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COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN

This book is the only comprehensive guide to the competition regimes of China, Hong Kong and Taiwan. Chinese developments are placed in the context of the adoption of competition regimes by developing and transitional states worldwide. The book also considers the pressure of transnational organisations on transitional states to adopt market-based economic strategies. The book adopts an inter-disciplinary approach considering the political, economic and legal issues relevent to competition policy adoption. The paradoxical phenomenon of Communist Mainland China seeking to adopt a pro-competition law whilst capitalist Hong Kong refuses to do so is explained and contrasted with the successful Taiwanese adoption of a competition regime over a decade ago. The underlying economic and political forces that have shaped this unusual matrix are discussed and analysed with a theoretical explanation offered for the existing state of affairs.

MARK WILLIAMS is an Associate Professor of Law at Hong Kong Polytechnic University, where he teaches Hong Kong company and commercial law and Chinese commercial law. He has a special research interest in competition policy and law generally, and more specifically with regard to East Asia. He holds an LL B from the University of Bristol and an LL M and PhD from the University of London, King's College. He is admitted as a solicitor in England and Wales and in Hong Kong. He has been European Union visiting lecturer in EC Law at Fudan University, Shanghai, as well as a visiting lecturer at East China University of Politics and Law, Shanghai; Peking University; Nanjing University, China and at Cardiff University Law School, UK. He has published widely on the subjects of Chinese commercial law and competition policy in Hong Kong.

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PREFACE

The primary purpose of this book is to describe and analyse the competition law systems in place in Greater China. In order to do that, I decided that it was necessary, and appropriate, to place the extant systems in the context of the relevant economic theory that underpins competition regulation globally. The experience of developing and transitional states which have sought to adopt competition policy and law was also very illuminating in exposing common problems in the adoption process and so selected national cases have also been examined. The wider context of international developments in the competition law field have also played a part in the development of this branch of the law in Greater China and so they, too, are considered.

In order to accomplish my principal task, I also considered that, before undertaking a lawyer's analysis of the legal norms found in China, Hong Kong and Taiwan, it was essential to appreciate the historical, political and economic conditions of all three jurisdictions, for without that background knowledge the present state of competition regulation would be opaque and incapable of satisfactory explanation.

I have also attempted to create an explanatory theory from the facts I have found by use of a sociological methodology known as grounded theory, which allows for the construction of a theoretical explanation of the sometimes puzzling circumstances that pertain in competition policy and law in Greater China. The resultant hypothesis suggests that without a functioning democracy, which is explained in detail in the text, successful and effective adoption of a competition regime is impossible.

My excursus into the adjacent disciplines of history, economics and politics has not been undertaken without significant trepidation on my part, given that the whole of my higher education has been that of a traditional common lawyer, more at home with statutes and cases than with the nostrums of the social sciences. Nevertheless, I hope that my interdisciplinary approach to the subject of competition regulation in Greater China will be of some interest to the reader and, even though a

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theoretical explanation is offered to explain the present position, I have not altogether neglected the instincts of the practising lawyer, as will also be seen from the text.

I believe that political developments in both Mainland China and Hong Kong are central to understanding competition policy and this theme is explored fully in the text.

Currently, in Beijing, the various organs of the central government responsible for competition policy formation – the Ministry of Commerce, the State Administration of Industry and Commerce and the State Development and Reform Commission – are involved in a protracted power struggle to determine which body will win the considerable political and bureaucratic prize of controlling the new and powerful proposed competition authority. The original plan for an independent body appears to have been jettisoned in favour of an agency directly controlled by an existing bureaucracy. This volte face will have important implications both for the integrity of the system and the professionalism of the enforcement process. This in-fighting may also extend the decade-long delay in enacting a comprehensive statute; these matters are dealt with more fully in the text.

In Hong Kong, the post-colonial proconsul Tung Chee-wah, who has been Chief Executive since 1997, recently made an astonishingly frank admission of a fundamental weakness in his administration. On 13 January 2005, he stated in his annual Policy Address that 'these shortcomings and inadequacies have undermined the credibility of our policy-making capability and our ability to govern'. This *cri de coeur* proved to be Tung's political obituary and his resignation followed on 10 March 2005. His successor, Sir Donald Tsang Yam-kuen, a government servant of almost forty years' standing is unlikely to make any significant change to Hong Kong's sector-specific competition policy and so the existing bankrupt competition policy of the Hong Kong authorities is likely to remain unchanged. However, unexpectedly, a committee to review competition policy was announced in mid-March 2005 by the Financial Secretary, Henry Tang; the committee will report in 2006, so change could be in the wind.

