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Introduction and methodology

1.1 Scope of the book and a definition of China

> If monopoly persists, monopoly will always sit at the helm of government . . . If there are men in this country big enough to own the government . . . , they are going to own it.
>
> Woodrow Wilson, *The New Freedom* (1913)

So said the late President Wilson about the linkage of concentrated economic and political power some ninety years ago, in the context of the United States of America. These were the same concerns that had prompted the passage of the Sherman Act 1890 to control the giant industrial trusts that developed in late nineteenth-century America and appeared to many to threaten democratic institutions.[1]

This text will seek to demonstrate that Wilson's observation is still relevant today in considering law and policy development concerning economic competition in China, Hong Kong and Taiwan. Each jurisdiction exhibits facets of the posited relationship between economic and political power in those jurisdictions' differing approaches to competition policy making and the adoption of a comprehensive law to enforce the political choice of a pro-competition policy. In China, the political monopoly of the Chinese Communist Party previously led to a complete state monopoly of economic power. This economic policy was effectively abandoned in 1978 and the following discussion of competition policy and law in China results directly from that seismic shift. China now appears to have decided that a set of rules is needed to regulate the socialist market economy.

In Hong Kong, the existence of concentrations of economic and political power in the same hands also dictates policy towards the regulation of

[1] Ernest Gellhorn and William E. Kovacic, *Anti-trust law and economics,* 4th edn, New York: West Publishing (1994). Disappointment with the effectiveness of the Sherman Act led to the adoption of the Clayton and Federal Trade Commission Acts in 1914 to strengthen anti-trust regulation.

competition and has led directly to the government's open hostility to the introduction of comprehensive legislation. But, interestingly, it is the private ownership of economic assets that causes competition problems in Hong Kong, not a dominant publicly owned sector, which is, in contrast, the root of Mainland competition problems.

In Taiwan, the politics and economics of authoritarianism gradually gave way, during the 1980s and 1990s, to a more pluralist form of politics and with that political reformation a fair competition law was enacted to police the newly liberalised economy. However, before examination of competition policy can begin, it is necessary to define China.

The expression 'Greater China' is often used as a useful phrase to avoid the political pitfalls of comparing the *de jure* separate jurisdictions known as Mainland China, Hong Kong and Macau and the *de facto* separate jurisdiction of Taiwan. For convenience, in this thesis the words 'China' and 'the Mainland' are used interchangeably and since Mainland China forms the largest constituent part of the People's Republic of China, the abbreviation PRC is also sometimes used in the restricted sense of applying only to Mainland China.

Hong Kong, as a Special Administrative Region (HKSAR) of the People's Republic of China, has its own political, economic and legal system distinct from the Mainland. This is guaranteed in international law by the Sino-British Joint Declaration 1984, a treaty within the meaning of the Vienna Convention on the Law of Treaties 1969,[2] and deposited at the United Nations. Domestically, Article 31 of the PRC Constitution (CPRC)[3] provides that 'The state may establish Special Administrative Regions when necessary.' The Basic Law (BL) of the HKSAR was adopted by the National People's Congress and Promulgated by the President of the PRC on 4 April 1990.[4] This is the governing constitutional document establishing the HKSAR as from 1 July 1997. Article 1 provides that Hong Kong 'shall exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power'. This 'one country, two systems' approach is confirmed to continue for fifty years from 1997 and, further, that the socialist system and policies 'shall not be practised in Hong Kong

[2] United Kingdom Treaty Series 58 (1980), Cmd. 7964; 1155 United Nations Treaty Series 331. See Article 80: only treaties registered with the United Nations may be invoked before the International Court of Justice but nonetheless remain valid as between the parties.

[3] For an English translation of the Constitution of the People's Republic of China, see China Laws for Foreign Business, vol. 4–500, CCH Asia, loose leaf (1999).

[4] The Basic Law of Hong Kong Special Administrative Region of the People's Republic of China www.info.gov.hk/basic_law/flash.html.

during that period'.[5] However, the recent (April 2004) 'interpretation' of the Basic Law by the Standing Committee of the National Peoples Congress,[6] which effectively vetoed the adoption of universal suffrage for the election of the Hong Kong Chief Executive in 2007 and the Legislative Council in 2008, has caused acute political controversy in Hong Kong and calls into question the real ambit of the 'one country, two systems' formulation of the former supreme PRC leader Deng Xiaoping.

