not pursuant to public laws (such as private transactions), it could constitute an enterprise under the FTL.\footnote{12}

A provision of the first draft of the Enforcement Rules\footnote{13} provided that where either an act in violation of the FTL or its effect occurs in the ROC, the FTL shall apply. Although now removed from the final Enforcement Rules, this concept is consistent with the ROC’s existing position on asserting legal jurisdiction.\footnote{14} Accordingly, the FTL could very well apply to foreign enterprises that do not maintain a permanent business establishment in Taiwan. Where they maintain a branch in Taiwan, they will certainly be subject to the FTL.\footnote{15} In light of the substantial foreign investment in Taiwan and its important role in international trade, extraterritorial application of the FTL to nonresident companies and application otherwise to foreign-owned companies located in Taiwan should be monitored closely by international practitioners.

B. Exemptions from the FTL

Falling within the FTL’s definition of enterprise only begins the analysis. The FTL also provides for three statutory exemptions. First, it recognizes that patents, trademarks, and copyright are legal monopolies granted by the government. As such, a proper exercise of such rights pursuant to the Trademark Law, Copyright Law, or the Patent Law will not violate the FTL.\footnote{16} However, what the FTC and the courts will perceive as reasonable and proper is unclear. This uncertainty may invite controversy.\footnote{17}

Second, article 46(1) of the FTL exempts activities otherwise in violation of the FTL if they are authorized by law, which literally means statutes enacted by the Legislative Yuan. The FTL offers no clear guidance on what other regulated activities will be exempt from the FTL.\footnote{18} In view of the popularity of “administrative guidance” or “moral suasion” in Taiwan, controversies have arisen. Thus

\footnote{12. Interpretation Kung-Yen-001, 1 FTC GAZETTE, no. 4, May 31, 1992, at 4.}
\footnote{13. FTL art. 48 authorizes the FTC to adopt these Enforcement Rules, a practice different from that in, say, the United States and Europe but similar to that in Japan.}
\footnote{14. See Criminal Code art. 3 which follows the same principle.}
\footnote{15. The FTC has informally taken the position that ROC branches of two merging foreign enterprises will be subject to the premerger review rules under the FTL. Speech by Vice Chairman Y-Nan Liao of the FTC, at Lee and Li, Taipei, Taiwan (June 4, 1992).}
\footnote{16. FTL art. 45.}
\footnote{17. Taiwan’s Patent Law already prohibits tying arrangements. In addition, commentators have argued that trademark licensing could not be designed to restrict markets. Moreover, in negotiations with American film companies in June 1992, Taiwanese owners of MTV business have argued that collective bargaining by American companies for copyright licenses would violate the anticartel provisions of the FTL.}
\footnote{18. Cf. the practice in Germany, where specific sectoral exemptions are set forth in its competition statute, and that in the United States, where exemptions are set forth in other federal statutes but can be created by judicial pronouncements as well.}
far, decisions or regulations of agencies that may not be clearly authorized by a statute have permitted business conduct not in conformity with competition rules.19

More importantly, article 46(2) of the FTL further exempts activities by public utilities, government-owned enterprises, and transportation enterprises, if they are approved by the Executive Yuan, for up to five years from its promulgation.20 The government enterprise exemption is particularly controversial since the private sector argues that the FTL does not treat them with an even hand.21 In addition, the public utilities and transportation enterprise exemptions also overlap in part with the exemption under article 46(1) of the FTL, further complicating the interpretation of these exemptions.

C. MONOPOLIES, Oligopolies, and Monopolization

Rightly or not, the primary concern of the FTL is monopolies. Following a de facto structural approach, it nominally defines a monopoly as a condition wherein an enterprise does not face competition or has such a superior market power as to exclude competition in a particular market defined in terms of both the relevant product or service and the relevant geographical area.22 Significantly, the FTL also applies to oligopolies, defined as a condition wherein two or more firms do not engage in price competition among themselves and collectively constitute monopolies.23 The FTL contains this progressive provision because the government perceives many sectors of the economy in Taiwan to be quite centralized.24 Also, in a civil law jurisdiction, like Taiwan, which lacks discovery proceedings, collusive agreements are harder to prove.25

The mere possession of monopoly power is not in and of itself objectionable.

19. Soon after the FTL took effect, a lawyer in Taiwan filed a petition with the FTC for a test case on the legality of securities brokerage commissions. The FTC finally took the position that such rates were authorized by a specific provision in article 85 of the Securities and Exchange Law. However, the FTC states that it still was not pleased with this exemption, and suggested that the fixed rates be removed. FTC, PRESS RELEASE (Mar. 28, 1992). An ongoing study by a group of scholars led by this author found that business activities permitted by more than 300 regulations of other agencies could be challenged under the FTL.

20. Such activities, if approved, will be exempt until Feb. 4, 1996. FTL art. 46(2).

21. As a result, the Executive Yuan has been very conservative in reviewing a pending application by the Ministry of Economic Affairs (MOEA) on behalf of government-owned companies regulated by it for exemption of more than twenty specific types of business activities.

22. FTL art. 5(1), 5(3).

23. Id. art. 5(2). It reflects the government's perception that many oligopolistic enterprises in Taiwan have engaged in tacit anticompetitive acts by "conscious parallelism" or "price leadership."

24. This provision is also influenced by the structural approach in article 22 of the German Act against Restraints of Competition [Gesetz gegen Wettbewerbsbeschränkungen]. Act Against Restraints of Competition, HGB, § 22 (1990) (Ger.).

However, unlike other national or regional competition rules, the FTL requires the FTC to regularly publish a list of monopolies and oligopolies. Although generally acknowledged to be unnecessary and perhaps harmful to effective enforcement, the unique requirement of predetermining the existence and extent of monopoly power without regard to whether there is any actual or alleged conduct of monopolization now becomes an important issue. Stakes are high for the FTC and businesses alike. Practical concerns include the strains on limited resources of the FTC to conduct thorough investigations, its strength and credibility to ensure that such findings will survive legal and political challenges, big business's concern with the stigma effect of being labeled a monopolist in Taiwan, and anticompetitive allegations by lesser competitors that may ensue.

