A Review of Taiwan’s Fair Trade Law Draft by Referring to the U.S. Antitrust Laws

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A REVIEW OF TAIWAN'S FAIR TRADE LAW DRAFT
BY REFERRING TO THE U. S. ANTITRUST LAWS

by

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A Thesis Submitted to the Graduate Faculty of
the University of Georgia in Partial Fulfillment
of the
Requirements for the Degree

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I. INTRODUCTION

A. The Reason for the Thesis

With the invention of modern tools of communication, the distances has been shortened between different countries in the world, and the interactions among them are greatly increased. Undoubtedly, the communication of international economic activities is one of the most significant influences. The problems caused by trusts provide a good example. After the appearance of cartels in Europe and trusts in America, the countries of Asia also found the same problem and sought their own ways to solve it. Now, Taiwan, the Republic of China, has encountered such problems too.

In an attempt to solve the problems, Taiwan is enacting an antitrust statute - the Fair Trade Law. Due to the similarity of human economic activities throughout, the experience of the advanced countries would be helpful to the legislature of Taiwan when they consider enacting such an antitrust law. The United States is one of the advanced country whose antitrust regulation has been referred by Taiwan's Fair Trade Law draft. This thesis is an attempt to make comments and suggestions for improving the draft Fair Trade Law in Taiwan by referring to the regulations and case experience of the antitrust laws in the U. S.
B. Legislative Background of Enacting the Draft FTL

In the last forty years Taiwan's economy has changed rapidly from a simple agricultural system to a complex and varied industrial-commercial economy. Because of these tremendous changes in economic circumstances, the old laws regulating economic activity are unable to regulate the modern economic activities in the society. Due to a lack of good regulation, economic activity has been uncontrollable during this time of economic changes. Many monopolies and oligopolies have formed. According to a recent study, fourteen industries in Taiwan have a market concentration rate over ninety percent, and many competing businesses engage in anticompetitive practices such as price-fixing and output restrictions. There arise many serious economic and social problems in the society. As a result, benefits to consumers, allocation of social resources, and the economy of the nation have been seriously damaged.

At the present time, the only current statute regulating such monopolistic practices is the Administrative Act for Agriculture, Mining, Industry and Commerce in the State of Emergency. The act was enacted in 1938, and its only regulation of antitrust practices is to prohibit actions which monopolize or control the market in a few designated goods and enterprises. This regulatory law is based on the older economic system and are unable to deal with the problems growing out of the new economy. Consequently, many monopolies have escaped regulation and punishment. Hence,
the outdated antitrust law facilitates the growth of monopolies in Taiwan.

Dissatisfaction with the antitrust protection of the current statute and the poor enforcement of the statute led to legislative consideration of the FTL. By enacting the draft FTL, the government seeks to expand the scope of the current antitrust statute and also to provide better regulation and stricter sanctions against anticompetitive acts, thereby reconstructing the order of economic society in Taiwan.5

C. The Structure of the Thesis
Chapter I, the introduction of this thesis, describes the enactment and legislative background of the Fair Trade Law in Taiwan. It also explores the purpose of the thesis—making suggestions for improvement of the draft FTL by referring to U. S. antitrust laws. Chapter II gives a general picture of the respective antitrust laws of Taiwan and the U. S. The significant contents of the antitrust law are examined in the next four chapters: monopoly and oligopoly in Chapter III; mergers and combinations in Chapter IV; concerted actions in Chapter V and Chapter VI. These four chapters share a similar structure: First the relevant FTL regulation is described and criticized, then the proposed alternatives are described and examined, and finally the proposal for improvement of the FTL is made. At last, Chapter VII is the conclusion.
ENDNOTES

1. The Fair Trade Law (the FTL) in Taiwan was firstly drafted in March, 1985. On May 15, 1986, the revised FTL Draft was submitted to the Legislative Yuan of Taiwan. This FTL Draft was made by referring to similar legislations of the United States, West Germany, Japan, and Korea. See the Draft Fair Trade Law (1986); see also, Liu, The Draft Fair Trade Law Was Adopted by Taiwan, East Asian Executive Reports, 8 (July 1986)


3. This statistics was provided by the Industry Department, according to the statistics report of the major industrial products in 1982. See Wu, An Analysis of the Draft Fair Trade Law, 9 Taiwan Economic Research Monthly, 6, June 1986, at 45.


5. See the Draft Fair Trade Law (1986) [hereinafter the draft FTL]
II. THE ANTITRUST STATUTES IN TAIWAN AND THE U.S.

A. The Antitrust Statutes in Taiwan

1. The Original Antitrust Statute

The first and only legislation in Taiwan relating monopolistic practice is the Administration Act of Agriculture, Mining, Industry and Commerce in the State of Emergency, which was enacted in 1938. The only regulation dealing with monopolistic practice in the statute is provided in Article 12: "people who produce or operate the designated goods or enterprises must not take such actions that monopolize or control the market." Such terms as "to monopolize" and "to control the market" are too ambiguous to be applicable legal terms. The difficulty thus occurs when applying such ambiguously worded requirements to today's complicated business practices. Hardly any enterprises have been held to be monopolies because there has been no objective standard for monopolistic practices.\(^1\) In addition, the applicable scope of the statute is too limited. The limited application of the statute to the few designated goods and enterprises makes the statute too restricted to regulate many other products and enterprises.