This paradox of Communist Mainland China seeking to legislate a competition statute, whilst capitalist Hong Kong resolutely refuses to do so, will be fully explored, and, hopefully, satisfactorily explained in the text which follows. The anomalous position of Taiwan in competition matters, as regards Mainland China and Hong Kong, will be contrasted with the experience of those jurisdictions to illuminate what I consider are the necessary prerequisites for the adoption of an effective competition regime.

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Clearly, political considerations are fundamental to understanding both the *status quo ante* and the future direction of competition policy in Greater China and this justifies my attempt at an interdisciplinary approach to this intriguing subject.

I have endeavoured to state the law, as I understand it, as at 1 December 2004.

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30 April 2005

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ACKNOWLEDGEMENTS

This book is the product of a number of years' study and appreciation of Greater China. I first came to live in the Far East in 1995 during the dying days of British imperial possession of Hong Kong. Since that time, I have tried to understand something of the history, politics, economics and the legal systems of the Chinese peoples and such small appreciation as I have of these large subjects would not have been possible without the assistance of many people.

In Hong Kong, my initial introduction to staff at Peking University and Nanjing University was made possible by Mr Khaw, the Academic Registrar of Hong Kong Shue Yan College. The College President, Dr Henry Hu and the Principal, Dr Chung, were also instrumental in encouraging my study of the laws of China. Paul Stables of Shue Yan College was also most helpful in debating many issues with me.

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In China, I must thank academic colleagues at Peking University, Professor Wu Zhipan; at Fudan University, Shanghai, Professors Zhang Naigen, Lu Zi'an and his wife Sophie; at East China University of Politics and Law Professors Si Pingping, Feng Jun and Chen Zidong; at DongHua University Shanghai, Ms ShenYan, and at the Chinese Academy of Social Sciences, Professor Wang Xiaoye. I also owe a great debt to my former

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In Taiwan, I greatly appreciated the assistance given to me by officials at the Fair Trade Commission, Taipei.

In Switzerland, I must thank Robert Anderson at WTO for information concerning the Jenny Working Group and Phillippe Brussick of UNCTAD for allowing me to attend their seminar in Hong Kong.

In London, I own a sincere debt of gratitude to Professor Richard Whish of King's College for his guidance and encouragement. I also wish to acknowledge the great help given to me by Dr Megan Walters, who not only introduced me to the world of grounded theory methodology but also suggested that it had a useful application in explaining the complex relationships between politics, economics and competition law.

In Cardiff, I wish to thank Professor Duncan Bloy for reading extracts of the text and making several very helpful suggestions. Lesley Green is also to be commended for her sterling efforts to read my dreadfully written manuscript amendments and for committing them to type so efficiently.

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ABBREVIATIONS

ACT	Asia Container Terminals Limited
AM	Administrative Monopoly
APEC	Asia-Pacific Economic Co-operation
ASEAN	Association of South-East Asian Nations
ATV	Asia Television Limited
BA	Broadcasting Authority
BL	Basic Law
BO	Broadcasting Ordinance
Cap.	chapter
CBRC	China Banking Regulatory Commission
CCNM	Centre for Co-operation with Non-Members
CCP	Communist Party of China
CD-R	CD recordable
CECIA	Hong Kong Chief Executive's Council of International Advisers
CEO	Chief Executive Officer
CFA	Court of Final Appeal
CLP	China Light and Power Company Limited
Cmd	Command Paper
CNAC	China National Aviation Corporation
CNPC	China National Petroleum Corporation
COMPAG	Competition Policy Advisory Group
CPC	China Petroleum Corporation
CPRC	Constitution of the People's Republic of China
CROC	Constitution of the Republic of China
CT	City Telecom
CTI	Committee on Trade and Investment of APEC
CTV	cable television market
CWHK	Cable and Wireless Hong Kong
DPP	Democratic Progress Party
DSB	Dispute Settlement Body