The Enforcement Rules attempt to address these difficult issues. In predetermining which are monopolies, these Rules require the FTC to examine five factors: market shares in the relevant market, substitutability from both timing and geographical perspectives, the ability of an enterprise to influence prices, entry barriers to other enterprises, and conditions of imports and exports. More importantly, the Enforcement Rules set forth nonbinding "safe harbor rules" or thresholds. Generally, a monopoly or oligopoly will not exist unless an aggregate market share test is met, and either an individual market share test or an individual revenue test is also met. The individual market share test requires at least that: (1) an enterprise (in the case of single-firm domination) has a 50 percent share in the relevant market; (2) two enterprises jointly have a two-third share in such market; or (3) three enterprises jointly have a three-fourth share in such market. Each such enterprise should also have at least a 10 percent share in such market or more than NT $1 billion of revenues for the preceding fiscal year.

Even when these general tests are not met, firms could still constitute monopolies or oligopolies under special circumstances. For example, entry barriers to the provision of goods or services created by law or technology could exist. The Enforcement Rules also suggest that other factors may enable existing firms to influence supply and demand in the relevant market and exclude competition. Therefore, the FTL could be a powerful tool to force liberalization in traditionally restrictive markets.

The FTL prohibits a monopolistic enterprise from unfairly excluding others from the market, maintaining or modifying prices unjustifiably, requesting fa-

26. FTL art. 10 ("Monopoly enterprises shall be announced by the competent authority.").
27. A market share analysis should be based on the production, sales, inventory, import, and export volumes of the enterprise and for all firms in the relevant market. This analysis should be based on information obtained from the FTC's investigations and records of other Board of Foreign Trade of the MOEA. See Enforcement Rules art. 5.
28. Id. art. 3.
29. Id. arts. 4(1), 4(2).
30. Id. art. 4(3).
31. The FTC has hinted that, by a preliminary estimate, approximately 131 firms in Taiwan could be listed as monopolies under the criteria set forth in the Enforcement Rules. Liao, supra note 15.
vored treatment unjustifiably, and otherwise abusing its dominant market position.\textsuperscript{32} Oligopolies, which are treated as a form of monopolies, will be subject to the same prohibition. Because the FTL is more similar to article 86 of the Treaty of Rome\textsuperscript{33} than to section 2 of the U.S. Sherman Antitrust Act,\textsuperscript{34} European experience of how these prohibitions will be interpreted may be more useful.\textsuperscript{35} Conceivably, both predatory pricing and monopolistic pricing may constitute an act of monopolization. With reduced tariffs but higher retail prices and cost of living, both dumping and exorbitant prices have raised public concerns in recent years.

Buying power is also suspect under this provision insofar as a powerful buyer could exact unjustifiably favorable treatment. The FTL's legislative history clearly shows a strong public concern with monopsonies. Exclusionary practices that are anticompetitive are prohibited as well. This prohibition could force firms with substantial market power to drastically modify their distribution arrangements. Nonetheless, whether and how an economic analysis of the social cost and benefit of an exclusionary practice by market dominant firms will be made is unclear.\textsuperscript{36} Particularly troubling is the amorphous concept of 'abuse of dominant market position.'\textsuperscript{37} Guidance on its meaning could be sought from comparable concepts in European competition laws. However, until the enactment of the FTL, an abuse of right, however reprehensible, has never constituted a criminal offense or created administrative liabilities in the ROC.

While global competition may demand that companies in Taiwan be more scale-efficient, the FTL's sanctions reveal a strong contrary legislative intent to control big firms in Taiwan. A maximum three-year imprisonment or a criminal fine of up to NT $1 million, or both, may be imposed for violating these provisions.\textsuperscript{38} Compared with the United States' sentencing guidelines for Sherman Act\textsuperscript{39} violations, imprisonment and monetary penalties under the FTL seem to be vastly disproportionate. Moreover, a violation could also lead to administrative sanctions and civil liabilities.\textsuperscript{40} The severity of these sanctions also sharply contrasts with the uncertainty in determining what constitutes monopolization or oligopolization, as these FTL provisions typically follow standards such as 'unfair methods'\textsuperscript{41} and 'without proper reason.'\textsuperscript{42} As a result, the control of monop-

\textsuperscript{32} FTL arts. 10(1), 10(2), 10(3).

\textsuperscript{33} Treaty Establishing the European Economic Community, 298 U.N.T.S. 11 (1958) [also known as the Treaty of Rome].


\textsuperscript{36} Cf. article 24 of the Enforcement Rules, supra note 27, which mentions some factors in reviewing the legality of vertical arrangements in general.

\textsuperscript{37} Article 148 of the Civil Code also prohibits, as a civil matter, abusive exercise of rights.

\textsuperscript{38} FTL art. 35.


\textsuperscript{40} Id. arts. 30, 31, 32, 41. The administrative fines could be imposed consecutively, and the maximum of such fines imposed each time is also NT $1 million.

\textsuperscript{41} FTL art. 10(1).

\textsuperscript{42} FTL art. 10(3).
olies may become very controversial, with frequent clashes between the FTL and Taiwan's industrial policies.

While grappling with these thorny issues, regulators, prosecutors, litigants, and courts in the ROC inevitably will all have to look to foreign antitrust and unfair competition laws for guidance. For example, market power analysis is thus far unknown to lawyers traditionally trained in Taiwan. Even economists are not necessarily well versed in industrial organization in Taiwan. Because of the unique requirement in the FTL to publish and update a list of monopolies and oligopolies without regard to whether any actual anticompetitive conduct exists, the need for this analysis takes on more significance.

