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### Competition policy in East Asia : the cases of Japan, People's Republic of China, and Hong Kong

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Competition Policy in East Asia: The Cases of Japan,  
People's Republic of China, and Hong Kong

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**Competition Policy in East Asia:  
The Cases of Japan, People's Republic of China, and Hong Kong**

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Abstract: This paper describes and evaluates the competition policies in Japan, China, and Hong Kong. A simple framework based on the economic incentive of violations of law is used to evaluate the effectiveness of competition policy. After half a century of effort, Japan has finally established of a modern antitrust system, although its surcharge system could be further improved so as to enhance the deterrence effect of the law. China and Hong Kong (as most other East Asia countries) are at the early stage of developing an adequate and effective competition policy. Their short experiences, however, demonstrate the importance and complexity of designing a truly independent enforcement system. Factors impeding the development of competition policy in East Asia include the lack of internal interest, conflicts with other national policies, and the influence of state-supported enterprises. There is much East Asian countries can learn from the cases reviewed, particularly in the field of institution building.

*JEL* Classifications: K21, L4.

Keywords: Competition policy, deterrence effect, institution building

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## 1. Introduction

Competition laws promote economic efficiency and social welfare by prohibiting restrictive business practices and maintaining a “level-playing field”. Approximately 82 countries now have competition laws in today’s world.<sup>1</sup> Although relatively new to East Asia countries, competition law has become one of the most important policy issues in this region. This paper reviews the cases of Japan, which is the first Asian country to introduce competition law,<sup>2</sup> the People’s Republic of China and Hong Kong, which, like most other countries in this region, introduced a competition policy within the past decade. What are the current states of their competition policies? How effective are these policies and their enforcement? What can be learnt from the experiences of cases reviewed?

Emphasis will be given to both the content of the competition policy/laws and the working of the enforcement system. A simple framework developed in the literature of law and economics is used to evaluate the effectiveness of competition policy. According to this framework, effective deterrence of violation of competition law requires that the expected cost of violating the law, which equals the probability of getting caught times the amount of fine to be imposed, be no lower than the illegal gain. While the law specifies the severity of sanctions, the probability of detecting a violation depends on how the enforcement system is designed and operates in practice. Since the probability of detection is less than one, the fines to be imposed must exceed the actual illegal profit, thereby justifying a punitive (or multiple damages) system.

With half a century of effort, particularly the significant amendments of its antimonopoly law made during the 1990s and recent improved enforcement, Japan has made its way to the establishment of a modern antitrust system. Nevertheless, the surcharge system, its major mechanism for imposing sanctions, is still not yet consistent with the basic deterrence principle mentioned above. China and Hong Kong, on the other hand, are at early stage of developing an adequate and effective competition policy, as in the case of most other Asian countries. In China, besides lacking a comprehensive antimonopoly law, the 1993 Anti-Unfair Competition Law, enforced primarily through

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<sup>1</sup> See Pitofsky (1998)

<sup>2</sup> The Philippines enacted its anti-monopoly law in 1925 under the American rule.

local administrative agencies, is ineffective in combating violations protected by local interests. While seemingly easy to operate, the sector-based approach of Hong Kong suffers from the informational problem that the enforcers are unable to convey their impartiality and independence to the general public.

After a brief description of the objectives of competition law, Section 3 of the paper contains the simple framework on effective deterrence, which is useful in evaluating the effectiveness of competition law. Sections 4, 5 and 6 examine competition policies in Japan, China, and Hong Kong, respectively. Section 7 draws some common lessons and general points that might be applicable to other countries in the region. Section 8 provides some concluding remarks.

## **2. Objectives of Competition Law**

Competition laws can be defined as a set of rules which govern the way in which business firms compete or interact with one another in the market place. The objectives of competition law, according to the *Model Law on Competition* recently published by UNCTAD, are<sup>3</sup>

“To control or eliminate restrictive agreements or arrangements among enterprises, or merger and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.”

The Pacific Economic Cooperation Council published a set of (non-binding) principles for guiding the development of a competition-driven framework for APECs economies which declares that

“the ultimate goal of this competition framework is to promote the process of competition, as opposed to the welfare of individual competitors, in order to achieve greater overall economic efficiency and an increased average standard of living in domestic economies and the APEC region as a whole (PECC, 1999, p.6)”

Competition laws in some countries, such as Japan and P. R. China, also have consumer protection as one of the purposes of competition law.

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<sup>3</sup> UNCTAD, 2000.

According to the UNCTAD Model Law, competition law covers three main areas: restrictive agreements or arrangements, abuse of dominant position of market power, and merger and acquisitions. Unfair methods of competition are also prohibited in some countries such as the U.S., Japan, the Republic of Korea and P. R. China.

Competition policy is relatively new to East Asia, with many countries having established such a policy within the past ten years. Table 1 contains some basic information concerning some Asian countries that have competition laws:

Table 1. Main Competition Laws in Some Asian Countries

Country	Name of Law	Date of Enactment
P. R. China	Anti-Unfair Competition Law	1993
Hong Kong	Competition Policy Statement/Sector-based Competition Provisions	1998
India	Monopolies and Restrictive Practices	1969
Indonesia	Law Concerning Prohibition of Monopolistic Practices and Unfair Business Competition	1999
Japan	Antimonopoly Act	1947
The Philippines	Antimonopoly Law	1925
Republic of Korea	Monopoly Regulation and Fair Trade Act	1980
Taiwan	Fair Trade Law	1991
Thailand	Price-Fixing and Antimonopoly Act (Renamed Trade Competition Act in 1999)	1979



### **3. An Economic Framework for Evaluating the Effectiveness of Competition Law**

Competition laws differ across countries in terms of coverage, content, enforcement procedure, legal system, and social, political, cultural or historical background. In order to evaluate the effectiveness of competition law in a given country, it is useful to adopt the following economic framework, which was developed in the law and economics literature and has contributed significantly to the understanding of the economic incentives of violation of competition laws.<sup>4</sup>

Like in most other laws, competition laws depend on sanctions and penalty in order to stop violations. The expected penalty (or cost) are determined by such factors as the type and size of penalty imposed on violators, if they get caught, and the probability that a violation is uncovered and the participants successively prosecuted:

$$\begin{aligned} \text{Expected cost of violating the law} &= p \times L \\ &= (\text{the probability of getting caught}) \times (\text{the losses due to punishment}). \end{aligned}$$

#### *Factoring Determining the Size of Losses*

The severity of penalty,  $L$ , is specified in the law. What type of penalties can be imposed? Is there criminal as well as civil remedies? What is the amount of fine to be levied? Are there multiple damages? Should repeated offender be punished more severely? And so on. In the United States, for example, violations of the Sherman Act currently can result in criminal penalties with fines of individuals up to \$350,000, imprisonment up to three years, or both.

#### *Factors Determining the Probability of Detection*

The probability of detecting a violation,  $p$ , depends on factors such as the administrative and legal power of the enforcement agency, types of procedures it uses, sizes of its budget, qualification and experiences of law enforcement agents, etc. It also depends on the degree of independence the enforcement agency enjoys in launching investigations and making decisions.

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<sup>4</sup> See, for example, Posner (1977) and Becker (1968).

In addition to public enforcement, whereby the enforcement agency initiate cases against violations, competition law can also be enforced via private enforcement whereby individual victims come forward to files cases with the court. Thus, another factor affecting  $p$  is whether private cases are allowed and how willing the individuals are to so do. For example, the 1914 Clayton Act of the United States allows anyone who has been injured by antitrust violations to sue in federal court and, as an incentive, recover treble damages plus the cost of suit.<sup>5</sup>

Another important factor concerns the burden of proof in a competition case. In the United States, two principles are used in deciding the legality of a conduct. The per se rule, which applies to price-fixing and certain types of vertical restrictions, means that, if a firm is found to have engaged in one of these activities, the activity cannot be defended on other grounds (e.g. efficiency). The rule of reason, on the other hand, examines an activity as it functions in the market place, and thus may or may not be illegal. Currently, the rule of reason applies to horizontal mergers and cases involving monopolization. The distinction between the two roles lies principally in the evidentiary burden each imposes on the parties to the litigation. Under the per se rule, the plaintiff need only demonstrate that the defendant engaged in proscribed conduct, whereas under the rule of reason, the plaintiff must further argue that this conduct actually hurt the plaintiff or society.<sup>6</sup>

The effectiveness of enforcement also depends on the extent to which the enforcement agency is able to act without being constrained or unduly influenced by political forces or by other government ministries that might have conflicting objectives. For example, the Department of Justice was the only enforcement agency of Sherman Act in the United States before 1914 when the Federal Trade Commission Act authorized the FTC to enforce the laws together with the Justice Department. The adoption of such a dual system is a consequence of the effort by U.S. Congress to reduce the influence of the

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<sup>5</sup> For an analysis of the trends in private and public antitrust cases in the U.S., see Lin *et. al* (2000).

