IN FAIRNESS WE TRUST? --- WHY FOSTERING COMPETITION LAW AND POLICY AIN’T EASY IN ASIA

Lawrence S. Liu

Executive Vice President and Chief Strategy Officer
China Development Financial Holding Corporation
125 Nanking East Road, Section 5
Taipei 105, Taiwan, Republic of China
Tel.: 2-2766-7511 or 2-2763-8800 ext.1722
Fax.: 2-2766-9096
Email: lawrenceliu@cdibh.com
ABSTRACT

IN FAIRNESS WE TRUST? --- WHY FOSTERING
COMPETITION LAW AND POLICY AIN’T EASY IN ASIA

Lawrence S. Liu
Executive Vice President and Chief Strategy Officer
China Development Financial Holding Corporation
125 Nanking East Road, Section 5
Taipei 105, Taiwan, Chinese Taipei
Tel.: 2-2766-7511 or 2-2763-8800 ext.1722
Fax.: 2-2766-9096
Email: lawrenceliu@cdibh.com

This paper asks a central question: why have not Asian competition laws come of age? I argue that the answer lies largely in reliance on fairness-based principles in enacting and enforcing these laws. I canvass the statutory competition law and enforcement experience in those Asian jurisdictions like Japan, Korea, Taiwan, China, Thailand, and Indonesia that have some form of definitive competition law. I find most of them have legislative titles, abbreviations, specific provisions and enforcement agencies that are associated with "fairness" and "fair trade". Free competition law (with antitrust rules governing freedom of competition) is often confused with (unfair) competition law. Whatever it means, fairness suggests reliance on some sort of non-efficiency goals in these laws and confusion with industrial policy. A strong emphasis on fairness also suggests insufficient political support for a strong competition law and policy in these Asian jurisdictions. I also compare the Asian experience and policy goals behind these Asian competition laws with experience in the United States, Germany and the European Union, which have gone through extensive debates to reach or move towards a consumer welfare/efficiency model of antitrust enforcement. So, one can infer that even though competition laws become more important in Asia, they will need more time to gain maturity.
IN FAIRNESS WE TRUST? --- WHY FOSTERING
COMPETITION LAW AND POLICY AIN’T EASY IN ASIA

Lawrence S. Liu*
10/14/2004 draft

I. Introduction

Fostering competition law and policy ain’t easy in Asia, for good reasons. To begin with, some Asian competition laws don’t even have the right titles. Positive competition laws in Asia often are labeled as some kind of “fair trade” laws, and their enforcement agencies are called some kind of “fair trade” commissions. As argued later herein, fairness could mean many things and anything but efficiency, the dominant goal of antitrust laws. This, I argue, is how Asian competition laws got into trouble in the first place.¹

Second, statutory competition laws, albeit supposedly focusing on monopoly and cartel regulation, often contain an element of unfair competition law. As such, they are “unitary” competition laws wherein rules prohibiting unreasonable restraints of trade and rules against unfair competition are commingled. Worse yet, the legislative goals of these two subparts of the unitary code are often shared and recited in the same legislative purpose clause, resulting in further confusions in law enforcement activities.

Third, competition laws in Asia were more often superimposed than home grown. Failure to truly internalize the need to foster market competition allows positive competition laws in Asia to drift more toward non-efficiency goals.

Fourth, these competition laws do not command any higher order of priority, respect or importance among the full panoply of municipal economic laws. Nor do fair trade commissions or similar competition authorities in Asia command a strong

---

¹ Professor, Soochow University Law School and National Taiwan University Management School and, concurrently, Executive Vice President and Chief Strategies Officer, China Development Financial Holdings Corporation, Taipei, Taiwan. The views expressed in this article are those of the author’s alone and should not be attributed to any organizations with which he is affiliated. Comments should be sent to lawrenceliu@cdibh.com.

² Interestingly, the Asian jurisdictions that have an elaborate set of competition laws are all Civil Law countries like Japan, Korea, Taiwan, Thailand, Indonesia and China. There has been talk but no action in Hong Kong for years about enacting a comprehensive competition law, mainly to deal with anticompetitive conduct in the service sector. In April 2004, Singapore adopted the Competition Act 2004 bill, which is expected to be enacted and effective by early 2005. see Global Competition Review, vol. __, no. __, p. 36 (2004).
position in municipal government hierarchy.

Fifth and most important, competition laws in Asia do not receive enough political support. Indeed, there are other ways in various Asian polities to deal with competition issues, or even to suppress competition. In fact, lack of a strong political commitment for robust competition laws can be aggravated by the different approaches to competition regulation as shown by the American and European/German models. This confusion reduces predictability of Asian competition laws as enforced.

It is important that organizations like the Organization for Economic Co-operation and Development and the International Competition Network are intensifying their dialogue with Asian antitrust regulators and opinion leaders. On the other hand, mixing competition rules with trade rules in the context of World Trade Organization’s new trade negotiations could be problematic. Therefore, it does not appear Asian competition laws would come of age any time soon. The imminent passage of the draft Antimonopoly Law in China, the world’s largest factory and an ever-increasingly important market in its own right, only makes the challenge more daunting. In China and elsewhere in Asia, unless and until there is a strong political commitment to efficiency, rather than fairness, as the dominant goal of competition laws, not much progress in developing antitrust jurisprudence can be expected.

How Asian competition laws have gotten to this stage is examined in Part II, and this paper focuses on the prominence given to fairness and other non-efficiency goals in positive competition laws in Asia. It then examines the different approaches to competition laws in the American and European/German models, in Part III, in a way to explain the prominence of fairness-related goals in Asia. In Part IV, this paper explores how Asian countries can back away from the fairness model of competition laws, and offers a short conclusion.