Macau SAR has similar autonomy to Hong Kong based on its own Basic Law which came into effect on 20 December 1999 and is, in essence, similar to the Hong Kong version. Macau does not have a competition regime, has a very small economy and is, therefore, not considered in this book.[7]

The position of Taiwan is controversial. The PRC and most of its population regard Taiwan as an integral part of China: 'Taiwan is part of the sacred territory of the PRC. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the Motherland.' [8] Taiwan has *de facto* independence and is thus considered a renegade province by the PRC government. The population of Taiwan appears to be divided between those who consider the Republic of China on Taiwan (ROC) as the legitimate government of the whole of Chinese territory, those who consider Taiwan to be an independent state with no territorial claim on the Mainland and that there is no legitimate PRC claim to Taiwan and, thirdly, those content to allow the current ambiguous *modus vivendi* to continue for the sake of peace and economic prosperity. A recent Taiwan enactment to sanction direct plebiscites on

[5] Article 5 BL.

[6] Decision of the Standing Committee of the National People's Congress on issues relating to the methods of selecting the Chief Executive of HKSAR in 2007 and for forming the Legislative Council of HKSAR in 2008, 26 April 2004 http://www.info.gov.hk/cab/cab-review/eng/basic/pdf/es5200408081.pdf.

[7] A very large proportion of the Macau economy is based on the gambling industry that has historically been monopolised by Hong Kong based tycoon Stanley Ho. His company STDM (Macau Society for Tourism and Entertainment) provided 63 per cent of government revenue in 2002. STDM recently lost its gaming monopoly and two new entrants have pledged to invest some US$2.2bn in new casino facilities. Macau's gambling shake up 4 December 2003 http://news.bbc.co.uk/1/hi/world/asia-pacific/3287755.stm. The first rival 'Las Vegas-style' casino to the STDM monopoly, The Sands, opened in May 2004. Competition has now begun in earnest in the Macau gaming industry for the first time. See 'New casino mobbed', *The Standard* (Hong Kong), 20 May 2004.http://www.thestandard.com.hk/thestandard/news_detail_frame.cfm?articleid=47695#intcatid=1.

[8] See preamble to the CPRC, above.

constitutional matters[9] may result in further political tension among the people of Taiwan who may, at some time in the future, vote for *de jure* separate statehood from the PRC. The Mainland government has warned that any such unilateral declaration by Taiwan would result in military action being taken by the People's Liberation Army to prevent the division of national sovereignty.[10] The island of Taiwan is currently governed under the authority of the Constitution of the Republic of China (CROC)[11] adopted on 25 December 1946, which still claims the whole territory of China extant at that date.[12] In practice, the ROC only exercises authority over Taiwan and its dependent islands in the Taiwan straits.

Thus, what is sometimes referred to as Greater China can be divided into the following jurisdictions: a socialist Mainland, 'The People's Republic is a socialist state under the people's democratic dictatorship led by working class'[13] based on 'democratic centralism',[14] non-socialist Hong Kong and Macau SARs[15] and the ROC on Taiwan whose constitution states it to be 'a democracy of the people, to be governed by the people and for the people'.[16]

Economically, the PRC is constitutionally based on 'the socialist system . . . [of] public ownership of the means of production'[17] and the state-owned economy is said to be the leading force in the national economy.[18] Exploitation of man by man is stated to have been replaced by the principle of 'from each according to his ability, to each according to his work'.[19] However, Article 11 stipulates that 'the non public ownership sector comprising the individual economy and the private economy within the domain stipulated by law is an important component of the socialist market economy'.[20] Further, Article 15 CPRC elaborates that 'the state practises the socialist market-directed economy'.[21] The state also promises to 'permit the private economy to exist and to develop within the limits prescribed by law . . . [and] to protect the lawful rights and interests of the private economy'.[22] Under Article 18 CPRC, foreigners too are allowed to invest in China. Thus, the PRC's current official economic policy is

[9] http://www.gio.gov.tw/taiwan-website/4-oa/20040301/2004030101.html and http://www.gio.gov.tw/taiwan-website/4-oa/20040203/2004020301.html.