D. MERGER CONTROL

The FTL is not only concerned with monopolization, it also seeks to control monopolies at their inception. Accordingly, it authorizes the FTC to review a merger and similar forms of economic integration by requiring premerger notification and approval. A combination under the FTL could take any one of the following legal forms:

1. mergers;
2. holdings or acquisitions of more than one-third of the voting stock or capital of another enterprise;
3. a transfer or lease of all or a majority of an enterprise’s business or property;
4. frequent joint operations with other enterprises or operating another enterprise at its request; or
5. the exercise of direct or indirect control over the personnel of another enterprise.

This legal approach notwithstanding, the FTC and commentators generally agree that from an economic perspective, combinations can be classified into horizontal combinations among competitors, vertical combinations to integrate operations, and conglomerate combinations. However, how the legal definitions

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44. A case in point is that, according to one prior study, ten industries in Taiwan had a market concentration rate of more than 90 percent. See Fung-Hsiang Hsaio, Determination and Analysis of Market Concentration in the ROC, 13 Monthly J. Taip. Bank 43 (1981) (cited in World Law of Competition, supra note 3, § 2.02[3], at n.30). Pursuant to an unpublished memorandum of Taiwan's Price Surveillance Council, a former agency under the MOEA which is now merged into the FTC, enterprises that possibly had engaged in anticompetitive practices include the producers of PVC powder, PE plastics, and certain consumer products. Id. n.34. The result of many such studies, however, was not derived from a rigorous market analysis, and may have confused, for example, domestic output with total market demand. Failure to consider actual or potential import also reduces their usefulness.
45. FTL art. 6. An attribution rule applies where an enterprise group holds or acquires shares in another enterprise, so that all holdings will be aggregated. Id. art. 6(5).
of combinations will be interpreted in the context of economic integration remains to be seen.46

Intended to capture only sizeable, market-sensitive economic integration, the FTL sets up certain thresholds to determine what combinations require the scrutiny of the FTC:

1. where the combined enterprise will enjoy one-third of the market;
2. where one of the constituent enterprises to a combination has one-fourth of the market shares; or
3. where the sales of one of the constituent enterprises to a combination for the previous accounting year exceeded the minimum sales amount (presently, NT $2 billion47) published by the FTC.48

Failure to obtain the FTC’s prior approval to a reportable combination may result in divestiture, compulsory disposition of assets, cessation of business, and administrative fines.49 Accordingly, although the FTC does not have structural remedies for dealing with monopolization, it may unwind combinations that tend to create monopolies. Prudent firms, therefore, may be motivated to file for its approval when the applicability of the FTL is in doubt.50 In its review the FTC has to determine the legality of a combination under a cost-benefit analysis. If the advantages of such a combination to the national economy as a whole outweigh the disadvantages arising from restricted competition, the combination may nevertheless be approved.51 Potential benefits such as economy of scale, reduction of production cost, and rationalization of management are recognized by the FTL's

46. For example, it is unclear whether a merger of a wholly owned subsidiary into its patent company will be subject to the FTL. Similarly, it is unclear whether the “'holdings' test (which suggests a particular condition, as opposed to 'acquisitions' which suggests a specific action) will apply to holdings that already exceeded one-third when the FTL became effective. The same issue also exists for an enterprise that already controlled another enterprise before the FTL’s passage.

47. Publication 81-Kun-Fa-Mi-012, 1 FTC GAZETTE, no. 3, Apr. 30, 1992, at 1.

48. FTL art. 11(1). To alert enterprises that may be subject to merger review, the FTC is further required to publish and maintain a list of enterprises having a minimum 20 percent market share. Id. The sales threshold offers more certainty than the market share threshold test. Although enterprises proposing to combine may try to follow the market analysis prescribed under monopoly control provisions of the FTL and the Enforcement Rules, the difficulties inherent in this process could lead to miscalculations.

49. Id. arts. 13, 40. The requirement for a definitive approval distinguishes the FTL’s merger review provisions from those under the American Hart-Scott-Rodino Antitrust Improvement Act, under which failure to act by the enforcement agencies constitutes a de facto approval. 15 U.S.C. § 18a(a).

50. The Enforcement Rules impose unilateral or joint filing obligations based on the different legal definitions of combinations. Information to be filed includes sales amount, business report, and financial statements of all affiliated enterprises for the prior fiscal year; number of employees at each constituent enterprise, production, or operating cost; selling price and the unit value of the relevant goods or services sold; and a description of the positive economic effect of the proposed combination. A one-time supplemental filing may be made, which will toll the two-month deadline for a disposition by the FTC. Where necessary, the government may publish its approval of such combinations. Enforcement Rules, supra note 27, arts. 7, 8, 9, 10.

51. Id. art. 12.
legislative history. However, many practical issues still require further clarification by the FTC. Even at the policy level, the FTL's merger review provisions present important issues. The FTC, for example, needs to reconcile its policies with the traditionally mercantilistic industrial policies of the ROC, which, favoring scale economy, encourage Taiwan firms to compete globally. The more consideration is given to competitive pressures from abroad, the more such a review seems to differ from the market analysis used to determine monopolies.

E. HORIZONTAL CONCERTED ACTIONS

Although the FTL is nominally more concerned with monopolies, enforcement efforts since its enactment have focused on cartels, or concerted actions among enterprises. A concerted action requires some agreement, contract, or other form of coordination of intent and is necessarily consensual. It means a horizontal action among firms at the same level of production or sale that may affect how supply and demand for the relevant goods or services interact in the market.

The FTL establishes a general principle that enterprises in competition with each other may not engage in concerted actions to restrict prices, quantities, customers, territories, or otherwise restrict each other's commercial activities. Enterprises engaged in such cartels may be subject to a maximum three-year imprisonment and both criminal and administrative fines and may incur civil liabilities. This prohibition, however, follows the American per se rule only nominally. Following the model of Germany's and the European Community's

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52. For example, it is unclear whether adverse social and political consequences (such as plant closure and layoff of redundant employees) should come into the economic cost-benefit calculus. It is also unclear how the NT $2 billion sales threshold will apply, and the FTC has hinted that foreign firms with branches in Taiwan that have such sales should apply insofar as their branch operations will be combined, despite that both enterprises are foreign entities. See Liao, supra note 15.