<sup>6</sup> Different countries may adopt different rules regarding the same conduct. For example, price-fixing is considered per se illegal in the U.S., where effort to set prices jointly by cartel members are sufficient to prove that they have violated the law. This is so even when the cartel members did not implement the agreement or the agreement had no adverse effects on consumers. In Japan, however, the Japan Fair Trade Commission has to further prove that the cartel members actually followed the agreed plan and that the conduct has affected competition.

president of the United States on the enforcement of laws.<sup>7</sup> To cite another example, the conflict between the MITI (the main enforcer of Japan's industrial policy) and the Japanese Fair Trade Commission are often cited as a main reason for the weak antimonopoly law enforcement in Japan during the 1960s-1980s.

#### *Deterrence Effect of Competition Law*

Given that corporate crimes are motivated by the desire for pecuniary gain, it is clear that to deter those crimes effectively, the expected penalty must be at least, if not exceed, the expected gain. Since the probability of getting caught is less than one, the penalty imposed should be greater than the illegal gains. Put it differently, simply taking away the illegal profits will not deter antitrust violations. The drafters of the U.S. antitrust laws were aware of this simple economic principle. Under the "treble damages" system of the United States, plaintiffs are entitled to receive three times of the amount of actual damage (plus the attorney fees). The 1993 Anti-Unfair Competition Law of the People's Republic of China and its Consumer Protection Law also allow multiple damages.<sup>8</sup>

Below I review the cases of Japan, P.R. China and Hong Kong.

#### **4. Competition Policy in Japan**

Prior to and during the WWII, the Japanese economy was dominated by the zaibatsu --- large, family-dominated industrial affiliations. Following the war, the United States occupation forces undertook to promote the deconcentration and demonopolization of Japanese industry.

The heart of the Japanese competition policy is the Act Concerning Prohibition of Private Monopolization of Fair Trade, more widely known as the 1947 Anti-Monopoly Act (AMA), which was modeled on the U.S. antitrust statutes. The declared objective of the AMA is "to promote free and fair competition, to stimulate the creative initiative of entrepreneurs, to encourage business activities of enterprises, to heighten the level of employment and people's real income, and thereby to promote the democratic and

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<sup>7</sup> Although the five commissioners of FTC are nominated by the president (and confirmed by the Senate), as is the general attorney of the Justice Department, they each serve a seven-year term. This way, the FTC is less influenced by presidential policies, thereby increasing the independence of the antitrust enforcement system. In addition, no more than three commissioners can be from the same political party.

wholesome development of the national economy as well as to assure the interests of consumers in general.” The main provisions of AMA are listed in Table 4.1.

Table 4.1. Main Provisions of the Anti-monopoly Act of Japan

Section	Content
Section 3	Prohibits “unreasonable restraint of trade” (cartels)
Section 6	Prohibits certain international agreements of cooperation that entail unfair trade practices or unreasonable restraint of competition
Section 7(2)	Fine on price cartels (administrative surcharge)
Sec. 8(1)-(3)	Prohibits collusion and conspiracy in trade associations
Section 8(4)	Prohibits the creation of “monopolistic situations” in highly concentrated markets
Section 9	Limits cross-shareholdings and holding companies (revised 1996)
Section 13	Limits interlocking directorates and dispatch of directors to other companies
Section 15	Sets market concentration limits on mergers and acquisitions
Section 18(2)	Subjects implicit collusion and parallel price increases to JFTC notification system
Section 19	Prohibits “unfair trade practices”; stipulates that these activities are to be further specified in “JFTC Designations”
Sec. 21-23	AMA exemptions (natural monopolies, industries with a specific industry law, special cooperatives) (Sec. 21 was abolished in 2000)
Section 24	AMA exemptions of recession and rationalization cartels (revised in 1999)

The AMA has three major pillars. First, it prohibits “unreasonable restraint of trade”, i.e., collusive activities by firms that lead to restraints. Second, the AMA contains

<sup>8</sup> The U.S. “treble damage” system has been criticized by some for having caused too many lawsuits.

prohibition of the behavior of monopolization through the means of mergers, cross-shareholdings, and interlocking directorships. The third pillar of AMA prohibits “unfair business practices”, i.e., business behavior that reduces competition by closing competitors out of certain market or adopting discriminating rules that benefit only a few firms. The following six classes are particularly highlighted as unfair business practices:<sup>9</sup>

- (i) Unfairly discriminating against other entrepreneurs;
- (ii) Dealing at unfair prices;
- (iii) Unfairly inducing or coercing customers of a competitor to deal with oneself;
- (iv) Dealing with another party on terms that are restrictive;
- (v) Using one’s bargaining power unreasonably in dealing with another party;
- (vi) Unfairly interfering competitors in their transactions with third parties or interfering in the internal affairs of a competitor.

AMA created the Japanese Fair Trade Commission (JFTC), analogous to the Federal Trade Commission in the United States, to achieve the purpose of the law. The JFTC consists of a Chairman and four Commissioners, each appointed for a five-year and renewable term. They are nominated by the Prime Minister and subject to the approval of the Diet, but once appointed enjoy substantial immunity from short-term political pressures. Independent administrative agencies of this kind were unknown before the creation of the JFTC.<sup>10</sup>

The JFTC can choose to prosecute a violation in four ways: informal settlement, formal administrative procedures, criminal investigation, and preventive consultation. An administrative investigation can be started from two various sources: by initiation of the JFTC itself, or based on a report to the JFTC by the general public. (According to Schaede (2000, p.113), most of the cases handled by the JFTC are triggered by complaints from the general public.) Following an investigation, and if it suspects a strong violation, the JFTC can issue either a *warning*, a *caution*, a *recommendation*, which are antitrust

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<sup>9</sup> The six types were first specified by the JFTC designations in 1953, and later in the current version of 1982.

<sup>10</sup> Besides the Antimonopoly Act, the JFTC implements the Act Against Unjustifiable Premiums and Misleading Representations and the Act Against Delays in Payment of Subcontract Proceeds, etc. to Subcontractors, which are special laws complementing the Antimonopoly Act. The JFTC is positioned as an extra ministerial body of the Ministry of Public Management, Home Affairs, Posts and Telecommunications.

equivalence of administrative guidance, or issue a *complaint*, file for criminal prosecution with the Ministry of Justice or file for an injunction with the Tokyo High Court.<sup>11</sup> Among the above measures, issuing warnings and recommendations are the most common and important procedures. For instance, of 1,007 total formal cases brought by the JFTC between 1947 and 1996, 77.8% were recommendations, and most of these cases were immediately accepted by the respondents (Schaede, 2000).

As it was originally enacted, the AMA was quite stringent. First, the provision on monopolization in the original law (Article 8) uses a “structural control” to prohibit “undue imbalance in business powers”. An industry with an enterprise that has a market share exceeding a certain threshold may automatically be considered to exhibit undue imbalance business power. The prohibition of monopolization in the United States, on the other hand, uses a “conduct approach” whereby occupying a large market share in itself does not necessarily violation the law.<sup>12</sup> Second, acquisition and ownership of stocks of a competing company was prohibited. Mergers of companies were not allowed unless permitted by the JFTC.

The AMA has been amended several times, most substantially in 1953, 1977 and in the 1990s. While the 1953 amendment relaxed certain prohibitions of the original law, subsequent revisions generally strengthened AMA.