II. Fairness As Dominant Goal of Asian Competition Laws

A. Competition Law Titled as Fair Trade Law

Competition law conceivably can have different goals, and young antitrust jurisdictions do not necessarily share efficiency or consumer welfare as the sole or even dominant goal. Indeed, fairness is etched into the definitive title of positive
competition laws in several Asian jurisdictions. Take, for example, the most “mature” competition laws among them like the Act Concerning Prohibition of Private Monopoly and Maintenance of Fair Trade of Japan. Although this 1947 vintage and oldest of positive competition laws in Asia is known as the Antimonopoly Law, its full title indicates a clear and strong legislative mandate to ensure the “maintenance of fair trade.”

Unfortunately, there does not seem to be any significant exploration as to why the Japanese antimonopoly law came to be titled as some kind of a fair trade law. This inquiry is shadowed by the law’s short title as an antimonopoly law. However, section 1 (legislative purpose) of this law clearly mentions terms and phrases like “unfair business practices” and “promote free and fair competition”. Therefore, it is reasonable to speculate that this legislation governs two completely different and equally important aspects of competition law: free competition and fair competition. In antitrust parlance, unreasonable restraints of trade can constitute unfair business practice. More important, unfair competition means a kind of business tort: resorting to misappropriation or misinformation to gain a competitive edge.

But this is exactly where Asian competition laws got mixed up. Free competition and fair competition are two vastly different things. The former focuses on efficiency (discussed more later), while the latter rightfully focuses on fairness. But section 2(9) of the Japanese Antimonopoly Law blends them together under the definition of “unfair business practices”. These practices include a hodgepodge of wrongful conduct like undue discrimination, dealing at undue prices, undue inducement or coercion of customers of a competitor, dealing with others in a way unreasonably restricting the business activities of others, dealing with others through unwarranted use of bargaining position, and undue interference with a transaction or undue inducement for an insider to act against his company.

A deceptively simplistic and elegant prohibition then follows in section 19 of the Japanese Antimonopoly Law: no entrepreneur shall employ unfair business practices. Some of the defined conduct contained in this prohibition would fall within the traditional antitrust domains where efficiency goals reign. Some are business torts that should be dealt with through unfair competition law. And yet some others in fact would be viewed as pretty legal, albeit aggressive, methods of competition in the West. No matter. The good, the bad and the ugly are all captured by one single Japanese rubric of “unfair business practices” and condemned as such.²

² For details, see Hiroshi Iyori and Akinori Uesugi, the Antimonopoly Laws of Japan, Federal Legal
Korea’s positive competition law, enacted in 1981 as the second oldest in Asia, is similarly entitled the Monopoly Regulation and Fair Trade Law. Outside Korea, it is generally known as the Fair Trade Law. This makes it an interesting and important deviation from the short title practice in Japan. In other words, emphasis seems to be on fair trade rather than monopoly regulation. The Japanese Antimonopoly Law heavily influenced Korea’s Fair Trade Law. Section 1 of Korea’s Fair Trade Law is almost identical to the Japanese Antimonopoly Law, making references to unfair business practices and free and fair competition. Important, it was not a small matter that section 15 of Korea’s Fair Trade Law also contains essentially the same prohibition found in sections 2(9) and 19 of the Japanese Antimonopoly Law! Therefore, Korea enhanced the Japanese emphasis on “fairness” and magnified the resulting confusion.

Taiwan followed the same model in 1992, but simply labeled its competition code the Fair Trade Law, dispensing with the reference to monopoly control in the definitive title. Again, Taiwan committed the same faux pas: section 1 of Taiwan’s Fair Trade Law indiscriminately refers to free and fair competition. Chapter III (later renamed) of Taiwan’s Fair Trade Law was entitled “Unfair Competition” like Chapter V of the Japanese Antimonopoly Law. It contains the same hodgepodge of prohibitions, which are slavishly copied and placed even into the same section 19!4

Three leading Asian countries therefore signed on to the fairness model of competition law enforcement, at least in name. To be sure, labels are not always dispositive. Indeed, with the third millennium Thailand as a newcomer in enacting competition laws in Asia adopted a more neutral term, Trade Competition Act. However, the Thai TCA was also heavily influenced by the earlier Asian competition laws mentioned above. For example, section 29 of the Thai TCA copied section 24 of Taiwan’s Fair Trade Law, which is a catchall prohibition of other methods of unfair competition.6 Section 24 of Taiwan’s Fair Trade Law in turn copied Section 5 of the

---


6 See Sakda, supra, note __, at p. 179.
Federal Trade Commission Act.\(^7\) Therefore, the newcomer seems equally incapable of resisting the temptations of dealing with competition laws with the same fairness-related broad brush.

Likewise, when Indonesia enacted a competition law in 1999, it labeled the law “Law Number 5 of 1999 concerning the Prohibition of Monopolistic Practices and Unfair Business Competition”.\(^8\) Law No. 5 of Indonesia thus also smacks of a fair trade law. Again, in section 19 there is a hodgepodge of antitrust and unfair competition rules governing excluding others from same or similar business, preventing clients from dealing with competitors, restricting sales or distributions and discrimination against specific businesses.\(^9\) Even though it is unclear how Indonesia borrowed from foreign laws in enacting Law No. 5, suffice it that there is enough similarity with the progeny of Japanese-Korean-Taiwanese-Thai fair trade laws.

The case of China as a somewhat latecomer in enacting competition law is interesting, and it offers a clear variation of the earlier models found in Japan, Korea, Taiwan, Thailand and Indonesia. First, China’s Law Against Unfair Competition of 1994 is not merely a fair trade law in essence; its definitive title has gone so far as to emphasize “unfairness”. In other Asian countries with a definitive unfair competition statute, the provisions all deal with unfair competition rules. Not so in the case of LAUC. There is a fair amount of provisions in it that are concerned with free competition law, like prohibitions of bid rigging and administrative monopolies. By contrast, in the Japanese Antimonopoly Law, Korean Fair Trade Law, Taiwanese Fair Trade Law, Thai TCA and Indonesia Law No. 5, antitrust rules constitute the majority of the core provisions. In other words, unfair competition rules were thrown into --- and thereby complicating --- a larger basket of antitrust rules. By contrast, China’s LAUC places a few antitrust rules into a whole range of unfair competition rules. China therefore perceives free competition rules from the lens of unfair competition law. The experimental and incremental nature of the LAUC explains this small anomaly in blending rules governing free and fair competition.