53. An indication of such a dichotomy is the inconsistent threshold requirements for monopolies and combinations in the Enforcement Rules. Although a general sales volume test of NT $1 billion was used for examining monopolies, the FTC failed to adhere to this logic in that it relaxed the threshold for combinations; the NT $2 billion sales threshold for requiring combinations to be approved is twice as high as the threshold for monopolies.

54. This is in part because the list of monopolies has not been published. But there is also a strong belief that cartels are very popular; some of them have even been formed with the government's encouragement or acquiescence through "administrative guidance" or "moral suasion." 55. Enforcement Rules, supra note 27, art. 2(2). However, it is not settled how joint ventures will be treated. Conceivably, large-size joint ventures could be subject to rules governing both horizontal concerted actions and combinations.

56. Id. art. 2(1). This definition seems to add a "de minimis" exception to concerted actions among competitors. It therefore could exclude from antitrust scrutiny cartels among competitors not having adequate market power.

57. FTL art. 14(1).

58. Id. arts. 30, 31, 32, 35, 41.
competition laws, the FTL also establishes seven specific exceptions whereby such cartels could nevertheless be legalized.  

As a general condition to legalizing cartels, the FTC has to find that such cartel arrangements are "beneficial to the national economy or public interest as a whole." A showing by enterprises that their agreements or joint arrangements are procompetitive is insufficient. Such agreements and arrangements not only have to be jointly notified in advance by such enterprises or their trade association, but a definitive approval by the FTC is also required. To this extent, this FTL requirement is different from the European models that have developed practices to permit block exemptions and negative clearances. The FTC may also impose conditions and require modifications as a condition of its approval. An approved concerted action will be valid for up to three years. When good cause is shown, such approvals may be extended for terms not exceeding three years. The seven exceptions, each of which smacks of a rule-of-reason analysis, are:

1. standardization cartels, that is, product or model standardization in order to reduce cost, improve quality, or enhance efficiency;
2. research or marketing cartels, that is, joint research and development or joint market development to upgrade technology, improve quality, reduce cost, or enhance efficiency;
3. specialization cartels, that is, agreements to engage in separate specializations to facilitate rationalization by enterprises;

59. Note, however, an empirical research that showed costs increased after cartels were legalized in West Germany. DAVID AUSDRETSCH, THE EFFECT OF LEGALIZED CARTELS IN WEST GERMANY (1987) (cited in DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 745 (1990)).
60. FTL art. 14.
61. To this extent, this FTL requirement is different from the prevalent American treatment of agreements among competitors. The legality of such actions is typically challenged in a public or private enforcement proceeding, whereas request for advisory opinions through the United States Department of Justice’s business review process is still relatively rare.
62. Enforcement Rules, supra note 27, art. 11. An application should disclose, for example, the nature, term, and applicable location of such concerted actions; agreement or other documents contemplating such joint actions; the substance of such actions and proposed method for implementation; each participating firm’s revenues, financial statements, and business reports for the prior fiscal year; and quarterly sales and production and pricing data concerning the relevant goods or services for two years. In addition, they should provide a self-analysis describing the cost structure before and after such proposed joint actions; the proposed cartel’s impact on enterprises not participating in such actions, impact on market structure, supply, demand, and prices; impact on upstream and downstream industries and their markets; benefit or adverse consequences to the economy as a whole; and public interest. Id. arts. 12, 13.
63. FTL art. 15. Whether such approvals will become perpetual shields from market competition through extensions remains to be seen.
64. The application should state how these efficiencies could be obtained. Enforcement Rules, supra note 27, art. 14.
65. The application should demonstrate cost savings in such activities and specify how these efficiencies could be obtained. Id. art. 15.
66. The application should state how these efficiencies could be obtained. Id. art. 14.
(4) export cartels, that is, agreements limited to foreign markets in order to ensure or facilitate export;\textsuperscript{67}

(5) import cartels, that is, joint importation of foreign goods in order to improve the effect of trade;\textsuperscript{68}

(6) recession cartels, that is, joint restriction of output, sales, equipment, or prices pursuant to a plan to meet demands during an economic recession when market prices for goods are lower than average production cost and enterprises in that industry experience difficulty in surviving or excess production;\textsuperscript{69} and

(7) small business cartels, that is, joint actions taken to improve operating efficiency of small and medium enterprises or enhance their competitiveness.\textsuperscript{70}

These seven exceptions indicate that they are not necessarily guided by economic considerations alone. For example, in June 1992 the FTC approved a grains import cartel, previously organized by the government in part to balance U.S.-Taiwan trade, to continue until the end of 1993. In addition, the seven exceptions are exclusive and, therefore, rigid. However, the definition of concerted action is open-ended. Justifiable joint business activities may nevertheless constitute illegal concerted actions if they do not fall into any of the seven exceptions. This is in part because, at the end of the legislative process, the seventh exception was changed from a catchall exception to one for small businesses only. A case in point is the legality of joint construction bids. A popular practice that is sometimes even required by agencies awarding infrastructure construction projects encompassed by Taiwan’s massive Six-Year Plan, joint construction bids could be supported by procompetitive considerations, but may not fit into any of the seven exceptions. As a result, the FTC is in the process of drafting guidelines to screen these bids.

These seven exceptions will render the FTC a potentially important agency as it could sit in judgment on the industrial policies of other agencies. Interest groups may be tempted to treat the FTC as just another regulator that they are prone to

\textsuperscript{67} The application should also state the ratio of such participating enterprises’ export to the total export in the most recent year and analyze how export can be enhanced. \textit{Id.} art. 16.