#### *AMA and Its Enforcement: 1950s-1980s*

The first major revision of the 1947 law was made in 1953. The 1953 amendment deleted per se prohibition of cartelization and introduced two types of authorized cartels, namely

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<sup>11</sup> Among the administrative measures, a *caution* is the weakest form, while a *warning* is a stronger, written version of guidance. There is no legal base for a *warning*, and no penalty will ensure. If the JFTC finds evidence of substantial violation of the AMA, it can issue a *recommendation*, which is usually accompanied by a cease-and-desist order. The respondents must notify the JFTC within a period of time (usually ten days) whether they accept this recommendation. If the JFTC receives an acceptance, it will close the case by issuing a final “recommendation decision”. There will be no further investigation or adjudicative procedures. If, however, the respondents deny the alleged conduct and refuse to accept the recommendation, the case is turned into a *complaint* for which a trial hearing will open. If the respondents reject a complaint decision of the trial hearing, they can appeal to the Tokyo High Court and, if necessary, to the Supreme Court.

<sup>12</sup> Article 8 was particularly despised by the Japanese business community, which saw economies of scale as vital to revitalize the economy that had been devastated by the WWII.

the “*depression cartels*” and the “*rationalization cartels*.” *Depression cartels* are temporary cartels designed to alleviate the economic hardship caused by “disequilibrium of supply and demand.” *Rationalization cartels*, on the other hand, are regarded as necessary “for effecting an advancement of technology, an improvement in the quality of goods, reduction in costs, and increase in efficiency or any other rationalization of enterprises.” Both types of cartels must be approved by the JFTC.

Article 8 of the original law, which deals with “undue imbalance of business power”, was also deleted, although it was added back in a different formula in the 1977 amendment. The provisions on mergers and acquisitions were relaxed so that they are prohibited only when they tend to substantially restrain competition. The 1953 amendment also introduced exemptions of resale price maintenance (for certain commodities that fall in the category of intellectual property).

There was one aspect of the AMA that was strengthened by the 1953 amendment, namely the control of unfair trade practice. The original law prohibits “unfair methods of competition.” The 1953 amendment widened the scope of prohibition to “unfair business practices” to include practices by those enterprise that are not competitors to one another (say suppliers and customers) that tend to lessen competition. The aim of this change was to control abusive conduct by large enterprises vis-à-vis small enterprises when the former engage in transactional relationships such as suppliers of parts and components (Matsushita, 1993).

The AMA was amended again in 1977, which considerably strengthened Japan’s antimonopoly law. First, the JFTC may levy an “administrative surcharge” on cartels up to an amount of about 1.5% of the total sales during the period in which the cartel operated. Second, to correct a monopolistic situation and control “undue imbalance of business power”, the JFTC may compel necessary structural changes to restore competition (Section 8.4). Third, a “price reporting system” was introduced so as to deter “tacit collusion” in industries where prices tend to move upward simultaneously. The surcharge system was introduced at the time when many Japanese industries formed price cartels after the first oil crisis. Tremendous complaints from the consumers were the contributing factor for the introduction of the surcharge system (Matsushita (1993)).

### *Slack Enforcement of the Antimonopoly Law*

Japanese enforcement of its antimonopoly law, particularly prior to the 1980s, has been heavily criticized for having been overly slack. According to *The Economist*, “the law itself has teeth in plenty; the problem is that its designated watchdog has been trained not to bite.”<sup>13</sup> The lack of tight enforcement of antimonopoly law is often cited as one of the characteristics of the Japanese government behavior during the postwar period (Porter, et. al., 2000, Chapter 2.)

A primary reason for the slack enforcement of the AMA is due to Japan’s pursuit of industrial policy which played crucial roles in the Japan’s economic miracle during the postwar period. Aimed at enhancing the competitiveness of Japanese firms in the international markets and catching up with more advanced economies, Japanese ministries, most notably MITI<sup>14</sup>, the Ministry of International Trade and Industry, have adopted various measures that contradicted the principle of fair competition. As noted by Caves and Uekusa (1976, p.149):

The goals of the Ministry of International Trade and Industry have varied over time in weight and composition, but some have recurred regularly since the ministry’s founding in 1949. One has been to promote the movement resources to certain favored industries.... Another goal has been to promote larger operations in certain industries---larger plants because of an abiding faith in economics of scale, and larger firms in the belief that ... Japanese firms should be as large as their American competitors in order to compete with them effectively. This goal has led at times to considerable enthusiasm for mergers and restriction of new entry into industries of interest to MITI...

The pursuing of industrial policy has affected both the contents of Japan’s anti-monopoly law, as well as its enforcement. For example, the introduction of depression and rationalization cartels was a tool of industrial policy.<sup>15</sup> Exemption cartels were most

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<sup>13</sup> *The Economist*, September 16, 1989. Shogo Itoda, Commissioner of the JFTC, rejected this claim by saying that “the JFTC barks loudly and bites violators hard”. See Itoda (2000).

<sup>14</sup> In 2001, MITI was reorganized to form the Ministry of Economy, Trade and Industry (METI).

<sup>15</sup> According to Iyori and Uesugi, (1983), “the major exemption laws were enacted until 1952. The Stabilization of Specific Small and Medium Enterprise Temporary Measures Act which authorized depression cartels for specific small enterprises, and the Export Trading Act which permitted export cartels, were both enacted in that year. Since that time, many exemption laws intended to prevent excessive competition between small enterprises or to promote rationalization were enacted, revised or strengthened almost every year.... Many exemption laws opened the door for approval of cartels not by the JFTC but under the guidance of the ministries in charge of the industries. They also provided for restrictions on the activities of non-members of cartels in order to strengthen cartel activities (p.19).”



popular during the 1960s-1970s. According to Porter et. al (2000, Chapter 2), as many as 1379 cartels were allowed during 1953-1994.<sup>16</sup> The extension of provisions governing “unfair methods of competition” to cover “unfair business practices” in the 1953 amendment was to a large extent because of the intention to protect small suppliers (Matsushita, 1993).

According to some scholars, “the Japanese government takes a more pragmatic approach to antitrust enforcement, one that makes allowance for national goals such as industrial catch-up” (Okimoto, 1989, p.13). However, it seems fair to say that the government has given more weight to industrial policy than to competition policy. Although the JFTC and MITI have been tried to work out differences through negotiations, “there are not many examples that can be cited in which the JFTC has ordered MITI to make major changes in industrial policy in order to conform to antitrust statutes (Okimoto, 1989, p.14).”

### ***Evolution of AMA and Enforcement: the 1990s***

Japan’s antitrust system had been undergoing substantial changes since early 1990s, with the MAM being further strengthened and the power of JFTC greatly enhanced. The changes were driven mainly by two factors: the trade disputes between Japan and the U.S. and the internal drive for reforming economic structures by means of deregulation and promotion of competition in domestic markets.

Around the mid-1980s, allegations of possible anti-competitive practices by Japanese firms and trade associations were raised by the U.S. government at a series of Japan-U.S. trade negotiations. In the Structural Impediments Initiatives talks with the United States in 1989, the Japanese government made several commitments related competition law and policy, including<sup>17</sup>

- (i) to increase the number of JFTC investigators and allot more budget to it;
- (ii) for the JFTC to take formal actions, particularly in such fields as price-fixing cartels and bid-rigging;

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<sup>16</sup> The Japanese government has not approved any recession cartels since 1989, despite the decade-long recession in the 1990s.

- (iii) for the JFTC to increase the transparency of the AMA enforcement by disclose more detailed information on cases challenged;
- (iv) to increase the calculation rates of surcharges; and
- (v) for the JFTC to publish a set of guidelines concerning distribution and trade practices.

Since 1995, the Japanese government has initiated a series of comprehensive plans for economic restructuring, in an attempt to get the economy out of the recession considered to be the worst since the WWII. Deregulation has been taking place in important sectors of the economy (telecommunications, energy, transportation, financial service, etc.). Promotion of competition is a major part of the government comprehensive reform plan.

In June 1990, the JFTC announced a policy to bring aggressively criminal accusations in order to seek criminal penalties against (i) cartels, bid-riggings, boycotts and other serious violations that are likely to have a widespread influence on consumers; and (ii) violations that involve firms or industries that are repeat offenders, or that do not abide by the measures to eliminate violations. A person who participated in an illegal cartel or engaged in monopolization could face up to three years in prison or up to 5 million yen in fine.<sup>18</sup>

In 1991, the rate of administrative surcharge was quadrupled to 6% for industries other than wholesale and retail businesses. In addition, the Japanese government has been pursuing initiatives so as to reduce the set of exempted cartels that were allowed by the AMA and other laws.<sup>19</sup> As a result of these measures, the number of cartels implemented

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<sup>17</sup> See Yamada (1997).