It is small wonder that all six existing positive competition laws in Asia are explicitly or implicitly titled as some kind of fair trade laws. This usage of fair trade law is different from similar terms used in the West (like the Office of Fair Trade in the United Kingdom or the state fair trading laws in the United States). This

\(^7\) See Liu, supra, note __, at p. 136.
\(^9\) Id.
phenomenon cannot be explained away by mere coincidence.

B. Challenges Faced by Asian “Fair” Trade Commissions

Fairness is not just the name of the competition law in Asia. The enforcement agencies want a fairness label, too. Therefore, for example, the Thai competition authorities are called the Thai “Fair Trade” Commission, even though nowhere in the legislative title of the Thai TCA contains any reference to fair trade. This, again, follows the practice long established by older Asian competition authorities: the Japanese Fair Trade Commission, Korean Fair Trade Commission, and Taiwanese Fair Trade Commission. While the acronym “FTC” came from the United States and originated from the Federal Trade Commission, in Asia none of these jurisdictions are federal states. They never had the traditional or practice of installing independent commissioners charged solely with the task of enforcing well-defined laws. In fact, one cannot be convinced easily that these Asian FTCs are a truly independent commission as the American Federal Trade Commission is understood to be. Therefore, they can claim instead one and only one important feature: regulating “fair” trade.

As with the argument above relating to the definitive title of competition laws in Asia, it is not a coincidence that the competition authorities in Asia have come to be called fair trade commissions. Begun with the JFTC in 1947, the Asian FTCs were created to enforce their fair trade laws. Unlike America, European Union or Germany, courts in Asia are not always prominent adjudicators of important social issues. Regulators in the executive branch become lawmakers by default. As a result, Asian competition laws in reality are the creation of the Asian FTCs. They interpret and shape the fairness in their fair trade laws in a way virtually unchecked by the judiciary.

C. Hybrid Competition Law

Asian competition law seems a hybrid of antitrust rules and unfair competition rules blended together. In the statutory competition laws of Japan, Korea, Taiwan, Thailand and Indonesia, the legislative purpose clause sets forth the goals of these laws. They make references to “free and fair competition” indiscriminately. And this is intriguing for pedagogical purposes, as “free competition law” and “fair competition law” are two related but distinctive branches of competition law. “Free competition law” deals with freedom of consumer choices and protects freedom from
unreasonable restraints of trade. It is concerned with efficiency-related goals. As a result, “free competition law” usually is interested in ensuring that there is not too little competition left in the market to discipline firms. On the other hand, “fair competition law” deals with misappropriation or misinformation designed to gain an unfair competitive advantage. As such, “fair competition law” is rightly concerned with fairness issues. It therefore seeks to deal with too much competition.

In more developed competition law jurisdictions like Germany, European Union and America, competition law is binary, with separate codes or different bodies of case law addressing antitrust rules and unfair competition rules. In Asia, there is some level of binary development. In at least Japan and Korea, in addition to antitrust codes, there are separate unfair competition codes, like the Law Prohibiting Unfair Competition of Japan enacted in 1934 and the Law Prohibiting Unfair Competition of Korea enacted in 1962. But even in Japan and Korea, as mentioned above, “unfair business practices” explicitly specified in the dominant competition statute blur the binary arrangement. On the other hand, Taiwan clearly follows the hybrid, or unitary, legislative model more closely. Unlike Japan and Korea it does not contain a separate code of unfair competition law. Even though China as yet does not have a comprehensive competition law, its LAUC is also a hybrid and contains both embryonic antitrust rules and more elaborate unfair competition rules. Regardless of the proportion of antitrust rules to unfair competition rules in the entire competitive code, the hybrid Asian competition laws create a problem for law enforcement and interpretation. Maintaining competition may be confused with avoiding unjustifiable injury to competitors (and not necessarily consumers), that is, protecting competitors. Read in this way, consumer welfare and efficiency considerations are suppressed; law enforcement becomes an exercise in deciding whether there is fairness.

D. Comfort with Fairness

Traditionally, competition law drafting and enforcement in Asia has been dominated by academic or bureaucratic lawyers. It is only natural that Asian lawyers would hark back on fairness as the main policy goal that would inform and drive competition law enforcement in Asia. For one, few of them studied economics or price theory or believed efficiency goals should dominate the enforcement of their municipal competition laws. By contrast, fairness explicitly or implicitly pervaded the law faculty curriculum in Asian universities. As will be shown later, stressing fairness in enforcing competition law is problematic. Indeed, there have been claims
that fairness should not be considered in the selection of legal rules because it reduces welfare. In recent years, there has been a plethora of commentaries on fairness in its relationship to legal rules. Notably, some scholars like Kaplow and Shavell have argued:

Legal rules should be selected entirely with respect to their effects on human welfare, which is to say, on the well-being of individuals in society. In particular, this means that ideas of fairness should … receive no independent weight in the evaluation of legal rules.…

That difficulty with fairness-based analysis will be seen in clearest terms in a number of paradigmatic situations … that promoting notions of fairness would make everyone worse off. (emphasis added).

Most of these commentaries focus on the human well-being, not in the context of market or competition. Also, they deal with welfare at the individual level, rather than the firm level. In addition, as a result, welfare in this context means pecuniary and non-pecuniary functions. But the logic and argumentation against allowing fairness-based notions to affect legal policies in the human welfare context are stronger when one examines the proper role of fairness in the context of market transactions and competition. There, the concern is primarily or exclusively monetary. If the fairness-based legal rules flunk the more rigorous human social welfare test, then a fortiori, the theory of normative legal analysis suggests that they have no place in competition law jurisprudence.