[10] For example see *China Daily*, 31 May 2004 http://www.chinadaily.com.cn/english/doc/2004-05/31/content_335212.htm and *China Daily*, 26 May 2004 http://www.chinadaily.com.cn/english/doc/2004-05/26/content_333820.htm.

[11] The Constitution of the Republic of China www.gio.gov.tw/taiwan-website/5-gp/yearbook/appendix3.htm.

[12] Art. 4 CROC. [13] Art. 1 CPRC. [14] Ibid. Art. 3. [15] Confirmed by Art. 5 BL.
[16] Art. 1 CROC. [17] Art. 6 CPRC. [18] Ibid. Art. 7. [19] Ibid. Art. 6.
[20] 1999 amendment CPRC. [21] 1993 amendment CPRC. [22] 1988 amendment CPRC.

ambiguous – a socialist state that tolerates private ownership of economic assets, which form an important component of a socialist market-directed economy. These inherent contradictions exist as a result of a political imperative to improve China's economic performance whilst maintaining the people's democratic dictatorship led by the Chinese Communist Party (CCP);[23] the relevance of these constitutional matters will be considered later in the text.

Hong Kong was always portrayed by its pre-1997 colonial government as a bastion of free enterprise and ferocious economic competition. The HKSAR Basic Law confirms that Hong Kong will not be required to practise socialism until at least 2047[24] and that private ownership of property shall be protected[25] by the common law system extant before 1997.[26] Thus, the *status quo ante* was preserved on the retrocession of sovereignty to the PRC.

Taiwan's constitution provides for a social-democratic dispensation of economic assets and 'seeks to effect equalisation of land ownership and restriction of private capital in order to attain well-balanced efficiency in national wealth and people's livelihood'.[27] Further, private wealth and privately operated enterprises might be restricted by law if deemed 'detrimental to a balanced development of national wealth and people's livelihood'. But private productive enterprise shall 'receive encouragement, guidance and protection' from the state.[28] It is also provided that 'public utilities and other enterprises of a monopolistic nature shall, in principle, be under public operation but may be permitted by law to be owned by private persons'.[29] Thus, Taiwan's constitutional position is of a classic social-democratic mien based on the Swedish model, exhibiting a statist bent apparently sceptical of the benefits of economic competition.

So much then, for the theoretical positions of these three jurisdictions in relation to their economic structures. This book will seek to demonstrate that these constitutional positions do not in fact, reflect the reality of the economic structures extant in any of the jurisdictions considered here. Discussion of the situation as regards China will be found in chapters 4 and 5. The Hong Kong position will be analysed in chapters 6, 7 and 8 and Taiwan's competition regime will be considered in chapter 9. The results of the analysis and a synthesis of the overall findings are offered in chapter 10. The conclusions drawn from the evidence might be surprising because, as is often the case, appearance and reality in China are often very different.

[23] Preamble to CPRC. [24] Art. 5 BL. [25] Ibid. Art. 6. [26] Ibid. Art. 8.
[27] Art. 142 CROC. [28] Ibid. Art. 145. [29] Ibid. Art. 144.

Having described the constitutional arrangements of the three jurisdictions under study, the remainder of this chapter will seek to set the rationale for this enquiry (1.2) and the objectives of this book (1.3), to explain the methodology adopted (1.4) and provide an explanation of the structure of the work (1.5).

1.2 Rationale and research questions

The rationale for undertaking the research necessary for this study of China flowed from two factors – the size and potential importance of the economic restructuring process under way in the formerly socialist economy of China and the relatively growing global importance of the Chinese economy, coupled with the existing significance of the Hong Kong and Taiwanese economies. As regards China, a desire to understand what new regulations the Chinese government proposed as a replacement for the state planning process that had existed hitherto as the principal tool of economic management also stimulated the author's curiosity. The nature of the socialist market, the means of policy formation, the particular policy pressures that affect the Chinese government, the process of legislation and the effectiveness of law as a practical method of enforcing policy choices, were all issues that needed to be understood. Also worthy of consideration were developments in competition policy in former socialist states and through the auspices of international organisations as China emerged from a state of self-imposed autarky and was faced with new policy choices. The accession of China to the World Trade Organisation (WTO) would also have a considerable, though perhaps unpredictable, effect on China's economy but clearly domestic producers would now face more competition than in the past.