<sup>18</sup> The corresponding maximum for the companies involved was 500 million yen, up from the previous 100 million yen level according to the most recent amendment of the AMA approved by the Diet in May 2002. However, there are no criminal penalties for unfair trade practices except for violations of the final decision.

<sup>19</sup> As a recent initiative, the following measures were taken. (1) About 35 exemption systems under 20 laws based on the various laws other than the Antimonopoly Act and the Exemption Act were abolished or modified in accordance with the 1997 Omnibus Act in June 1997; (2) The 1999 Omnibus Act took effect in June 1999. This Act includes such measures as to repeal the systems of depression cartels and rationalization cartels under the Antimonopoly Act, to abolish the Exemption Act, and to limit the scope or establish the procedures with FTC concerning 6 systems under other 4 laws. Another amendment to the

dropped from a peak of 1,079 cases at the end of March 1966 to 15 cases under 4 laws as of the end of April 2000.

In 2001, a system was introduced for the first time under which those who suffer from unfair trade practices can file a suit with a court seeking injunctive relief against violation of the AMA. This represents a big improvement in civil remedy of AMA violations.

Another recent development worth noting is the measures taken to limit the potential anti-competitive effects of administrative guidance that has been prevalent in the government-business relationships in Japan. As is well known, administrative guidance is frequently used to accomplish certain policy objectives by various ministries in Japan. In the recent Deregulation Promotion Plan, the Japanese government requests that competent ministries consult with the JFTC in advance of the issuance of administrative guidance. In 1994, the JFTC made public "AMA Guidelines on Administrative Guidance," which identify administrative guidance which may lead to anti-competitive business activities and recommend various ministries to consult with the JFTC before issuing administrative guidance.

Throughout the 1990s, the government has also been enhancing the manpower of the JFTC's organization. In 2000, the JFTC had a total of 564 staff members, jumped from 484 in 1992.<sup>20</sup> The increase in the size of JFTC is remarkable during the time that the Japanese government was streamlining its many ministries.

Table 4.2 below contains the types of cases JFTC dealt with from 1995-2000, whereas Table 4.3 lists the amount of surcharges levied (on cartels and bid-riggings). As can be seen, the primary focus of the JFTC was on bid-riggings during this period.

Table 4.2 Cases Where Legal Measures Were Taken by JFTC, 1995-2000

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Antimonopoly Act took into effect in June 2000, which repealed the Section 21, thereby eliminating the antimonopoly exemption for the electricity, gas and railroad sectors, as well as other sectors that could be characterized as natural monopolies.

<sup>20</sup> For a brief comparison, in 1999 the Department of Justice Antitrust Division had 819 staff, the Federal Trade Commission of the U.S. had 964 staff, and the Competition Directorate General of the EU had 486 staff in that year. (Source: JFTC's web site.)

Type of Violation	1995	1996	1997	1998	1999	2000
Private Monopolization	0	1	1	3	0	1
Bid-rigging	14	15	13	15	22	9
Price Cartels (excluding bid rigging)	5	7	4	3	3	2
Unfair Trade Practices	4	2	9	5	5	5
Others	2	8	0	1	2	1
Total	25	30	27	27	32	18

Source: JFTC Annual Reports, 1995-2000.

Table 4.3: Surcharge payment orders (1994-2000)

Fiscal Year	1994	1995	1996	1997	1998	1999	2000
Number of cases	26	24	14	16	16	20	16
Number of recipients of orders	512	741	368	369	576	335	719
Total amount (Million Yen)	5,668	6,446	7,486	2,833	3,149	5,459	8,517
Amount per case (Million Yen)	218	268.5	534.7	177	196.8	273	532

Sources: JFTC's annual reports

### *An Evaluation of Japan's Competition Policy*

Japan's competition policy has been in place for more than half of century. Prior to the 1990s, competition policy played a subordinate role in Japan's regulatory policies. The pursuit of industrial policy by means of controlling and guiding investment and

permitting cartels, etc. contradicted to the principles of competition policy. Since early 1990s, Japan's antimonopoly law has been significantly strengthened and enforcement improved. The law now has more "teeth" and on the whole is no less comprehensive than competition law in any other country. JFTC is now more powerful, more independent, and more visible, and has been more active during the past ten years.

However, there is an important aspect of the law that seems to need further revision. As mentioned earlier, the primary mechanism for imposing sanctions under the AMA is the surcharge system. Enterprises found to have engaged in hard-core restraints of trade such as cartels and bid-riggings are levied a fixed rate of 6% upon their sales revenues for three years. It is important to note that the surcharge system was never intended to be punitive; "it is regarded as a confiscation of excessive profits rather than as a fine" (Sanekata and Wilks, 1996, p.115). According JFTC Commissioner Itoda, the surcharge system "aims at forcing violators to fork out undue profit from cartels or bid riggings, and achieving social justice based on the crime-does-not-pay idea." (Itoda (2000)).

Before the 1991 amendment, the rate was 1.5%, calculated based on the long-term average profit rates in each sector, which was 3%, and the assumption that only half of long-term profits came from illegal cartel activities. The rate was raised to 6% in 1991, corresponding the fact that the actual profits of cartels were around 15 to 20 percent of sales.<sup>21</sup>

Using the economic framework put forward in section 2 of the paper, we can see that the current surcharge rate under the AMA is too low to effectively deter violations of the law. Given that the probability of detecting violation,  $p$ , is small than 1, the surcharges should be greater (by a factor of  $1/p$ ) than the surplus profits accruing from illegal cartels, in order to really achieve the idea of "crime-does-not-pay". Anything less would imply those cartels activities are profitable business even when they are caught. Further increase in the surcharge rates, and more generally a shift from a "confiscation-based" system to a punitive system, would make Japan's competition policy more

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<sup>21</sup> The trade representatives of United States expected an increase to at least 10% (Sanekata and Wilks (1996)).

consistent with basic economic principles.<sup>22</sup>

Much can be learned from the Japanese experience. For instance, what are the main reasons that antimonopoly law enforcement was slack and ineffective prior to the 1990s? Besides the conflicts to other national policies (such as industrial policy) often mentioned by critics, there are other lessons that can be valuable for East Asia countries. As summarized in a detailed study by Schaede (2000), two factors combine to work against an empowerment of the JFTC and the AMA overtime. First, there is a lack of public awareness of antitrust. There is little common understanding of the AMA's content. The general public is not sure what exactly the law permits or prohibits, offering little support for stricter AMA enforcement. Second, in stark contrast to the U.S., where private damage action is a primary deterrent to antitrust violations, private antitrust lawsuits are extremely rare in Japan. Whereas a total of 31,745 private antitrust suits were brought in the U.S. between 1945 and 1988, only 18 such suits are filed in Japan in that same period (Schaede 2000, Chapter 5). The primary reason for this discrepancy lies in a combination of high costs and low probability of success in Japan.<sup>23</sup> Thus, to create a stronger incentive for private parties to report antitrust violations would enhance the effectiveness of the competition policy.<sup>24</sup> The Japanese experience also sheds light on how to build a truly independent enforcement agency. This last aspect will be discussed in more detail in section 7 of the paper.

## **5. Competition Policy in the P.R. China**

China did not have a competition policy until early 1980s when it started the transition process from a central-planning economy to a market economy system. Under the old economic system, competition had no roles to play both in theory and in practice, and therefore there was no need whatsoever for a competition policy.

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<sup>22</sup> Assuming 15-20% cartel profit rate and 3% of normal profit rate, the surcharge rate should be at least 12%; it would be 36% under the U.S. "treble damages" system.

<sup>23</sup> In particular, in both the AMA and Civil Code cases, the plaintiff has the full burden of proof and must provide evidence both of a causal relationship between cartels and the injury suffered, and of the extent of damages incurred. Moreover, there are neither double or treble damages nor punitive damages, so the financial incentive for bringing in a private suit is low. Because class action suits are now allowed in the Japanese system, potential plaintiffs cannot pool litigation cost. Lastly, the chances of winning a private antitrust case are small, as courts in the past have sided with the defendants in most instances.

<sup>24</sup> Iyori (1986) argued that due to cultural differences, Asia people tend to settle cases privately, rather than bring them to court.