\textsuperscript{68} The application should state the participating firms’ import for the last three years and the cost savings from joint importation and should explain what specific impact may follow such joint actions. \textit{Id.} art. 17. The filing should include comparative data on average production cost and prices, capacity, utility ratio, sales, production, import and export value, and volume; inventory for the last three years; change in the number of firms in the relevant industry over the last three years; market outlook; and remedial measures taken at such firms’ own initiatives. \textit{Id.} art. 18.

\textsuperscript{69} \textit{Id.} art. 19.

Capture. As indicated by the grains import cartel case, what was once accepted or encouraged by the government is now suspect and, unless exempt from the FTL, will eventually come under the FTC’s scrutiny. For its part the FTC has adopted a cautious, case-by-case approach, at least initially. Since the decisions of the FTC will have to be published in government gazettes, a body of administrative precedents will become apparent and available as the FTC builds up its expertise in dealing with cartels.

F. Vertical Restraints and Exclusionary Practices

The FTL also regulates vertical and exclusionary arrangements. It will nullify resale price maintenance (RPM) unless daily consumption goods are involved that may be readily substituted in the marketplace through “fee competition.” These consumer goods are to be published, and the FTC has hinted that the list of goods that can be subject to an RPM will be short. On the other hand, the FTC has also taken the position that, in the case of an agency or consignment sale, an RPM will be permitted because, legally speaking, no resale of goods occurs. The FTC has also indicated that nonbinding resale price suggestions should be acceptable.

Enforcement of the rule nullifying RPMs can be straightforward because of its simplicity. Since the FTL came into force many firms, in response, have renegotiated with their resale dealers to remove the RPM arrangement. The FTL, however, does not criminalize a violation of this rule, which as stated only nullifies an agreement to the contrary. Thus, this treatment perhaps reflects an awareness that RPM is a very controversial issue in antitrust law in certain countries such as the United States. Still, in recent enforcement actions the FTC has hinted that it could assess administrative fines on enterprises for a violation of this rule.

The FTL also prohibits an enterprise from engaging in any of the following conduct if it constitutes a threat to fair competition. A violation of this provision is punishable by two years’ imprisonment or criminal fines, or both. However, criminal liability can attach only when the enterprise alleged to be in violation has failed to comply with a cease-and-desist order of the FTC. The same rule applies to an enforcement action by the FTC to seek administrative fines.

71. FTL art. 17.
72. Id. art. 18.
74. FTL art. 41. Therefore, this position is tantamount to criminalizing the rule nullifying the RPMs.
75. Id. art. 19. As the following discussion will bear out, “unfair competition” in this provision is used to describe primarily what are understood to be vertical restraints and exclusionary arrangements in the United States.
76. Id. art. 36.
77. Id. In recent enforcement actions, the FTC has provided for deadlines as short as ten days for compliance with this injunctive order.
78. Id. art. 41.
79. Id. art. 19(1).
The first prohibition under this rule relates to inducement to boycott or refusal to deal. Specifically, an enterprise may not, acting with the purpose of injuring another enterprise, cause another enterprise to terminate other enterprises’ supplies, purchases, or other transactions. Even though this prohibition may parallel the general rule against concerted actions such as collective boycott, arguably no actual agreement to this effect is needed; solicitation alone is sufficient.

Second, unreasonable discrimination also constitutes a violation. Specifically, this provision prohibits not only unreasonable price discrimination, but also nonprice discrimination. Unlike the U.S. Robinson-Patman Act, discrimination in rendering services can be illegal as well. Conceivably, discrimination should be found by comparing goods or services of like quality. Cost differential, volume, credit risks, and market conditions (such as the need to meet competition) may constitute reasonable defenses. In any event, the breadth of this rule could force enterprises to justify their various business arrangements with different customers from time to time.

Third, an enterprise may not induce customers of its competitors to transact business with it through duress or improper business ethics, such as commercial kickbacks. Its vagueness could prevent rigorous competition. A controversy in point is the impact of the rule against improper enticement on promotional campaigns such as offering gift items, prizes, or lotteries. The FTC is in the process of developing guidelines to control such promotional activities. In addition, a predatory low bid by an enterprise without sufficient market power may also constitute a violation.

Fourth, an enterprise may not employ coercion, bribery, or other improper means to cause other enterprises to refrain from price competition or participate in combinations or concerted actions. Therefore, this rule could apply to situations where only a solicitation or attempt to jointly engage in anticompetition conduct is evidenced.

Fifth, an enterprise may not employ coercion, bribery, or other improper means to obtain confidential information of other enterprises relating to sales, production, customers, or technology. Although well-intended and much needed, this rule against misappropriation of trade secrets is fatally flawed insofar...
as criminal enforcement is concerned. The cease-and-desist requirement essentially permits a culprit to relent, thereby making it extremely difficult to establish a prima facie violation. The misplacement of this requirement in article 19(5) has literally taken the teeth out of an otherwise well-crafted inhibition.

Sixth and foremost, an enterprise may not use improper restrictions on the business activities of its counterparties as a condition for dealing with them. Restrictions could take such forms as tying, exclusive dealing, territorial restraint, and customer or usage restrictions. One of the most succinct provisions of the FTL, this rule nevertheless promises to have a far-reaching and profound impact in Taiwan as it affects virtually all types of nonprice vertical restraints. Clearly, a "rule of reason" analysis is called for. The legality of a challenged transaction will depend on factors such as the intent, purpose, and market position of the parties, market structure, nature of products or services, and the competitive impact of implementing such restrictions in the relevant market. For firms with sufficient market power to be listed as a monopolist or oligopolist, this analysis offers standards of legality that are somewhat more concrete than those governing the antimonopolization rules in article 10 of the FTL. To be sure, a case-by-case approach will be followed as the FTC and practitioners develop their expertise in interbrand and intrabrand market analysis.