But why does fairness figure so prominently in legal rules? Kaplow and Shavell assign three possible explanations for the ill-considered prominence given to fairness-based notions in the selection of legal policies. First, fairness may reflect long held, internalized views of social norms. Second, fairness may be a proxy for some instrumental objectives. Third, fairness represents some tastes for satisfaction. All three explanations are plausible for shaping Asian competition laws.

II. A Survey of Asian Experience

11 Id, at p. 5.
12 Id, at p. __. For a more comprehensive treatment, see Louis Kaplow and Steven Shavell, Fairness Versus Welfare, Cambridge, Ma., Harvard University Press, 2002.
A. Competition Law Experience in Japan

That fairness has informed competition law enforcement is very clear in the experience of Japan. Just take one prominent example: Writing a foreword for Iyori and Uesugi’s classic 1983 treatise on Japanese competition law, former Commissioner Michiko Ariga of the JFTC commented upon the change in traditional attitude about competition forced on by the enactment of the Japanese Antimonopoly Law. She stated: “The legal concept of freedom of contract did not include freedom of competition in business.” By this she invoked the free competition law strand of the Japanese Antimonopoly Law. So she seemed to be on the right track of antitrust analysis. But then she took a sudden turn and had this to say,

Restrictive business practices were not conceived as unfair. Monopolization and cartelization were not considered as being against the public interest, because they were created by contract or agreement accepted by all parties. Unfairness from the view-point of equality or disparity did not bother the policy maker at the Government or the Diet. (emphasis added).13

Commissioner Ariga apparently confused efficiency loss with unfairness. Alternatively, she was more interested in expressing her displeasure with market restraints in terms of natural justice and fairness. Laudable as these comments may be, they are not exactly an appropriate antitrust analysis. They are not even necessary to the conclusions to be drawn. As antitrust economics (at least in the United State) had progressed by that time, the theory of monopoly suggests that monopolies have two evils. First, it transfers wealth from consumers to producers. Second and more important, they force consumers to substitute away into more costly and less efficient goods so as to obtain the same level of utility, thereby creating a social deadweight loss.14 Both the wealth transfer and social deadweight loss are losses in allocative efficiencies. It is not for the government to arbitrate, by fiat, between the desirable amount of consumer surplus versus the desirable amount of producer surplus.

Commissioner Ariga’s reference to restraints of trade being “against public interest” is also interesting. It may be a common statement by lawyers inferring that

---

13 See Iyori and Uesugi, supra, note __ at page vi-vii.
such restraints are void as against public policy. However, the vagueness and breadth of “public interest” also can be a Pandora’s box and opens the door for multiple and competing goals that supposedly inform but actually confuse municipal competition laws. Unfortunately for Asian competition law, the Pandora’s box was opened back in 1947, when regulators and the public in Japan developed a fairness-based (whatever fairness meant) perception of the Japanese Antimonopoly Law. The slight permutations in Korea, Taiwan, Thailand, Indonesia and China that followed down this path, as we now know, was history.

The Organization for Economic Co-operation and Development has made keen observations about the Japanese lock on fairness in enforcing its competition law. The OECD found that,

[I]n Japan’s traditional approach to market competition, fair treatment has been as important as free processes. In all settings, the term “competition” is typically accompanied by both “free” and “fair”. The competition agency has considered fair competition to be as indispensable as free competition. Widespread public concern to protect the value of fairness thus supports this aspect of the competition agency’s actions. The statutory definition of “competition” concentrates on process and immediate effects on particular businesses. “Competition,” for most purposes, is a state in which firms can sell similar goods or services to the same consumers, or get similar products form the same supplier, “without undertaking any significant change in their business facilities or kinds of business activities.” Such a definition would encourage assessing competition in terms of how conduct diverges from ‘business as usual rather than in terms of economic concepts such excess profits, allocative efficiency, or innovation.15

The focus of this astute observation of Japanese competition law enforcement philosophy, I think, is legal culture and social norms. The “widespread public concern to protect the value of fairness” cited by the OECD forces the JFTC to follow the quirky kind of enforcement philosophy mentioned above.

Fairness can confuse antitrust enforcement. In the case of the Japanese Antimonopoly Law, the prohibition of “private monopolization” is aimed at abuse of dominant market position and the resulting harm to competition. However,

according to OECD findings, there have been only 15 of such private monopolization cases in the half century of Japanese experience in enforcing competition law. The reason is that “it appears the [Japanese] FTC typically deals with large-firm abuses as unfair practices rather than as private monopolization.” (emphasis added)\textsuperscript{16} This go-easy sentiment towards large firms comes from the government. On the other hand, there is a strong demand on the JFTC to enforce the law in a way to restrict competition. The OECD found that “[t]he most common complaint that the [Japanese] FTC receives is about excessive discounts (that is, competitors complaining about “too much competition”)...”\textsuperscript{17} Under JFTC case law, there are “many cases about sales at prices that are ‘unjustly’ low, which are typically competitor complaints about rivals’ price cutting.”\textsuperscript{18} As a result, the OECD was led to the conclusion that “[t]he surprisingly large number of [J]FTC actions about price cutting would not inspire confidence in consumers that competition enforcement is promoting their interests.” In other words, the business culture is such that aggressive price competition is viewed as unfair! The two sentiments are, to be sure, contradictory of each other. On the other hand, they tend to average each other out along the common theme of maintain a “stable” (perhaps more aptly, static) market condition.

In Japan, despite the statutory instruction for the competition law to promote economic growth, competition and growth were treated as inconsistent goals forcing a trade-off.\textsuperscript{19} As found by the OECD,

Principally because of concerns about growth, and secondarily because of concerns about fairness of market outcomes, other policies and interests have often trumped competition policy. This effect has not been confined to situations in which other social interests and values justify controls on business behaviour. Rather, competition policy has yielded to interests in ensuring stable supply or even protecting or promoting specific industries. The statute identifies developing the national economy and benefiting consumers as separate goals, implying that there might be economic trade-offs between them and that they might not always lead to the same policy decisions.