In the early of 1980s, China moved toward a market economy, permitted the development of the private sector and introduced competition into its economic life. There was then the need to set up rules to govern competition. Currently the main laws and regulations in PRC that deal with competition issues are: 1980 Regulations on Development and Protection of Competition, the 1993 Anti-Unfair Competition, and the 1998 Price Law.

The objective of competition policy in China is to “safeguard healthy development of the socialist market economy, encourage and protect fair competition, stop acts of unfair competition and to defend the lawful rights and interests of operators and consumers” (Article 1, the 1993 Anti-Unfair Competition Law).

### ***The 1980 Regulations Concerning Development and Protection of Competition***

The Provisional Regulations Concerning Development and Protection of Socialist Competition Mechanism, issued by the State Council on October 17, 1980, is the first government document related to competition in China. It was stipulated that

"in economic activities, with the exception of products managed exclusively by state-designated departments and organizations, monopolization or sole proprietary management of other products are not allowed".

The contents of the regulations are rather brief. Article 6 of provides that "competition must be introduced by breaking down regional blockades and departmental barriers. No locality or department is allowed to block the market. No locality or department should impose any ban on entry of goods made in other places. Localities should ensure that raw material be transferred out according to state plans and must not create any blockade. Departments in charge of industry, transport, finance and trade must revise any part or parts of their existing regulations and systems which impede competition so as to facilitate competition."

### *The 1993 Anti-Unfair Competition Law*

In 1993, the Anti-Unfair Competition Law of was promulgated as the first competition law in China.<sup>25</sup> It is the major law that aims at protection of competition and prevention of unfair competition practices. The promulgation and implementation of this law represented a significant step toward the establishment of a competition policy in China.

Business practices that are prohibited in the 1993 law can be classified into following three categories:

#### *A. Deceptive Advertising and other Business Activities Involving Dishonesty*

Articles 9 prohibits false or misleading advertising. It also extends liability for false advertising to advertising agencies which are or should be aware of a seller's misrepresentation. Article 13 limits the use of drawings for prizes as a marketing strategy. To be legal, prize drawings must be both conducted honestly and involve prize not exceeding RMB5,000.

With regards to other forms of dishonest business behavior, Article 8 prohibits bribes in business transactions, especially in the form of "kickbacks" whereby the buyers of commodities are rewarded, in money or materials, "off the book". Article 14 outlaws utterance and dissemination of stories intended to injure the reputation of one's competitors.

#### *B. Protection of Intellectual Property Rights and Trade Secrets (Articles 5, 10)*

Article 5 offers protection against trademark infringement. It forbids not only forgery of brand marks and certificates of quality and origin, but also the use of similar brand identification, such as names, packing, or designs, which are likely to confuse consumers. A fine of between 100% and 300% of the value of the illegal gains may be imposed. Criminal sanctions may be imposed in accordance with the PRC Trademark Law.

Article 10 protects trade secret. Trade secrets refer to "the technical information and operational information which is not known to the public, which is capable of bringing economic benefits to the owners of the rights, which has practical applicability and which



the owners of the rights have taken measures to keep secret.” The law imposes a fine of RMB10,000 to RMB200,000 upon those who obtain such secrets illegally or who, with know or should know that trade secrets were obtained illegally, nevertheless agree to distribute such knowledge to third parties.

*C. Anti-Trust Provisions (Articles 6, 7, 11, 12, and 15)*

Five of the eleven prohibited acts can be classified as anti-trust provisions. Article 15 prohibits collusion in tendering process (bid rigging).<sup>26</sup> Violators can be fined between RMB10,000 and RMB200,000, depending on the seriousness of the offense (Article 27).

Article 11 forbids predatory pricing. It provides that “An operator shall not sell its products at a price that is below the cost for the purpose of driving out his competitors.”<sup>27</sup> In any of the following events, such sales do not constitute an act of unfair competition: (1) selling fresh products; (2) disposing of products whose period of validity is about to expire or other overstocked products; (3) seasonal reductions of prices; and (4) selling products at reduced prices in order to pay off debts, or due to change in the line of production or closure of business.

Article 12 provides that “In selling a product, an business operator shall not make a tie-in sale against the wish of the buyer or attach other unreasonable condition.” Article 6 provides “Public utility enterprises or other business operators that have a legal monopolistic status shall not force others to buy the goods or services of their designated business operators in order or exclude other operators from competing fairly.” Violation of Article 6 may face fines between RMB 50,000 (US\$6,060) and RMB 200,000 (US\$24,242), as well as confiscation of between 100% and 300% of their illegally acquired revenues (Article 23).

Article 7 addresses the behavior by government officials coercing customers into buying products from their designated suppliers, as well as blockade of regional competition. The article provides that “A local government and its subordinate departments shall not abuse their administrative power to force others to buy the goods of

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<sup>25</sup> An English version of the law can be found at: <http://www.apeccp.org.tw/doc/China.html>

<sup>26</sup> It is worth noting that the PRC Anti-Unfair Competition Law does not prohibit price cartels (price-fixing) in general, which is outlawed, as per se illegal, in almost all competition laws in other countries. This omission was fixed in the PRC 1998 Price Law. See below.

the operators designated by them so as to restrict the lawful business activities of other operators.

A local government and its subordinate departments shall not abuse their administrative power to restrict the entry of goods from other parts of the country into the local market or the flow of local goods to markets in other parts of the country.”

The 1993 Anti-Unfair Competition Law does not provide for criminal penalties except for trademark infringement (Article 21) and business bribes (Article 22). Even the hard-core collusive behavior of bid-rigging does not face criminal penalties under the 1993 law, although it does under the Law of Public Tendering of the PRC which took effect in January 2000.

### ***The 1998 Price Law***

The main objective of the Price law, which came into effect in 1 May 1998, is to curb price wars and predatory pricing in China’s domestic consumer goods markets.

The law prohibits the following unfair pricing practices: price-fixing (Article 14), predatory pricing, discriminating against business operators, spreading rumors of price hikes, attracting business through deceptive pricing, among others. The 1993 Anti-Unfair Competition Law addressed predatory pricing but did not spell out the definition of cost. The Price Law suggests that “cost” refers to production and operation costs. The provision regarding discrimination against particular business operations was designed to prevent the “price squeeze strategy” by a monopoly which may drive competitors out of the related markets. The 1993 law also contains similar provisions regarding discrimination against particular business operations. Neither the 1987 Price Administration Regulations nor the 1993 Anti-Unfair Competition Law addressed the practice of price-fixing. According to the Price Law, penalty for price-fixing can be as high as up to five times of the illegal gains. However, no criminal penalties can be imposed on violators of the Price Law.

### ***Regional/Sectoral Regulations***

In addition to the national Anti-Unfair Competition Law, various provinces and major

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<sup>27</sup> The law, however, does not spell out what cost means.

cities also have their own laws and regulation designed to counter unfair competition. For example, price-fixing was first prohibited under Guangdong Province's implementing regulations of anti-unfair competition. Beijing City also enacted its Anti-Unfair Competition Law in 1994, shortly after the promulgation of the national law on unfair competition. Up till now, over twenty provinces/cities in the PRC have enacted their own anti-unfair laws or regulations.<sup>28</sup> Some sector regulations, for instance the 2000 Telecommunications Ordinance of PRC, have also incorporated certain competition provisions

### ***Enforcement***

The Anti-Unfair Competition Law is enforced by the State Administration for Industry and Commerce (SAIC) and its branches at the provincial, city, and county levels all over the country. All the SAIC branches have the investigation power and can issue corrective instructions (including suspension of business license) and impose fines to violations of the law.<sup>29</sup> The State Development and Planning Commission and the price administrative agencies of at the local levels, on the other hand, enforce the 1998 Price Law.

### ***Adequacy and Effectiveness of Competition Law in China***

The current competition policy in China has two major weaknesses: (1) lack of a comprehensive anti-monopoly law; and (2) pervasive intervene of regional protectionism with enforcement of competition law. Although the fines specified by existing laws are fairly steep, deterrence effect of the law is hampered by the weak administrative enforcement system. Public awareness of current competition laws also needs to be enhanced.

### ***The Anti-Monopoly Outline***

In 1994, Chinese officials announced their intention to supplement the Anti-Unfair Competition Law by promulgating an Anti-Monopoly Law. A "drafting group" was

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<sup>28</sup> Kong (2001), p.15.