A quite different set of issues was evident in relation to Hong Kong. The Territory's reputation as the paradigm example of a 'laissez-faire' economic model was often assumed without critical assessment, and so was ripe for investigation. An interesting anomaly was that whilst Hong Kong claimed to have a free, open and competitive market, the government, curiously, was openly hostile to both a domestic competition statute to protect the competitive process and also to any move by the WTO even to discuss multilateral rules on competition policy. The unusual phenomenon of a marked concentration of economic and political power in the same hands suggested that the official explanation of Hong Kong's policy stance might not be entirely accurate and so merited detailed examination and analysis.

As regards Taiwan, its separate economic and political development from Mainland China seemed to have contributed to its decision to legislate a comprehensive competition law in 1992. Even though a law existed, one needed to investigate how well it was operating in practice. Against this background, it seemed possible that lessons could be learnt by Mainland China and Hong Kong from Taiwan's adoption process, given their cultural similarities, which might be useful in their consideration of policy choices.

Traditional comparative law methods could not be employed fully in this undertaking, as there was no developed competition jurisprudence in either China or Hong Kong, and so a broad-based process of investigation was needed to include the relevant historical, political and economic environment within which competition policy was developing in each jurisdiction. Traditional legal analysis would be employed, where appropriate, but this narrow approach would not be an adequate framework to analyse and explain the existing competition situation in China and Hong Kong and so an interdisciplinary approach was adopted.

Thus, the rationale for the study of competition policy development in China and Hong Kong was essentially that the subject was inherently interesting, little of relevance had been published on the topic by legal academics and the importance of China, Hong Kong and Taiwan to the world economy justified an enquiry into their domestic competition systems. This was especially so in view of the enhanced economic globalisation fostered *inter alia* by the establishment of the WTO in 1995 and the organisation's subsequent activism in studying the interrelationship between competition law and trade. Competition is one of the so-called 'Singapore Issues'[30] and might yet lead to the internationalisation of competition regimes through WTO mechanisms, though as a result of the collapse of the September 2003 WTO ministerial meeting in Cancun, Mexico, the fate of the Singapore Issues is now very uncertain, especially as it appears that the European Union may now be prepared to drop its advocacy of WTO competition negotiations for the time being as part of the process of re-starting a new round of trade talks.[31] This is exactly what transpired in July 2004 when the EU agreed to withdraw its insistence on

[30] The term 'Singapore Issues' relates to a set of discussion topics first identified at the 1996 WTO ministerial meeting held in Singapore. They are: trade and investment, trade facilitation, transparency in government procurement and trade and competition policy.

[31] *World trade talks near collapse*, BBC, 9 December 2003. http://news.bbc.co.uk/1/hi/business/3304663.stm and Singapore issues: clarification of the EU position, European

competition policy being included in the new round of trade liberalisation negotiations at the WTO.

1.3 Objectives

In light of the focus on China and Hong Kong, but bearing in mind the international situation and the position of Taiwan, this book seeks to:

- investigate the experience of selected developing countries and countries in transition in adopting competition law and apply those insights to the study of China, Hong Kong and Taiwan;
- appreciate international developments in competition law and policy and how they affect decision-making concerning competition policy in China and Hong Kong;
- examine and analyse the development of competition policy and law in China, Hong Kong and Taiwan;
- assess critically the existing and proposed legal rules governing competition in China, Hong Kong and Taiwan;
- rationalise and explain the situation observed by use of grounded theory methodology so as to create a testable hypothesis that has both internal and external validity and is generalisable;
- make a contribution to the stock of knowledge concerning competition law and policy in China, Hong Kong and Taiwan and produce a theoretical explanation of the circumstances necessary to ensure that competition law adoption is effective.

1.4 Methodology

A way of thinking about and studying social reality.[32]

Adopting a methodological approach in order to create new theory or a hypothesis in law is not very common. Given the subject matter of this enquiry – nascent competition law in China, Hong Kong and Taiwan – and the need to understand more fully the underlying and replicable aspects of the results discovered, explicit recourse to a systematic structure of investigation, analysis and synthesis that could lead to the

Commission Communication, 31 March 2004 http://trade-info.cec.eu.int/doclib/cfm/doclib_section.cfm?sec=182&lev=2&order=date.