As a result, the pervasive Japanese view of fairness shared by members of the same industry “complicates developing clear rules against anti-competitive

\textsuperscript{17} id.
\textsuperscript{18} id, at p. 6.
\textsuperscript{19} See OECD, Regulatory Reform in Japan, p. 7.
co-operation in an industry.”\textsuperscript{20} As found by the OECD:

It can seem natural to set a standard of fairness based on common industry practice. Indeed, guiding an industry to that consensus has long been perceived as a legitimate government role. Thus, a pervasive competition policy problem has been government sponsorship or toleration of horizontal industry co-ordination, either by promoting and defending explicit cartels and market divisions, or by less direct means, from using trade associations as surrogates or tolls for governmental regulation, to encouraging tac- cop-ordination in oligopolistic industries, to administrative guidance that confirms and polices non-competitive consensus.”\textsuperscript{21}

In Japan, much of its substantive competition law is unfair competition rules. However, as found by the OECD, “‘free’ is conjoined with “fair.” All of the rules (which focus on premium offers, labeling, wholesale-retail contract terms, newspaper pricing, textbook sales practices, competition and commercial terms in ocean shipping, and excessive lotteries) are, literally, about protecting competitors.”\textsuperscript{22} These unfair business practice rules present a “regulatory”, that is, bureaucratic approach, to competition policy, and can be applied without the need to show economic or competitive harm in the cases involved, thereby diverging from sound economic policy.\textsuperscript{23} This kind of philosophy is a stark contrast with the more legalistic regulatory culture that guides, for example, American competition law enforcement.\textsuperscript{24} Under the Japanese Antimonopoly Law, rules about practice in a specific industry require industry consultation before their adoption.\textsuperscript{25} As a result, one can infer that this consultative process both facilitates industry co-ordination and requires competition. As the OECD concludes, this process “reinforces the implication that the industry –specific rules are aimed first at achieving fairness among businesses, and second at preserving the competitive process for the benefit of the larger public.” The OECD also believes the JFTC enjoys the strongest, widest support in the business community when they enforce this part of the Japanese Antimonopoly Law, causing the JFTC to use these rules to consolidate “its legitimacy and public image.”\textsuperscript{26}

So much attention has been given to “fairness” among competitors in Japan that

\textsuperscript{20} id, at p. 12.
\textsuperscript{21} Id.
\textsuperscript{22} Id, at. p. 21.
\textsuperscript{23} Id.
\textsuperscript{25} See section 71.
\textsuperscript{26} See Regulatory Reform in Japan, p. 21.
the whole area of anti-cartel rules became a minefield, and no clear rules emerged. In Japan, it can seem “natural to set a standard of fairness based on common industry practice.”27 Government guidance of industry has been customary and viewed as a legitimate exercise of administrative power. Therefore, a chronic and pervasive competition policy problem in Japan has been
government sponsorship or toleration of horizontal industry co-ordination, either by promoting and defending explicit cartels and market divisions, or by less direct means, from using trade associations as surrogates or tools for governmental regulation, to encouraging tacit co-ordination in oligopolistic industries, to administrative guidance that confirms and polices non-competitive consensus.28

The fairness-based competition policy in Japan also influenced the composition and work of the JFTC. To be sure, when fairness instead of efficiency is the dominant competition policy goal in any jurisdiction, it is not easy to develop an apolitical and professional competition policy institution. Supposedly independent, the JFTC and the commissioners are “not completely outside the political and government process.”29 The OECD found that:

The choice of personnel shows that the FTC maintains long-term ties to the rest of the government. The commissioners have traditionally been former officials from the Ministry of Finance (which was almost always the source of the Chairman), the central, MITI, and the Ministry of Justice, with one position reserved for a senior career FTC official. These ministries, especially the Ministry of Finance, also supplied many of the senior staff, which has been the principal source of policy and enforcement initiative. Because of ties such as these, some observers believe that the FTC has not always been as independent in fact as it could be in principle.30

Of course, there has been some important and benign change in the selection of commissioners in last several years. However, the JFTC has faced a formidable challenge in enforcing the Japanese Antimonopoly Law. The OECD quoted relatively a recent Japanese/British academic study and found the JFTC as:

27 Id, at 12.
28 Id.
29 Id, at 23.
30 Id. The OECD even suggested that “[s]ome observers believe that the FTC’s studies about distribution practices are best explained as assistance to other ministries’ arguments in trade negotiations.” Id.
‘a unique and vulnerable agency administering deeply unpopular laws based on a widely rejected model of market competition’, playing an ‘ambiguous and difficult’ role, with a ‘huge gap’ between its theoretical powers and its actual practice. The gap is closing, but ‘the renaissance of competition policy in Japan is recent, partial, and far from fully secured.’

B. Competition Law Experience in Korea

Korea has a similar experience as Japan in that fairness also informed and confused the enforcement of the Korean competition law. Much like Japan, Korea’s experience is the result of its development strategy. As found by the OECD, such development strategy resulted in “a dual economy, divided between highly competitive, export-oriented manufacturing and a much less dynamic, domestic demand-oriented sector. Indeed, the productivity gap between the manufacturing and service sectors in Korea is the largest in the OECD area.” For example, compared with Japan and the United States, the Hirschman-Herfindahl Index shows a significantly higher degree of concentration in Korea. “The HHI in ‘segmented’ industries, which are characterized by large firms and significant entry barriers, is particularly high in Korea.” The largest firms in these concentrated market segments are called, as we all know, the chaebols. Therefore, while the JFTC in Japan seldom used the rules against abuse of dominant market positions, the case in Korea is different. The KFTC has made it a significant function to regulate chaebols.