<sup>29</sup> The SAIC is under the State Council and has a long tradition of protecting market order since the establishment of the PRC in 1949. No new agency was created to enforce the 1993 Anti-Unfair Competition Law. Other duties of SAIC include administration of business licenses, registration of

formed in May 1994 which consists of officials from the State Economic and Trade Commission (SETC) and the State Administration for Industry and Commerce (SAIC). An Anti-Monopoly Law Outline was drafted and revised several times since then, often based on suggestions of scholars from various international organizations (such as OECD, the World Bank, UNCTAD, APEC) as well as from some countries (Germany, the US, Japan, South Korea, and Australia). The 1999 version of the Outline covers the standard categories of business conduct (price discrimination, tying, exclusive dealing, predatory pricing, market division, collusion, abuse of market power, etc.) and certain structural matters (such as mergers and acquisitions) that might lessen competition.<sup>30</sup> The Outline also spells out how enforcement agency should be established.

Perhaps unique to China is the inclusion of administrative monopoly in the Outline in separation chapter. Four types of administrative monopoly are classified: forced transaction, regional blockade, sectoral monopoly, and compulsory associations that restrict competition. Among them, regional monopoly and sectoral monopoly are most prevalent.

Regional monopolies are created and protected by trade barriers erected by provinces and regions. Local protectionism blocks the entry of goods and services into the local market, or prevents local raw materials or technology from being exported to other regions. Sectoral monopoly takes the form of large enterprises groups integrating administrative and business functions that also assume a regulatory role over the sectors. It also includes enterprises that are directly affiliated with government ministries or departments and receive preferential treatment. Public utilities, backed by their advantages as natural monopolies, also have characteristics typical of administrative monopolies. Operators in sectors such as water, power, gas, postal services, telecommunications, civil aviation, and railways use laws and government regulations as a cover to preclude competition and intrude the interests of consumers.

The Anti-Monopoly Outline is still yet to become a law. The long delay in introducing an anti-monopoly law is mainly due to controversy surrounding two fundamental issues.

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trademarks, enforcement of other laws such as the Trademark Law and the Advertisement Law of the PRC.  
<sup>30</sup> For a brief version of the Outline, see Chen (2000).

There are currently two different views on introduction of an anti-monopoly law. One view holds it is too early to enact such a law because China is still in the early stages of a market economy and its market system is not well developed. The issue for most industries is not excessively high concentration, but rather the contrary. Major firms have not yet attained economies of scale. The theme of market competition therefore should be to oppose unfair competition such as cheating and vicious competition, rather than to control industrial structure. Anti-monopoly action is something for the future.

The alternative view believes that the government should encourage the formation of large enterprise groups, promote the development of economies of scale, so as to enhance international competitiveness of Chinese enterprises. The introduction of an anti-monopoly law would work against these goals.<sup>31</sup>

To complement the existing Ant-Unfair Competition Law, China needs to develop an antimonopoly law that controls broadly restraints of trade and monopolistic behavior that lessens competition. It may still take some time before there is a greater consensus as to when is the desirable time to have an antimonopoly law. As China enters the WTO, and the dominating roles of the state owned enterprises in the economy decreases, attitudes toward antitrust will change. The on-going deregulation in important industries such as telecommunications, transportation, public utilities, and so on, will surely speed up the process of building up an effective competition law in China.

#### *Inability of the SAIC to Deal with Violations by Setoral or Regional Monopolists*

Within the existing legal framework of competition laws in China, the biggest problem is perhaps that the current enforcement mechanism cannot effectively deal with administrative monopoly (sectoral and regional monopolies). First, the leading agency dealing with market power in China today, SAIC, is an agency at the ministerial level directly under the State Council. As just one of a large number of government departments, it does not have the appropriate authority to monitor anti-competition acts of other ministries (in the same way that Japanese FTC oversees “administrative guidance”). In fact, the enforcement power of the SAIC has been weakened in recent years as a result of a few new laws. The *Telecommunications Ordinance of the PRC*

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<sup>31</sup> For more on administrative monopoly, see Wang (1998) and Yang (2002).

promulgated in 2000 specifies that anti-competitive acts within the telecommunications industry are now investigated by the Ministry of Information Industry, a task that had been under the jurisdiction of the SAIC. Similarly, the SAIC now no longer has the authority to fight bid-riggings – according to the Public Tendering Law enacted in 1999, it is now various (unspecified) government agencies that are responsible for fighting bid-riggings. These recent developments underscore the need to set up a truly powerful and independent enforcement agency so that existing laws can be implemented in a consistent and effective way.

Second, the current enforcement relies almost solely on local administrations of industry and commerce at the provincial, city, and county levels. However, the prevalence of regional protectionism makes it difficult for these law enforcers to carry out their duty. Motivated by both economical and political interests, local government leaders often protect local enterprises through various means such as creating regional trade barriers, making the “playing field” tilted in favor of local firms, or even putting pressure on law enforcers during their investigation of local firms. Since the heads of local AICs are appointed by local governments, it is difficult for them to enforce competition law independently and fairly. The existing enforcement system is not well suited for combating the regional monopolies that it was designed to combat.

Finally, a distinctive feature of China’s laws is the intent to establish strong deterrence effect of the laws by imposing strict punishment. According to both the Anti-Unfair Competition Law and the Price Law, violators may be punished to pay a fine that is multiple of the illegal gains (up to five times for price fixing and three times for infringement of trademarks and refusal to follow orders in other violations).<sup>32</sup> China has also put emphasis on encouraging private citizens to report illegal acts. For example, the State Development Planning Commission and the Ministry of Finance recently issued a rule on rewarding of individuals or groups who expose violation cases of the Price Law to proper enforcement agencies. According to the rule, an individual/group can receive 10% of the fine imposed a reported case – maybe more for special cases – but generally no higher than RMB2,000 (US\$243).<sup>33</sup>

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<sup>32</sup> The laws however do not provide criminal penalty.

<sup>33</sup> *People’s Daily*, 14 December 2001.

### *Raising Public Awareness of Competition Laws*

Although many in China have heard of the Anti-Unfair Competition Law and other laws, people are not sure what exactly the laws prohibit. A recent example illustrates this. On June 9, 2000, nine TV manufacturers in China formed a price cartel following various rounds of price wars in the late 1990s. The national media reported the meetings of the top managers of those firms held in Shenzhen City in southern China.<sup>34</sup>

It appeared that these TV producers were not aware that their collective action would violate the 1998 Price Law. First, the meeting was held under open coverage by the national media and the price agreements announced publicly afterwards. Second, top managers of some of the companies openly defend their decision by saying that such a collective decision needed in order to end the losses due the price wars in the industry. Officers from the State Commission for Planning and Development had to publicly make it clear that such an act was indeed a breach of the Price Law.<sup>35</sup>

## **6. Competition Policy in Hong Kong<sup>36</sup>**

Hong Kong did not have a competition policy until 1998 when the government issued a formal policy statement based on a series of studies by the Hong Kong Consumer Council.<sup>37</sup> The declared objective of its competition policy is "to enhance economic efficiency and free flow of trade, thereby also benefiting consumer welfare."

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<sup>34</sup> The nine producers are Konka, Skyworth, TCL, Rova, Hisense, Xococo, Jinxing, Panda and Westlake. They reportedly sell to more than 80 per cent of Chinese consumers. The manufacturers jointly established and announced that 21-inch, 25-inch, 29-inch and 34-inch televisions must sell for at least RMB1,050 (US\$127), 1,700 (US\$206), RMB2,600 (US\$310) and RMB 4,200 (US\$500), respectively. They also agreed that color TVs sold at lower prices would be considered poor quality. The alliance said the manufacturers who sell TVs lower than the prescribed minimums would not make enough to recoup production costs. (*China Daily*, 25 June 2000 and 11 August 2000.)

<sup>35</sup> On January 20 2000, the Chinese Automobile Industry Association publicized a decision by the ten Chinese automobile manufacturers not to fight a "price war" by lowering prices. (*China Daily*, 3 August 2000.)

<sup>36</sup> This section of the paper is based on Chen and Lin (2002) which describes and evaluates Hong Kong's competition policy in detail.