Unlike the case of a horizontal arrangement, the FTL does not authorize the FTC to evaluate such vertical restraints and exclusionary practices in advance through an application by the enterprises concerned. Although a request for interpretation is possible, the FTC’s recent responses do not offer much guidance. Still, a consensus exists in Taiwan that horizontal arrangements are more likely to have an anticompetitive effect; whereas (at least nonprice) vertical arrangements would not present as much anticompetitive risk. The FTC will do well to concentrate on economic, rather than political or social, considerations in its scrutiny of these practices.

II. Unfair Competition

A. Passing Off

The FTL’s unfair competition provisions are generally much less controversial than its antitrust provisions. At the heart of these provisions, which seek to prevent

89. Id. art. 19(6).
90. Enforcement Rules, supra note 27, art. 24(1). However, it does not apply to RPM, which is subject to the nullification rules under article 18 of the FTL.
91. Id. art. 24(2). The FTC has taken the position that restrictions imposed in connection with agency sales would not violate the FTL. FTC, PRESS RELEASE (Apr. 22, 1992).
93. On the other hand, there has been mounting political pressure since mid-1992 for the FTC to take enforcement actions against high-priced consumer products. As a result, exclusive distributorships have come under closer scrutiny.

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misappropriation of commercial goodwill, confusion of consumers, and other unfair methods of competition, is the rule against passing off. Although the Trademark Law, Patent Law, and Copyright Law in the ROC have all been amended to expand the scope of protection and increase civil and criminal liabilities, legal protection of commercial goodwill would not be complete without unfair competition law. Added to the draft version of the FTL in the mid-1980s at the request of Taiwan's trading partners, this provision fills the void. It prohibits the misuse of names, business names, corporate names, trademarks, service marks, packaging, containers, appearance, or other commercial symbols of others that are known to the relevant public. The use of a commercial symbol that is identical or similar to the commercial symbol of others constitutes an act of unfair competition. A use also includes a sale, transportation, import, and export of goods or services identifying such symbol. Misuse of famous foreign trademarks, even though they are not registered, will also constitute a violation.

One potential problem with the passing-off provision of the FTL is that the text seems to require actual, rather than possible, confusion by members of the relevant public. This distinction could make significant difference in enforcement actions, as it affects the burden and level of proof. Another potential problem with this provision is how its broad protection will affect other laws such as the Trademark Law. The rule against passing off grants broad protection to trademarks as well. In the ROC, however, under the current Trademark Law, which trademark takes precedence will require a careful analysis. A practical example is a person racing to the National Bureau of Standards of the MOEA to register a trademark that is beneficially owned by another person, whether through good faith prior use or registration of the trademark abroad. Since Taiwan follows the absolute priority-of-registration rule, and instances mentioned above do occur from time to time, resolution of this important issue will require a careful balancing of the policies behind these two laws.

95. Before the enactment of the FTL, there had been some similar cases which proceeded on the basis of a business tort in violation of article 184 of the Civil Code. In recent years, Taiwan courts have come to hold that passing off can constitute such a violation.
96. FTL art. 20. There are several exemptions to this prohibition, such as generic use of a term for goods or services that is customary in the trade or industry, use of a person's own name, and good faith use of a symbol before it becomes known to the general public, whether by the original user or by someone who continues with such use through taking over the business of the original user. Id. art. 20(1)-(3). A violation of article 20 is punishable by imprisonment up to three years and/or a criminal fine up to NT $1 million. An administrative fine up to NT $1 million may be assessed consecutively if the FTC's cease-and-desist order is not complied with. Id. arts. 35, 41.
97. The FTL provides for justifiable use of trademark rights as an exemption from it, and it has been suggested that this constitutes sufficient authority for the Trademark Law to take precedence. However, when not specifically provided in the FTL, other laws will apply. Id. art. 45.
B. FALSE ADVERTISING AND SIMILAR COMMUNICATION

Under the FTL an enterprise may not make, on goods themselves or in any advertising, any false or misleading representation that is likely to cause confusion or mistake by consumers as to relevant information such as the goods' price, quantity, quality, content, manufacturing process, manufacturing date or place, expiration date, method of use, purpose, place of origin, manufacturer, processor, and place of processing. A sale, transportation, export, or import of such goods is also prohibited. In addition, where relevant, this rule also applies to the provision of services. Advertising agencies and the media on which such advertisement appears will be jointly and severally liable if they know or should have known the false or misleading nature of such communication with consumers. On February 12, 1992, the FTC issued its first cease-and-desist order against organizers of an auto show who engaged in mispresentation to the public, thereby commencing an active enforcement program in this area.

C. TRADE LIBEL

Also added to the draft version of the FTL as a result of U.S.-Taiwan trade talks in the mid-1980s is the rule against trade libel. An enterprise may not, for the purpose of competing with others, make or publicize any false statement that is likely to injure another person's business reputation. The requirement of a specific intent to injure competitors is designed to shield tests performed by consumer groups from this kind of liability. As competition becomes keener as a result of Taiwan's economic liberalization, product comparison has both offensive and defensive strategies. Fair competition in providing comparative market and product information as required by this provision is desirable and may be invoked to determine the legality of comparative advertising, which has gained popularity in Taiwan.

D. MULTILEVEL SALES

Multilevel sales can be a legitimate way of distributing consumer goods. However, when the FTL was being drafted, illegal pyramid schemes that resorted to fraud, misrepresentation, and undue pressure mushroomed. As a result, the MOEA thought it necessary to control multilevel sales and criminalize illegal pyramid schemes. The FTL now makes it an offense for anyone to

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98. Id. art. 21.
99. As a result of a last-minute change in the draft FTL, no criminal liability will be imposed on any person involved in such action. However, the FTC may also require retraction or correction. Enforcement Rules, supra note 27, art. 25.
100. Case 81-Kung-Chu-001, 1 FTC GAZETTE, no. 1, Feb. 29, 1992, at 3.
101. FTL art. 22.
engage in a multilevel sales plan if participants receive commissions, monetary rewards, or other economic benefits mainly by inducing others to join in the plan, rather than from the marketing or sale of goods or services at reasonable market prices. 102 In addition, the FTL authorizes the FTC to adopt Regulations for the Control of Multilevel Sales. 103

E. OTHER METHODS OF UNFAIR COMPETITION

Following the model of section 5 of the U.S. Federal Trade Commission Act, the FTL provides for a catchall rule against other methods of unfair competition. Specifically, an enterprise may not conduct any deceptive or obviously unfair acts that are sufficient to affect orderly functioning of the market. 104 A violation will not incur criminal liability. However, failure to comply with the FTC’s cease-and-desist order will lead to administrative fines. 105 What constitutes other methods of unfair competition will require clarification on a case-by-case basis. The FTC and courts in Taiwan may extrapolate from interpretations and case law governing unconscionable conduct in article 74 of the Civil Code.