As Professor Liou, one of the scholars who proposed the draft FTL, pointed out, there are two major weaknesses in
the original statute. First, the application has been limited to the certain few designated goods and enterprises. Second, the statute prohibits all kinds of monopolies, including reasonable and necessary ones. In judicial practice, such weaknesses make the court hesitant to apply the original statute to monopolistic practices. Thus, the outdated antitrust law facilitates the growth of monopolistic practices in Taiwan.

For many years, legal scholars urged the government of Taiwan to reform or replace the antitrust law. In 1980's the government responded with the Fair Trade Law, which was designed to replace the original antitrust statute of 1938.

2. The Draft Fair Trade Law

The draft of new antitrust statute - the draft Fair Trade Law was formally adopted on May 15 1986 by the Executive Yuan of the Republic of China. After being submitted to the Legislative Yuan, the draft FTL has been the subject of arguments and debate. Many think that critiques by scholars, authorities and representatives from the industrial and commercial fields have caused this legislative delay.

The draft FTL incorporates two major legal sections: antitrust law and unfair competition law. The draft FTL governs monopolies, oligopolies, monopolization, mergers and combinations, concerted actions impairing free competition, and exclusionary vertical restraints. It also prohibits
certain types of unfair competition. Since this research is focused on a comparison of antitrust laws of Taiwan and the U. S., the section on unfair competition will not be discussed.

Monopoly, mergers and combinations, and concerted actions are the major contents of Taiwan's antitrust law. Monopolistic structure is allowed in Taiwan; whereas monopolistic conduct is prohibited. Such a monopoly policy results from the specific economic style of Taiwan. The country's economy relies mostly on import-export trading. In order to raise competitive competence of this country in the international market, the existence of certain reasonable monopolies in structure is necessary.

Mergers and combinations are not strictly prohibited. Those who intended to engage in merger and combinations are required to apply for approval in advance. Applicants are judged on the basis of a reasonable standard by the government's Fair Trade Commission.

Concerted actions are generally prohibited, but may be permitted exceptionally. The parties involved in concerted actions may apply for permission from the authority. Permission will be granted when the concerted actions have a justifiable purpose, such as efficiency or promotion of competitive competence.

There are both criminal and civil penalties for violation of the FTL. The criminal penalties includes imprisonment not exceeding three years and fines not exceeding one
hundred thousand N. T. Dollars. The civil penalty allows a request of treble damage from the victim. The enforcer of the FTL would be a new agency, the Fair Trade Commission ("FTC"), which would be established within the Ministry of Economic Affairs ("MOEA"). The FTC is to be in charge of the antitrust practices in the nation. It has the power to investigate possible violations and the power to impose administrative sanctions.

In presenting the draft FTL, the government of Taiwan intended to promote a good and healthy economic society in which the order of transactions is maintained and free competition is secured. With such efforts, Taiwan is trying to reach the goals of economic liberalization and internationalization.

B. The Antitrust Statutes in the U. S.

Since the major reference for reviewing Taiwan's FTL draft in this research is the U. S. antitrust laws, a general picture of the U. S. antitrust would be introduced.

The U. S. antitrust law is rooted in the common law tradition. It can be traced from common law actions which were developed to limit restraints on trades and to proscribe monopoly power and middleman profits. There were two factors leading to enactment of the Sherman Antitrust Act of 1890 - the first antitrust law. One was people's dissatisfaction with the antitrust protection provided by the common law; the other was rising concern over the
effects of abusive practices by corporate giants at that time. The Sherman Act was enacted to restrict the expanding power of the railroads and trusts. Unfortunately, it failed and did not meet public expectation. When the antitrust issue became a hot topic of the 1912 presidential election, Congress passed the Clayton and Federal Trade Commission Acts in 1914 to supplement the original Sherman Act.15

The Sherman Antitrust Act of 1890 is the basic and the most important antitrust legislation in the U.S. Most substantive antitrust laws derive from the concepts and the theories contained in Section 1 and 2 of the Act. Section 1 of the Act declares contracts, combinations and conspiracies in restraint of trade to be illegal. Section 2 forbids monopolization, combinations or conspiracies to monopolize and attempts to monopolize. Any violation of the two Sections are punishable by a fine not exceeding $50,000 or imprisonment not exceeding one year, or both.