<sup>37</sup> In October 1992 the Council launched a series of studies on market competition in such sectors as bank deposits, supermarket sales, gas supply, telecommunications, radio broadcasting, and residential property. "Low levels of competition" were found in most of the sectors. In November 1996, the Council published a report entitled *Competition Policy: The Key to Hong Kong's Future Success*. Here, it strongly

Instead of a competition law, the government set up a (sector-specific) competition policy framework (see below). Two types of business practices, horizontal restraints and abuse of market position that have the effect of impairing economic efficiency or free trade or are intended to distort the normal operation of the market, were included in the policy statement. For horizontal restraints, the following practices were listed "for illustrative purpose": (1) Price-fixing; (2) Bid-rigging, market allocation, sales and production quotas; (3) Joint boycotts; and (4) Unfair or discriminatory standards among members of a trade or professional body (intended to deny newcomers a chance to enter or contest the market). For abuse of market position, the following examples of conduct were listed: (1) Predatory pricing; (2) Setting retail price minimums for products or services for which there are no ready substitutes; and (3) Conditioning the supply of specified products or services to the purchase of other specified products or services or to the acceptance of certain restrictions other than to achieve assurance of quality, safety, adequate service or other justified purposes

Determination of whether a practice was restrictive or not "must be made in the light of the actual situation. The intended purpose and the effects of the practice in question, and the relevant market or economic conditions, etc., must be all taken into account." Thus, the rule of reason, rather than the per se rule, would be followed even for practices involving price-fixing and bid rigging, which are normally treated as per se illegal in most countries.<sup>38</sup>

The government also set up its sectoral approach in its policy statement, the essence of which is to identify anti-competitive behavior and to initiate pro-competitive measures through administrative or legislative measures on a sector basis. To put it differently, instead of establishing an overall legal competitive law for the entire economy, the government proposed to set different rules for different sectors to govern competition, with the administration of these sector-based rules to be carried out by sector-specific agencies. For example, the *Telecommunications Ordinance* and the *Broadcasting Authority Ordinance* specify the competition principles to be followed in promoting

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recommended the adoption of a comprehensive competition law and establishment of an independent Competition Authority.



competition in the telecommunications industry and the broadcasting industry, respectively. In addition, detailed competition provisions were incorporated in the contracts between the government and each individual license holder. The Telecommunications Authority (TA) and the Broadcasting Authority (BA) are the respective enforcers of the competition provisions in these two sectors.

Depending on the severity and nature of a violation, the TA or BA can issue either a warning or a direction (requiring a licensee to cease and desist from the action prohibited by the rules). A financial penalty can be imposed for "very serious" cases. For extremely serious cases, the license of the operator may be suspended. Initially, the financial penalties that could be imposed were small. Prior to 2000 the maximum fine that the TA could impose for violations of the competition provisions or breaches of a license contract was HK\$20,000 for the first; HK\$50,000 for the second occasion on which the penalty is so imposed; and HK\$100,000 for any subsequent occasion on which the penalty is imposed. These figures were raised to \$200,000, \$500,000 and \$1,000,000 respectively in early 2000 when the *Telecommunications Ordinance* was amended. For extremely serious violations, the TA can request the Court of Law to impose a financial penalty not exceeding 10% of the turnover of the licensee in the relevant market in the period of the breach, or \$10 million, whichever is higher. For the broadcasting industry, the penalty is an amount not exceeding 10% of the turnover of the licensee in the relevant market in the period of the breach, or HK\$2,000,000, whichever is higher.

Telecommunications (Competition Provisions) Appeal Board was established to hear appeals against the TA's decisions. The Appeal Board's decision is final. No competition appeal board has as yet been set up for the broadcasting industry.

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<sup>38</sup> According to the Secretary for Trade and Industry, many "apparently collusive agreements" can help firms achieve economies of scale and provide better service, and it "would not be proper to rule these out

Table 6.1 Competition cases completed by Hong Kong Telecommunications Authority

Type of Case	Number of Cases				Total
	1997-98	1999	2000	2001 (Sept.)	
Price-Fixing			1	0	1
Predatory Pricing		1	1	0	2
Mergers/Acquisition	3	0	1	0	4
Unauthorized Discount		8	1	0	9
Breach of Advertising Code		22	13	5	40
Exclusive Dealing		2	0	0	2
Undue Discrimination/ Unfair Cross-Subsidization		3	0	0	3
Customers Related Complaint		3	2	3	8
Operation without License		0	0	3	3
Others		6	0	0	6
<b>Total:</b>	<b>3</b>	<b>45</b>	<b>19</b>	<b>11</b>	<b>78</b>

Source: The Office of the Telecommunications Authority, Hong Kong

Table 6.1 contains the types of cases considered by the TA during 1998-2001. Although over half of the cases related to advertising conduct, some important competition cases have been considered during this short period of time. Most of the cases were resolved without being levied a fine, including the price-fixing case that occurred in January 2000 involving all (six) mobile phone operators.<sup>39</sup>

indiscriminately (*South China Morning Post*, November 4 1997).

<sup>39</sup> The price cartel lasted for two weeks only and the companies decided to rescind the simultaneous price increases after each receiving a warning letter from the TA. In another incident, the dominant operator in the international calls market was fined HK\$50, 000 (around US\$6,410) for having repeatedly violated the

### ***An Assessment of Hong Kong's Competition Policy***

The current competition policy framework is transparent. During the three years since the establishment of its competition policy, the government (the TA in particular) has handled many competition cases in an open, transparent and timely manner.<sup>40</sup> Although controversies have arose in some of the cases, the government seems to be satisfied with its current approach to competition policy.

Chen and Lin (2002) argue that there are two fundamental drawbacks with a sectoral approach.<sup>41</sup> First, a sectoral approach may hinder efficient allocation of resources across different sectors of the economy in the long run. In choosing which sectors to invest in, private agents follow not only price signals but also consider the institutional costs of operating in different environments. Under a sectoral approach, different sectors will inevitably have different sector-specific rules of the game. These rules are enforced by different regulatory agencies that may interpret the rules differently, follow different criteria, and have different enforcement experiences. Different institutional environments therefore imply different rates of return on investment, which will unavoidably affect private investors' decisions as to which sectors to enter.

The second fundamental problem has to do with the dual roles performed by various government regulatory agencies under a sectoral approach. On the one hand, as regulators of natural monopolies, they must fulfill their traditional regulatory duties, such as issuing and administering business licenses, and reviewing and monitoring the prices and qualities of regulated firms. On the other hand, they are the judges when competition complaints and allegations are brought *against* the firms they regulate. When the very same agency is responsible for two inter-related duties, it is difficult for outsiders to

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contract term that prohibited it from offering unauthorized discounts to its customers. ). It is probably the heaviest fined ever levied for a competition case in Hong Kong,

<sup>40</sup> Since 1997, the Telecommunications Authority has handled over 81 competition case. For details, see Chen and Lin (2002).

<sup>41</sup> The Consumer Council pointed out the following problems with the sectoral approach: it is "piece meal" and fails to provide comprehensive guidelines in a consistent manner; competition provisions in different sectors may be subject to different interpretations and carry different penalties; and a sectoral approach may be prone to the capture of regulators by interest groups. The government, on the other hand, stressed that a sectoral approach is less expensive to set up; it can take into account industry specifics and thus provides greater certainty to the business community; it helps avoid over-kills; and it did not see the need to introduce a broad competition law to Hong Kong at that stage.

believe that decisions concerning one such duty are made independently of considerations of the other duty.

The information problem arose in recent acquisition cases in the telecommunications cases dealt with by the Telecommunications Authority (TA). In 1997, Hong Kong Telecom CSL Limited who had been unsuccessful to obtain a mobile phone service license in a bidding process was allowed to acquire Pacific Link who were successful in the same bidding process. The TA was criticized for having compromised the regulatory environment by approving the loser in a license bidding process to buy back a license. The TA had difficulties defending its position because it was unable to convince critics that it had acted fairly in both granting mobile phone licenses and in approving the acquisition. Similarly, it was not able to establish that its approval of the transaction was independent of its on-going negotiation with Hong Kong Telecom (CSL's parent) on the termination of HK Telecom's exclusive licensing contract in the international calls market. Since the government had to compensate HK Telecom for early termination of its monopoly status, questions were raised as to whether the TA's approval of CSL's acquisition of Pacific Link was a part of the "compensation package" for the early termination of the monopoly contract. Had an independent authority approved the acquisition and the TA been responsible for making license decisions only, there probably would not have been such criticisms.