With reduced tariff rates and the substantial appreciation of the New Taiwan dollar, import growth in Taiwan in recent years has been significant. Part of such growth can be attributed to parallel importation of genuinely trademarked goods. As courts in Taiwan are now less inclined to treat such importation as a violation of the Trademark Law, the question of whether it could constitute a violation of the FTL has drawn increased attention. In a recent interpretation the FTC recognized that where an authorized distributor or locally licensed manufacturer is already present, consumer goodwill can be created by local promotional campaigns that may involve significant costs. A parallel importer may be found to engage in unfair competition if it affirmatively misleads consumers, through misrepresentation on the contents, source, contact name or address, or otherwise that such goods are imported by the authorized distributor. By this interpretation the FTC acknowledges that a ‘‘free ride’’ under such circumstances can constitute a deceptive or obviously unfair act. 106

102. FTL art. 23(1). A violation can be punished for imprisonment up to three years and/or a criminal fine of NT $1 million. Failure to comply with a cease-and-desist order of the FTC may lead to an administrative fine of NT $50,000 to NT $500,000. The FTC may also require such plans to dissolve or cease operations. Id. arts. 35, 42. A multilevel sale refers to a sales or marketing plan or organization in which a participant pays certain consideration in exchange for acquiring the right to sell or promote the sale of goods or services and the right to introduce other persons to join the plan or organization, thereby obtaining a commission, monetary reward, or other economic benefit. Id. art. 8.

103. FTL art. 23(2). These regulations require prior reporting with the FTC of such sales plans. Organizers are required to provide detailed information to prospective participants and maintain books and records at their principal place of business. Additionally, organizers may not impose certain terms that may harm the interest of participants.

104. FTL art. 24.

105. FLT art. 41.


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III. Remedies and Enforcement

A. Civil Remedies

The FTL provides strong civil remedies to anyone injured by any anticompetitive act or unfair methods of competition. Such a person may seek injunctive relief. This remedy is patterned after the relief for infringement of real property rights and, as such, is desirable in controlling unfair market practices. The FTL provisions prohibiting unfair competition indeed manifest a strong policy to protect commercial goodwill, which is a form of property right. However, an injunctive relief may not be appropriate for alleged violations of the antitrust rules in the FTL. A “moral hazard” could be created if an astute enterprise wishes to exploit this relief to obtain a prior restraint on the business conduct of its competitors. This chilling effect is not conducive to maintaining a vibrant, competitive economy. However, compensatory, after-the-fact relief should be sufficient.

Monetary damages may be awarded to a person injured by a violation of the FTL. Whether plaintiffs need to show that damages are caused by intentional harm is unclear, however. Some commentators, including legislators while reviewing the draft legislation, have adopted a literal interpretation and suggested that strict liability will follow a violation of the FTL. In countries such as the United States, however, antitrust violations are typically analyzed as an intentional tort. How causation will be analyzed also remains to be seen. Following a misappropriation theory, damages may be based on the illegal gains of the defendant. This principle is workable where there is unfair competition. However, calculating damages will be more complicated for different types of antitrust violations. Whether the direct injury requirement in ROC damages law will lead to a rule similar to the direct purchaser rule in Hanover Shoe v. United Shoe Machinery Corp. and Illinois Brick Co. v. State remains to be seen. In the case of joint defendants, whether contribution should be allowed will also be an interesting issue.

107. FTL art. 30.
108. See Civil Code art. 767.
109. FTL art. 31.
111. See Atlantic Richfield Co. v. USA Petroleum, 495 U.S. 328 (1990) (maximum RPM not proximate cause of plaintiff’s injury).
112. FTL art. 32(2).
115. From a policy perspective, such liability may be allocated on the basis of market shares. Alternatively, contribution may be disallowed to create a deterrent for those engaging in anticompetitive activities. While the FTL is silent on this issue, article 208 of the Civil Code suggests that, as among joint defendants, damages should be shared equally.
Under the FTL, actual damages may be trebled at the discretion of the court.\textsuperscript{116} From the comparative law perspective, this discretionary treble damages relief is most interesting. It is similar to the treble damages remedy in the U.S. Clayton Act, section 4.\textsuperscript{117} However, it is not automatic and not necessarily treble. As a form of punitive damages it deviates from the traditional civilian compensatory (rather than deterrent) rationale for the recovery of damages for civil wrongs prevailing in the ROC.\textsuperscript{118} Unrecognized foreign legal persons and entities may bring an action under the FTL if reciprocity exists.\textsuperscript{119} Therefore, this FTL provision would give equal standing to sue to foreign companies not qualified to do business in the ROC.\textsuperscript{120}

B. ENFORCEMENT BY THE FTC

The FTC is organized as a commission with nine commissioners who, being appointed by the president of the ROC with the recommendation of the premier, serve a three-year term that may be renewed. Unlike other commissions or councils in the ROC, which for all practical purposes are controlled by the head of the agency, the FTC functions in a way that is much closer to a truly independent commission. It is required to function independently, and its commissioners must have expertise in such areas as law, economics, or administration.\textsuperscript{121} The chair of the FTC, however, is considered a member of the cabinet, the Executive Yuan, and the FTC is accountable to the Legislative Yuan. As the FTL is new to Taiwan, the FTC is the only repository of expertise in the area of competition law. Judges and prosecutors have yet to embark on any intensive educational program.