What the KFTC does in its chaebol regulatory work is truly amazing. The OECD, for example, has summarized the nature, breadth and depth of the KFTC’s chaebol regulation. The following would strike any student of competition law as truly remarkable:

The KFTC designates the firms that are subject to special regulation because of their size, enforces rules governing the structure of holding companies, limits total shareholdings outside a designated group and cross-holdings within it,

33 Id, at p. 6.
limits loan guarantees within a group, restricts how financial affiliates in a group can vote shares, and polices ‘undue’ transactions within a group… in the 2003 designation, there are 17 ‘type A’ chaebol that are subject to a ceiling to total shareholding other domestic companies…, and 49 ‘type B’ chaebol that are subject to controls on cross-shareholdings and debt guarantees.  

In the United States, antitrust enforcers would try to forcibly break up these chaebols. In Korea, the political solution instead is to regulate them and maintain a socially acceptable level of industrial concentration and responsible conduct. This is because of social justice --- and fairness. As the OECD found, “the KFTC considers these [regulatory] functions to be as important as competition law enforcement, and the KFTC is just as stern in enforcing these rules, periodically announcing enforcement campaigns to check for undue transactions and other violations.” Indeed, the OECD found that regulating ‘undue’ intra-group transactions is the most important aspect of chaebol regulation, and it also is most closely related to conventional conceptions of competition law. An analogy is made to state aid subsidies, because a member firm within the chaebol group that otherwise would have to exit from the market is kept alive by affiliated firms. The anticompetitive impact as a result entrenches inefficient firms and bars “entry of potentially more competitive small ones.”

Another important aspect of such chaebol regulation is that competition law enforced as such is a substitute for corporate law! As found by the OECD:

Suspicious intra-group transactions may involve unfairness or something like predation, but more often the real problem is misappropriation, breach of fiduciary duty, or embezzlement. KFTC enforcement may fail where they aim at corporate misconduct that is not actually anticompetitive. Meanwhile, the new laws and institutions for dealing with corporate misconduct could remain underdeveloped as long as the KFTC is occupying the field…The KFTC was more independent and effective then the existing financial regulators…

Much like Japan, there have been pervasive industry self-regulatory codes. Again, fairness to competitors gives a different meaning to competition law. Indeed, this mentality explains why in Korea its competition law is known and abbreviated as

---

34 Id, at. p. 17.
35 Id.
36 Id.
37 Id, at. pp. 17, 18.
the Fair Trade Law. After the financial crisis, there has been a conscious effort to cut back on such cartel legalization. Another fairness-driven area of the Korean Fair Trade Law, as in the case of the Japanese Antimonopoly Law, is unfair competition and consumer protection rules. For example, these rules could limit promotional offers and in fact dampen market competition. It has been noted that in Japan and Korea, “regulation stymies efficiency gains by preventing large scale stores from driving the mom-and-pops out of business.” In some other areas like dealing with the credit card problems, the KFTC took a similar position to limit competition, because it thought excessive competition could jeopardize financial stability.

In recent years, there has been a great transformation of Korea’s economy and the work of the KFTC. Some surveyors think KFTC “shows every sign of wanting to be the Bundeskartellamt of Asia.” Indeed, according this new finding, KFTC has the second largest staff of economists (110 individuals, only next to 122 in the United States) in its workforce. When it comes to the eight competition law regimes that now have more economists than lawyers, Korea comes out prominently as the only Asian country. What is even more remarkable is that when one compares the ratio of economists to lawyers, Korea has the best ratio (two to one) among all competition law regimes in the world. One fair speculation is that with more economists on its staff in absolute and relative terms, the KFTC should move away from the fairness-based competition law enforcement, and gravitate gradually to the efficiency-based competition law model.

C. Competition Law Experience in Taiwan

Taiwan’s Fair Trade Law was heavily influenced by the Japanese Antimonopoly Law and the Korean Fair Trade Law. Therefore, it suffers from the same fairness-based principles and rules that have affected the enforcement of competition law in Japan and Korea. Fortunately, Taiwan as a more open and smaller domestic economy, and Taiwanese entrepreneurs and small and medium size companies contribute relatively more to its GDP. Therefore, the cartel legalization rules have not led to a proliferation of cartels. Nor has the TFTC had to worry about regulating the equivalent of chaebol in Taiwan, because conglomerates are less pervasive and less power in Taiwan than in Korea.

39 Id, at. pp. 18, 19.
41 Id.
Where the fairness-based principles and thoughts have affected Taiwan’s competition law enforcement is in the area of retail trade and technology licensing. The recent Microsoft case, for example, arose from a public outcry from consumers (mainly young students) that followed anti-counterfeiting campaigns by Microsoft and other members in the Business Software Alliance. A massive political storm gathered, forcing the TFTC to start investigating the pricing, licensing and other practices of Microsoft in Taiwan. The investigations finally led to an administrative settlement that, among other things, allowed the TFTC to monitor and offer comments on Microsoft’s pricing and other practice in Taiwan. In another recent case, Philips, Sony and Taiyo Yuden were alleged to engage in collective anti-competitive conduct, because they jointly licensed CD-R related technologies to Taiwan manufacturers at a flat royalty rate, which becomes more onerous to Taiwanese manufacturers the more they pursue low price strategies to drive out competitors (other licensees of these three foreign firms) outside Taiwan. The TFTC reacted to complaints by Taiwanese manufacturers, and invoked rules governing the abuse of dominant market position to begin investigations. TFTC sanctions against the three foreign firms eventually led to the termination of otherwise efficient joint licensing of complimentary technologies, and uncertainty as to what was the right – or fair – level of royalties to pay.42

D. Competition Law Experience in China

China offers one of the most interesting and challenging cases for the development of competition law in Asia. First, China is already a member of the World Trade Organization and bound by its rules governing international trade in goods and services. Indeed, China has been at both the demanding and receiving end of the WTO antidumping code. Its dirigiste economic policies lead to treatment of China as a nonmarket economy for antidumping exercises. On the other hand, it has become a quick study of these rules and never hesitates to use them to assert its right.