The criticisms of the TA's actions are not specific to these individual cases. Rather, they reflect the general drawback of a sectoral approach that stems from the presence of asymmetric information, and will likely arise in other sectors as well.

Chen and Lin (2002) further argue that a comprehensive competition law enforced by an independent competition authority would overcome the above two fundamental drawbacks and better promote competition in Hong Kong.

## **7. Common Lessons for East Asia Countries**

Competition law/policy is new to most East Asia countries (except for the Philippines and Japan). What are the main obstacles for developing an effective competition policy in

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Asia countries? What lessons can be drawn from the cases reviewed here that can be useful for other countries in the region?

### *1. Lack of Internal Interest*

For many Asian countries, it was external pressure or even direct intervention that triggered introduction of competition policy. For instance, Japan's 1947 Antimonopoly Act was "imposed" by the Allied Occupation Forces and its remarkably improved law enforcement during the 1990s was due to trade related pressures from the United States. In Taiwan, "the external threat of trade retaliation from the U.S. played a decisive role in the passage of the Fair Trade Law" in 1991 after nearly a decade long of deliberation and revisions (Liu and Chu (2002)). The enactment of the new competition laws in Indonesia was a direct consequence of an International Monetary Fund program designed to prevent the economy from ever falling into financial crises like the one occurred in 1998 (Pangestu et. al, 2002). While highlighting the positive roles international economic integration can play in promoting competition policy,<sup>42</sup> these observations indicate that in general there has been a lack of internal interest in competition policy in East Asian countries.

As the world economy becomes more integrated at increasing speed, countries will be forced, by external and internal factors, to set up rules for fair and efficient competition. Nevertheless, domestic demand is a key prerequisite for establishing a truly effective antitrust system.

### *2. Roles of the States*

Asian economies have a long history of heavy government intervention over market system through administrative guidance of flow of resources into selected industries or by setting state owned enterprises directly. Government played crucial roles in Japan's economic miracle in the 1970s-1980s, the catching-up process of the newly industrialized economies, as well as in other economies in this region. Longtime promotion of industrial policy has not only influenced industrial structures, largely in the direction of increased

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<sup>42</sup> For a detail discussion of the linkage between international trade and competition policy, see Wu and Chu (1998).

concentration and market power, it also has helped create a culture of playing the game with the help of government.

It would be naïve to expect that one could build an effective antitrust system in such environments overnight. Competition policy is sometimes seen as in conflict with other policy objectives. Influences of government-supported enterprises may delay introduction of competition policy or affect the scope and enforcement of such policy. This is illustrated by China's failure to enact an antimonopoly law, along with its 1993 Anti-Unfair Competition Law. In the Republic of Korea, due to the state's desire to protect and promote large conglomerates (chaebols), enforcement of the 1980 Monopoly Regulation and Fair Trade Act has focused on unfair practices rather than attacking abuse of monopoly power (Shin (2002)). It can be reasonably predicted that there will be widespread resistance to introduction of competition policy and to the development of a culture for fair competition in this region (Round (2002)).

### *3. Competition Law and Economic Development*

There has been a concern among developing countries that competition policy may adversely affect economic growth because it hinders the competitiveness of their domestic industries by imposing restrictions on their size and because it deprives the government of its regulatory and discretionary power. Some hold the view that competition policy should be implemented after achieving economic growth through industrial policy.<sup>43</sup>

One might be tempted to cite Japan's experiences to support the "first-industrial-policy-then-competition-policy" argument. However, one should keep in mind that today's world is different than it was before. With increasing globalization and integration of the world economy, it is extremely difficult, if not impossible, for a country to grow in nowadays without inflow of foreign capital and technology, without liberalizing its domestic industries and opening up trade with the rest of the world. Adopting competition policy will help attract foreign investment, promote trade and competition in domestic markets. Furthermore, it is almost indisputable that the only way

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<sup>43</sup> It is interesting to note that to promote economic development is one of the objectives the UNCTAD Model Law.

to achieve economic growth and efficient allocation of resources is to utilize market system and competition process. Just as other laws aimed to set up a legal environment for a market system to function efficiently, competition law in my view is an indispensable element of a modern market system, as it sets the “rules of game” and aims to guarantee a “level playing field” for competition.

#### *4. Institution Building and Independence of Enforcement Agency*

The enactment of competition law itself does not guarantee an effective competition policy. It is necessary to build a qualified enforcement agency. Independence of the enforcement agency is of crucial importance for rigorous and effective enforcement of competition policy. The drafters of the US antitrust laws were well aware of the importance of institution design when the Federal Trade Commission Act was enacted in 1914.<sup>44</sup>

While this independence principle has been emphasized repeatedly in this part of the world, the East Asian experiences tell us that it is easy said than done. Consider the case of Japan. Although modeled after the Federal Trade Commission of the United States, the JFTC has distinct characteristics in terms of the background of its commissioners and the way in which it is linked with other ministries. First, the JFTC commissioners are not independent business people or academics, but have always been appointed by the Prime Minister from the ranks of retired bureaucrats. The key post of chairman is the territory of the Ministry of Finance (MOF), which has provided every chairman since 1963.<sup>45</sup> The four other Commission posts are share out among leading ministries of the government: One always from MITI; a second from the Ministry of

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<sup>44</sup> The 1914 FTC Act created the FTC to enforce the laws together with the Justice Department. The adoption of such a dual system is a consequence of the effort by U.S. Congress to reduce the influence of the president of the United States on the enforcement of laws. Although nominated by the president (and confirmed by the Senate), as is the general attorney of the Justice Department, the five commissioners of FTC each serve a seven-year term, longer than the term of the president. This way, the FTC is less influenced by presidential policies, thereby increasing the independence of the antitrust enforcement system. (In addition, no more than three commissioners can be of the same political party.)

<sup>45</sup> In August 1996, Yasuchika Negoro became the first Chairman of the Fair Trade Commission of Japan without any Ministry of Finance (MOF) or the Bank of Japan background in the past 33 years. Since his appointment, the FTC has introduced more transparent rules and systems, and is said to be turning into "a watchdog that bites."

Justice; while the third and the fourth Commissioners come from the MOF, the Ministry of Foreign Affairs, or the JFTC itself. This certainly leads to potential conflict of interests as the Commissioners might consider the interests of their parent ministries. It is frequently alleged and widely believed that the relaxed applications of antimonopoly laws in the fields of banking and securities is due to the dominance of the MOF at the JFTC. It has been argued that the composition of Japan's FTC has been an actual impediment to the active enforcement of the antimonopoly law in Japan (Sanekata and Wilks (1996, p.124), in addition to conflicts with the objectives of industrial policy, which many often emphasize.

The recent Thai experience also underscored the importance of institution building. Due to poor institutional design, the Thai Competition Commission, chaired by the Ministry of Commerce, was unable to find the defendants guilty of violation of the 1999 Trade Competition Act in two cases against large companies in the year 2000 (Poapongsakorn (2002)).<sup>46</sup>

Finally, acting independently is different from being seen acting independently. The Hong Kong experience, assigning dual roles to the sector-based competition policy enforcers in particular, indicates that informational problems should be taken into account when designing the enforcement organ. Perhaps it is worth rephrasing the independence principle as one to build an enforcement agency that is willing, has the capacity, and can be seen, to act independently.

## **8. Concluding Remarks**

The three cases reviewed here, especially that of Japan, reflect some common difficulties many East Asian countries face in developing an effective competition policy. These include the lack of internal interest, conflict with other national policies, in particular promotion of large enterprises in selected industries as a means to catch up with more developed countries, influence of the state-supported companies, weak enforcement, and poor institutional design. Given the historical backgrounds of East Asian countries, these obstacles will likely continue to hinder the development of competition policy in this region in the near future. However, the remarkable achievements of Japan during the

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<sup>46</sup> One of the cases was in cable TV service market and the other in bear manufacturing.



1990s in strengthening its antimonopoly system suggest that the process toward an effective competition policy in East Asia will be moving at a much faster pace in the 21<sup>st</sup> century. With the ending of the era of heavy government intervention and pursuit of industrial policy and increased globalization and economic integration, countries will find it in their best interest to set fair “rules of the game” for competition. This should not surprise anybody, as competition laws are what are really needed in a market economy.

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