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EC	European Community
ECC	Electricity Consumers Concern
ECJ	The Court of Justice of the European Communities
ECR	European Court Reports
EIU	Economic Intelligence Unit
EPS	Easy Pay System
ETS	external telecommunications services
EU	European Union
FTC	Fair Trade Commission
FTL	Fair Trade Law
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GDP	gross domestic product
GITIC	Guangdong International Trust and Investment Corporation
GLC	government-linked companies
HKE	Hong Kong Electric Company Limited
HHI	Herfindahl-Hirschman Index
HIT	Hong Kong International Terminal
HKBN	Hong Kong Broad Band
HKCC	Hong Kong Consumer Council
HKCTV	Hong Kong Cable Television Limited
HKSAR	Hong Kong as a Special Administrative Region
HKSARG	Government of Hong Kong as a Special Administrative Region
HKT	Hong Kong Telecommunications Limited
HKTel	Hong Kong Telephone
ICN	International Competition Network
ICPAC	International Competition Policy Advisory Committee
IMF	International Monetary Fund
KCRC	Kowloon-Canton Railway Corporation
KMT	Kuo Ming Tang
LEGCO	Legislative Council
LPG	liquefied petroleum gas
MAP	Federal Ministry for Anti-Monopoly Policy and Support of Entrepreneurship
MIT	Massachusetts Institute of Technology

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MOEA	Ministry of Economic Affairs (Republic of China, Taiwan)
MOFCOM	Ministry of Commerce (People's Republic of China)
MOFTEC	Ministry of Foreign Trade and Economic Co-operation (People's Republic of China)
MSAR	Macau Special Administrative Region
MTL	Modern Terminals Limited
MTRC	Mass Transport Rail Corporation
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
NPC	National People's Congress
NPCSC	National People's Congress Standing Committee
NPL	non-performing loans
NRDC	National Development and Reconstruction Commission
NT	New Taiwan dollar
OAA	Osaka Action Agenda
OECD	Organisation for Economic Co-operation and Development
OFTA	Office of the Telecommunications Authority
OFTEL	Office of Telecommunications (UK)
OOCL	Orient Overseas Container Line
PBOC	Chinese Central Bank
PCCW	Pacific Century Cyber Works Limited
PRC	People's Republic of China
PRI	Pardido Revolucinario Institucional
RDEL	Residential Direct Exchange Lines
RMB	currency of the PRC known as the Yuan or RMB (People's money)
RoA	return on assets
ROC	Republic of China on Taiwan
RoE	return on equity
RPM	resale price maintenance
RTHK	Radio Television Hong Kong
s., ss.	section, sections
SAIC	State Administration for Industry and Commerce
SAR	Special Administrative Region

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SDERC	State Development and Economic Reform Commission
SDRC	State Development and Reform Commission
SETC	State Economic and Trade Commission
SLC	substantially lessen competition
SME	medium-sized enterprises
SOASAC	State-owned Assets Supervision and Administration Commission
SOE	State-owned Enterprise
SPDC	State Planning and Development Commission
SSNIP	significant and non-transitory increase in price
STDM	Macau Society for Tourism and Entertainment
TA	Telecommunications Authority
THC	terminal handling charge
TNC	transnational corporation
TO	Telecommunications Ordinance
TPM	Trigger Point Mechanism
TRIPS	Agreement on Trade-Related Intellectual Property Rights
TVB	Television Broadcasts Limited
UK	United Kingdom of Great Britain and Northern Ireland
UNCTAD	United Nations Conference on Trade and Development
UN set	United Nations Conference on Trade and Development, *The set of multilaterally agreed equitable principles and rules for the control of restrictive business practices* (1980)
US, USA	United States of America
USC	United States Congress
VAC	Veterans Affairs Commission
VOC	Dutch East India Company
WTO	World Trade Organisation
Yuan	Currency of the PRC, known as RMB (People's money) or the Yuan

Journal abbreviations

AM Ec Rev.	*American Economic Review*
Chi-Kent L. Rev.	Chicago-Kent Law Review

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Cmd	Command
CML Rev.	Common Market Law Review
ECLR	European Community Law Review
Geo. Wash. Int'l L. Rev.	George Washington International Law Review
HKCFAR	Hong Kong Court of Final Appeal Reports
HKLRD	Hong Kong Law Reports and Digest
HKLJ	Hong Kong Law Journal
J Law and Econ.	Journal of Law and Economics
J World Comp.	*Journal of World Competition*
JBL	Journal of Business Law
J. Pol. Econ.	*Journal of Politics and Economics*
JCL	Journal of Contract Law
LFCE	Ley Federal de Competencia Economica
NCILCR	North Carolina International Law Review
NY J. Int'l Law and Pol.	New York International Law and Policy Review
OJ	*Official Journal*
s., ss.	section, sections
Stan. L. Rev.	Stanford Law Review
SWJLTA	South-West Journal of Law
UCLA Pacific Basin Law Journal	University of California, Los Angeles Pacific Basin Law Journal

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