Second, China’s vast domestic market is becoming larger and deeper by the day. This makes enforcement of its competition law ever more important. When China enacts its Antimonopoly Law, that legislation will be applicable to the largest population as well as the fastest growing economy in the world. The Chinese experience could take the development of Asian competition law to a completely new

42 See Lawrence Liu, supra, at p. __.
level. However, problems from the fairness-based conceptions in other Asian
competition law regimes also could be magnified in China.

China has been a transitional economy for some time. This means, in the legal
context, it often has many truncated or simplified codes that are temporary or
experimental. The LAUC is one example. It prohibits a wide range of “unfair
competition practices” like: counterfeiting, bribery, false advertising,
misappropriation of trade secrets, trade libel, improper sales schemes using prizes,
administrative monopolies, lockouts from local market, predatory pricing, abuse of
dominate market position by public utilities, and bid rigging. Therefore, it is clear
that China has examined free competition law (or antitrust rules) through the lens of
unfair competition law. An examination of the Pricing Law (or translated as the Law
against Profiteering) allows the same impression.

The draft Antimonopoly Law will reflect the same thinking. It is clearly
patterned after the German/EU competition law model, and somewhat affected by the
other Asian competition legislation enacted earlier. It follows the same cartel
legalization regime.\footnote{See article 8 et seq.} China will face the same challenge as Japan, Korea and
Taiwan on whether it is fair to competitors to expose them to tense competition in
these horizontal situations -- admittedly a wrong question to ask. Likewise, rules
governing the abuse of dominant market position, and the related rules governing
predatory pricing and discrimination, could allow the competition law authorities to
determine what is the right – or, fair – price to charge.\footnote{See articles 15-20}

The most important provision in the draft Antimonopoly Law will be rules
against administrative monopolies.\footnote{See Articles 3, 7, 31-35, 47, 48.} Likewise, European law prohibits state aid
measures preventing the formation of a single market. In the United States, the
famous “state action doctrine” deals with the same issues, albeit on a much smaller
scale because there is much less government involvement in the American economy.\footnote{See Parker v. Brown, 317 U.S. 341 (1943).}
In this context, there may be more justification in treating the Antimonopoly Law as
some sort of fair competition law, because it is unfair for some government-linked
competitors to resort to government measures so as to forestall competition.
Analogy to the KFTC’s regulation of chaebol quickly comes to mind, although the
task could be more daunting in China. KFTC only has to deal with private
monopolies, albeit well politically connected ones. The competition law authorities

\footnote{See article 8 et seq.}
\footnote{See articles 15-20}
\footnote{See Articles 3, 7, 31-35, 47, 48.}
\footnote{See Parker v. Brown, 317 U.S. 341 (1943).}
in China will have to tackle government monopolies or government instrumentalities operating in the marketplace.

At one point, a version of the draft Antimonopoly Law provides for an independent commission, that is, some sort of fair trade commission, to the enforcement agency. In the current draft, there is no such proposal. One safe speculation is that politics will decide the shape and power of the enforcement agency. Therefore, whether a strong antitrust enforcer will emerge remains to be seen.

Politics will likely determine the role of competition law among the whole set of economic policies pursued by the Chinese government. As experience from other Asian competition law has shown, fairness-based principles can actually lead to industrial policy. Clearly, China has an industrial policy through which it wishes to create national champions that would be globally competitive. China believes strongly in this policy and thinks it is only fair for China to catch up with the world in this way. In recent years, China’s has been using its domestic market to set standards for technologies. Examples are Wi-Fi encryption, RFID (radio frequency identification), AVS (compression technology standard as an alternative to MPEG-4), 3G (mobile phone) and EVD (enhanced video disc). Pending enactment of the draft Antimonopoly Law including its merger control rules, China has already implemented rules governing acquisitions by foreign companies. Clearly, industrial policy plays a role in this discriminatory application of merger control. Foreign firms are justifiably concerned, as a government competition report recently criticized Microsoft, Kodak, Tetra Pak and others as monopolies.

III. Comparing the American and European/German Models

A. U.S. Experience

It is fair to say that, when it comes to mixing competition policy with fairness, no one was a saint. Even in the United States, where there has been more than a century of practicing antitrust laws, it was not until the late 1970s that the efficiency/consumer welfare objective of competition law signed on firmly. In the United States, antitrust enforcement has had a checkered history, and fairness played a

role in it. As found by the OECD, the adoption of early antitrust laws like the Sherman Act and Clayton Act met with “backlash and retreat in the 1920s.” 49 The empire struck back during the Great Depression, when

the first response of US competition policy was to emphasize competition as ‘fairness’, including co-ordination through industry-specific trade practice conferences and guides. These strategies, and regulatory structures with similar goals, overstayed into the post-war era, and their obsolescence helped sparked the major regulatory reform movement of the 1970s. 50

Despite a compelling argument by Judge Robert Bork in his classic book, the Antitrust Paradox, it is not clear the U.S. Congress was clear as to the goals of the Sherman Act. By intention or default, American federal courts were assigned the task, through case law, of groping for and identifying the proper policy goals of American antitrust laws. What we have learned is that courts went back and forth in this debate, which went on for decades. It was not until the economic learning that emerged from the Chicago School in the 1970s that set the path of American competition law enforcement on a track focusing on efficiency and consumer welfare. In other words, even when one takes the United States as the leading intellectual hub for competition law jurisprudence, it ain’t easy for the Americans, either. By that account, fairness at one point figured prominently in the American soul-searching for the true spirit of competition law.