[32] This definition is offered by Juliet Corbin and Anselm Strauss in *Basics of qualitative research: techniques and procedures for developing grounded theory,* London: Sage (1998), p. 3.

postulation of a testable explanatory hypothesis, seemed not only advisable but necessary.

This book is not a traditional exposition and analysis of a mature 'black-letter' common law subject. Rather, it is an investigation into a developing legal and policy field in distinct communities that do not share all or many institutions familiar to mature common law or civil law jurisdictions, although, of course, Hong Kong exhibits much greater similarity with other common law jurisdictions than does China, as a result of colonisation by the British between 1841 and 1997.

The use of analytical tools to make sense of the discovered information and then to use them to uncover hidden or obscure core issues in each jurisdiction required more than traditional deductive or analogical reasoning, so beloved of the common lawyer. This is the justification for this brief discussion of methodological issues and the adoption of a methodological approach in this book. This is the means by which a testable hypothesis will be created and this will form the benchmark against which the results discovered will be measured in the concluding chapter. Through the use of a methodological approach and the adaptation of a social science paradigm, a useful and testable hypothesis is generated which may be of wider application to the study of competition law, especially in developing countries likely to adopt a competition regime for the first time, than merely to the jurisdictions examined here.

This section will now examine a number of issues:

- the design of the research method actually undertaken;
- the nature and rationale for adopting a methodological approach in this book;
- the nature of research paradigms including the nature of the relationship between the enquirer and the enquired;
- the utility of traditional methods of legal research in relation to this project;
- grounded theory as a basis for conducting legal research;
- how data collection and analysis was undertaken;
- data sources; and
- the utility, contribution to knowledge and limitations of this book.

1.4.1 How is legal research typically carried out?

Legal research is, in some ways, a singular pursuit. It does not follow traditional scientific methods of developing theory and subsequently

collecting data to test against the theoretical construct. Legal researchers tend not to develop theoretical paradigms and then conduct empirical research. The methods of social or political science research involving the subjective evaluation of opposing theories are not those of the law, except in jurisprudence. Management science and economics which look to the testing of theory by the use of models against quantitative data and statistical analysis are again largely alien to the lawyer, whether as a practitioner or as an academic. The exception is criminology. Data collection from populations of research subjects may be obtained to assess the accuracy or otherwise of preconceived conceptions of criminals' propensity to offend or how they might react to particular sanctions or what may cause offending behaviour. But lawyers tend to view this as social science – a branch of sociology or psychology, not 'hard law'.

Legal research has traditionally meant the ability to seek out information in the form of written law by way of case decisions or statutory material or the views of academics or practitioners from journals or textbooks. After obtaining the raw material, the lawyer then has to understand the legal issues and follow the reasoning of the legislature or the court in order to gain an insight into the law. The ability then to extrapolate principle from case decisions is a cardinal virtue, highly prized by other lawyers and clients alike. For, if the lawyer can predict the decision of a court in respect of a novel or even a clear case, then the costs and uncertainties of litigation can thereby be diminished.[33] The same skill of analysis and exposition is also prized in academic lawyers.

Competition law, however, is an exception to the non-theoretical approach. Explicit recourse to economic theory is essential to understand the basic precepts and policy goals of competition policy. Economics is the *raison d'être* of competition law; the law is the handmaiden of economic theory, its actualisation in the real world of business.

As Whish says: 'Competition law is about economics and economic behaviour, and it is essential for anyone involved in the subject . . . to have some knowledge of the economic concepts concerned.'[34] Posner agrees: 'One thing that has long been clear, however, is that anti-trust deals with what are at root economic phenomena.'[35]

[33] The value of prediction as a vital lawyer's skill was lauded by Oliver Wendel Holmes in his highly influential essay *The path of the law*, 10 Harvard Law Review 457 (1897).
[34] Richard Whish, *Competition law*, London: Butterworth, 5th edn (2003), p. 1.
[35] Richard A. Posner, *Anti-trust*, University of Chicago Press, 2nd edn (2001), p. 1.