The FTC also wields substantial power. It is authorized to adopt the Enforcement Rules that, according to the practice in Taiwan, will receive substantial deference. Compared, for example, with the Merger Guidelines of the Federal Trade Commission and Department of Justice of the United States, the Enforcement Rules are more likely to be upheld in court. The FTC may also exercise semijudicial power, such as the "administrative investigatory power."\textsuperscript{122} To this end the FTC may, under pain of administrative fines for failure to comply, compel statements of facts and opinions from all interested parties, require production of

\textsuperscript{116} FTL art. 32(1).
\textsuperscript{118} Id. art. 32. There is already an emerging trend to rely upon punitive damages in the ROC. For example, the Securities and Exchange Law, as amended in 1988, now provides for treble damages for insider trading in art. 157-1. A provision in the draft Consumer Protection Law also provides for discretionary treble damages.
\textsuperscript{119} FTL art. 47.
\textsuperscript{120} This provision is similar to the enforcement provisions of the ROC's recently amended intellectual property laws. See Patent Law art. 88-1; Trademark Law art. 62-1; and Copyright Law art. 17.
\textsuperscript{121} FTL art. 28.
\textsuperscript{122} Id. art. 27.
documents by others, and conduct on-site investigation. As indicated above, the FTC is also empowered to impose a substantial amount of administrative fines and, under certain circumstances, structural relief. Striking the proper balance between government policies such as trust-busting and investment promotion will be a delicate task for the FTC.

C. CRIMINAL LIABILITY

The FTC imposes criminal liability for many types of violations. While the FTL bill stated that the antitrust rules were drafted to be much more lenient than rules against unfair competition, actually the reverse has happened. The FTL's criminal sanctions could disrupt distribution arrangements. Under the criminal jurisprudence of the ROC, corporations generally are considered not capable of committing crimes. The FTL has modified that traditional rule. In addition, the civil practice of acting as a "private attorney general" in the United States finds a distant cousin in the private prosecution system in Taiwan. Taiwan's Code of Criminal Procedure permits the direct victim of a crime to prosecute the offender as if he was the government prosecutor. Although an effective enforcement tool, the private prosecution rule, with its great potential for harassment, could also turn the FTL on its head.

IV. Conclusion

A. EXERCISE IN LEGAL TRANSPLANT

While a bold attempt to extrapolate from abroad and transplant to Taiwan antitrust and unfair competition principles, the FTL is still unlike its counterpart in, for example, the United States, where a corpus of thousands of judicial precedents offers much better guidance. Any codification attempt such as the FTL almost guarantees that the resulting legislation has to be open-ended and yet all-inclusive so that room for interpretation in the future remains. Such a legal transplant, once engineered, will become a continuing enterprise as the FTC and the courts will have to look to relevant foreign sources for continuing guidance on various issues that will surface under the FTL. But competition laws are necessarily imbued with ideologies, and the political economy of the governing law for the marketplace cannot easily be copied.

123. Id. art. 27.
124. An example in point is the limited deterrent for criminal misappropriation of trade secrets in art. 19(5) because of the poor draftsmanship.
125. Cf. Alan Watson, Legal Transplants and Law Reform, 92 L.Q. Rev. 76 (1976), in which he argued, perhaps simplistically, that the key for a law reformer interested in legal transplants is to find a transformable idea.

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B. THE "RULE OF REASON" APPROACH

The FTL bill was drafted with the intent to provide strong sanctions against market cornering and unfair practices of competition. What is fair, however, is often debatable, especially in a country like the ROC that is just beginning to experiment with competition laws. With the exception of RPM arrangements, for all practices that may have an anticompetitive effect, the "rule of reason" approach is adopted as a test of legality. The drafters hoped that this approach would enable the FTC and the courts to consider the intent, effect, and reasonableness of such practices in order to determine whether such practices should be permitted. There are, however, costs to this approach. While the FTL retains flexibility through this rule, it loses the certainty needed for compliance and guidance. This uncertainty is further compounded by the breadth of the FTL.

C. IN THE NAME OF FAIR TRADE

What fundamental principles should influence legislation in the name of fair trade? As far as the antitrust rules of the FTL are concerned, what is fair may not be the right question to ask. Maximizing consumer welfare would suggest that efficiency should be the predominant rule of the game. Law and economics are both relevant to competition rules. Interestingly enough, academic lawyers in Taiwan, who are often trained in Europe, are quite comfortable with the more expansive, social-engineering role for the government. They tend to believe that fairness should take precedence. Their colleagues in the economics profession, most of whom are trained in the United States, offer a sharp contrast. Students of this dismal science in Taiwan are generally more concerned with government failure than with market failure.

As the FTL becomes a permanent feature of the judicial edifice in Taiwan, the fundamental question of how much benefit it can gain for a small, open-ended, rapidly liberalizing and newly industrializing economy will be asked time and again. Likewise, one might ask: While unfair competition rules in the FTL justify their legitimacy by complementing the traditional tort law, what proper place is there for the FTL's antitrust rules as Taiwan rapidly integrates itself into a vastly different economy.


127. Michael E. Porter, for example, has advocated for rigorous enforcement of antitrust laws. MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 662–64, 690 (1990). Note, however, that it took ten years to enact the FTL, during which time Taiwan has been transformed into a vastly different economy.
the global trading community? These questions are too important to be left to regulators and judges alone. Companies, domestic and foreign, doing business in Taiwan and their counsel should do well to ask these questions. Eventually, they will become better prepared to deal with the new rules, as embodied in the FTL, governing the marketplace.

128. A government official who has made a significant contribution to Taiwan's economic development in the last forty years thinks that Taiwan does not need antitrust laws as long as it liberalizes its economy. K.T. Li, supra note 5, at 141.