There are several possible policy goals behind American competition law: income redistribution, protection of small business, concentration of political power, local control of business, and efficiency. 51 Income redistribution conceptually is closer to fairness than other goals. In the United States, there is a strong resistance for the government to get involved in arbitrating the proper allocation of consumer surplus and producer surplus. Also, gigantic producers which earn large profits may be a listed company whose shares are widely held by many small investors, while some consumers may command formidable wealth. Also, argues the neo-classical economist, the government can achieve income redistribution through better means, such as direct subsidies and taxation. 52

---

49 Regulatory Reform in Japan, p. 9.
50 Id.
52 Id. at pp. 8-9.
The Jeffersonian conception of populist economics, or protection of small business, has been discredited in the United States. But in cases like Alcoa, Brown Shoe, and Von’s Grocery, it had enjoyed a following. In America and elsewhere, it is now widely recognized that protecting local business at the expense of consumers is inefficient, and unfair. It is unfair to consumers, who have to subsidize firms as a result of government policy or law enforcement. It is also unfair to the local business, which is given a false hope of sustainable success.

In a democracy like the United States, it is now inconceivable that the government should enforce antitrust laws so as to ensure the political power is not concentrated in the hands of a few corporate tycoons or conglomerates. Again, it is not necessary or appropriate to invoke competition law this way.

The goal of local control of business was made famous by Justice William O. Douglass in Falstaff Brewing. Integration of the domestic market, development in transportation and logistics industries, and globalization all have made this argument obsolete.

B. German and European Experience

The case of German competition law is also interesting and instructive. Germany before World War II had an industrial concentration policy that included cartel legalization as a centerpiece. The GWB enacted during the Eidenaur administration is a reflection of new policy thinking. To be sure, there were compromises. But the “ordoliberalism” thinking espoused by Bohm and others imbued its competition law with a new spirit, which became the cornerstone of the competition law in the European Union. Although not as much litigated as an issue as the American antitrust laws, policy goals of competition law in Germany went through a debate. One can surely argue that cartel legalization rules since Regulation 17 of the European Community and even the GE/Honeywell case reflect a fairness-based framework of competition law: fairness to competitors. Also, one can argue that rule against abuse of dominant market position that emerged from German competition law and formed the basis of comparable EU competition law is also fairness-based. In the classic Banana case, supracompetitive pricing was deemed

---


55 See David J. Gerber, Competition and Law in Europe in the Twentieth Century: Protecting the Prometheus (___, 19__).

56 For a good comparison of American and European competition law in this area, see address by R.
illegal, showing a tendency for the enforcement agency to find a fair price that can be charged to consumers. The Banana case is probably an abnormal development of European competition law. But this judicial decision reflects different policy goals behind European competition law.

Former EU Competition Commissioner Karel Van Miert made a very clear statement of the policy goals behind EU competition law:

The aims of the European Community’s competition policy are economic, political and social. The policy is concerned not only with promoting efficient production but also achieving the aims of the European treaties: establishing a common market, approximating economic policies, promoting harmonious growth, raising living standards, bringing Member States closer together, etc. To this must be added the need to safeguard a pluralistic democracy, which could not survive a strong concentration of economic power. If competition policy is to reach these various goals, decisions must be made in a pragmatic fashion, bearing in mind the context in which they are to be made: the realization of the internal market, the globalization of markets, economic crisis, technological development, the ratification of the Maastricht treaty, etc.57

A well recognized American expert on European law has also concluded that EU competition law “seeks to preserve opportunities for small and middle-sized business, though it is also motivated by concerns for efficient business and for consumers’ interest.”58 Clearly, the litany of “noncore” antitrust goals reflect a strong European bent in favor of some fairness-based thinking.

Importantly, these thoughts and, in particular, the abuse of dominant market position rule that stands out as a distinguishing feature of European competition law, have been transplanted into the Japanese, Korean, Taiwanese, Chinese, Indonesia and Thai versions of the Asian competition laws. To the extent it allows government regulation of pricing, in Korea it has facilitated government regulation of chaebol, including their internal pricing. In Taiwan, it has enabled government regulation of royalty rates paid by Taiwanese manufacturers to foreign licensors and government

Hewitt Pate, Assistant Attorney General of the Antitrust Division of United States Department of Justice, “Antitrust in A Transatlantic Context: From the Cicada’s Perspective” (Brussels, Belgium, June 7, 2004).


regulation of the level of software prices that Microsoft can charge consumers.

IV. Getting out of the Fairness Straitjacket --- Conclusions

This article attempts to tell a story of Asian competition laws. Competition laws in Asia have not come of age, and the main reason is the influence it has received from fairness-based principles. Beginning from Japan and Korea, and down to Taiwan, Thailand, China, and Indonesia, these principles added non-efficiency goals to the enforcement of competition law. They also get competition law mixed up with industrial policy. Fairness to other competitors and fairness to consumers have to be considered. When foreign firms are targeted, Asian competition laws even run the risk of becoming an instrument of protectionism.

But Asians are not the only sinners. Even in the United States, there were decades of debates and inconsistent cases on the policy goals of antitrust rules. It was not until the late 1970s that the United States began to embrace efficiency and consumer welfare as antitrust goals and jettisoned other non-core goals. In Germany and the European Union, there is a different view and different approach to competition law. Competition law is viewed as an economic as well as political and social policy. German and European competition rules allow more government regulation, such as cartelization through applications and exemptions, and rules against abuse of dominant market position that permit the government to second guess prices. Generally speaking, the more formalistic and fairness-oriented European and German competition rules, not American competition law, came to be emulated in Asia.

Asian competition law authorities are generally weaker, because they have not received a really significant political commitment to enforce competition laws. Sometimes they have gone overboard and become enforcers of rules based on non-economic principles. They even enforce fiduciary duties, as in Korea. But there have been some improvements and changes. At the technical level, there is now more emphasis on antitrust economics in Asia, and economic analysis now plays a bigger role in informing Asian competition law. At the ideological level, competition law – and indeed competition policy – will become more important only when the entire fit of the political economy in Asian jurisprudence undergoes fundamental changes. Hopefully, globalization and more interactions among Asian jurisdictions will enhance the quality of this discourse. A strong signal of a fundamental change is when Asian competition law scholars, enforcers and judges
remove fairness from this discourse.