The Clayton Act was passed in 1914, twenty years after the Sherman Act. It specifies offenses more precisely. Section 2 of the Clayton Act, which is amended by the Robinson - Patman Act of 1936, forbids discrimination in prices and services which substantially lessen competition or tend to create a monopoly. Tying arrangements, requirements contracts and other exclusive arrangements are prohibited by Section 3. Mergers by stock and asset acquisitions which may substantially lessen competition are prohibited by Section 7.
The Federal Trade Commission Act of 1914 created the Federal Trade Commission, an independent administrative agency, to enforce the antitrust laws. The Commission is authorized to declare unfair methods of competition unlawful, and to issue orders prohibiting such unfair competition. A violation of a final order of the Commission will be subject to judicial review.

These antitrust laws were designed to control the exercise of private economic power by preventing and punishing monopoly. The economic goal of the antitrust law is to promote competition and to efficiently allocate social resources by prohibiting monopoly and restraints upon freedom of trade. In addition, the antitrust laws also serve non-economic goals such as decentralization of economic power, promotion of equality of business opportunity, and, most important, reduction of private economic power to protect public consumer welfare.

After nearly fifty years of experience, the U. S. antitrust law is functioning well though not entirely satisfactorily. The discussion of the Draft FTL in more detail and comparisons with the U. S. law will be given in the following chapters.
ENDNOTES

1. See Liou, Comments and Suggestions for the Draft Fair Trade Law, at 2, 1987, (an article presented in the hearing for the Fair Trade Law)
2. See id.
5. Id. Explanation for Art. 10.
7. Id. Art. 12.
9. Id. Art. 35.
10. Id. Art. 32.
11. Id. Art. 25.
12. Id. General explanation for the Draft FTL.
14. See id. at 15.
15. The Sherman Antitrust Act is the primary antitrust law in the U. S. The Clayton Act of 1914 and the Federal Trade Commission Act of 1914 are the supplementary statutes for the Sherman Act. The texts of the Sherman Act and Section 2, 3, and 7 of the Clayton Act are given in Appendix II.
17. See id. at 14.
A. Monopoly and Oligopoly in the Draft FTL

1. Monopoly in the Draft FTL

Article 5 of the draft FTL defines a monopoly as a condition wherein an enterprise does not face competition, or has such superior market power as to exclude competition in a particular market. The term "enterprise" includes companies, sole proprietorships, partnerships, and other persons and groups engaged in the sale of goods and services. The regulation on monopoly is provided in Article 10 of the draft FTL, where it prohibits a monopolistic enterprise from unfairly excluding others and from requesting favored treatment unjustifiably. Such regulation is intended to show that monopoly power is not objectionable per se, and only the exercise of monopoly power is objectionable and punishable.

Such a policy consideration, which prohibits monopolistic conduct but allows monopolies in structure, results from the specific economic structure of Taiwan. Taiwan's economic development relies mostly on export - import trading. To raise the competitive competence in the international market, large scale enterprises are not only allowable but necessary. Mass production has been strongly promoted
throughout in the international economy for many years to save costs and to promote efficiency.\(^5\) Hence the large scale enterprises formed by monopolies are not necessarily damaging the economic fabric of Taiwan. Accordingly, monopoly in structure is both justifiable and helpful in Taiwan as long as the enterprises are not engaging in monopolistic conducts which restrains free market competition. This is the major reason for such a monopoly policy consideration in Taiwan.

In addition, monopolies are not all objectionable per se. There are some monopolies formed naturally, which are helpful rather than harmful to society, for example, those formed by the high quality of their services or products and by new inventions or high technology.\(^6\) To promote efficiency and to encourage new invention and development of high technology, such monopolies are not be objectionable.

However, monopoly regulation in the draft FTL has been criticized in two ways.\(^7\) First, there are no criteria to determine whether or not a certain enterprise constitutes a monopoly. Although Article (5) of the draft describes the condition of monopoly, it does not give a definition for purpose of legal judgment. The conditions for monopoly in Article 5 are lack of competition and market power strong enough to exclude competition. However Article (5) fails to provide any objective criteria for determining such practical questions as how much market power is enough to exclude competition and how the range of a particular market
should be determined. Since there are no criteria for determining such conditions of monopoly, it is foreseeable that applying such a regulation to practical cases would cause some confusion in practice.

Second, the draft FTL provides no standards for identifying monopolistic conduct. The monopolistic conduct prohibited by Article (10) are those which unfairly exclude others and unjustifiably request favored treatment. The terms "unfairly" and "unjustifiably" are too ambiguous to be legal terms which can be enforced in practices. Except for Article 10 there is no regulation providing any standard for identifying monopolistic conduct. Thus there is a lack of standard for identifying monopolistic conduct. In order to define such ambiguous legal terms, to provide appropriate criteria and standards, and thus to incorporate the draft FTL, some scholars are seeking varied proposals by referring to different foreign jurisdictions. The U.S. antitrust law is one of the major concerns.

2. Oligopoly in the Draft FTL

Oligopoly is regulated in Article 5 (2) of the draft FTL. This Article provides:

When two or more enterprises do not in fact compete with each other in pricing and their relationships as a whole with other entities have the characteristics as specified in the preceding paragraph, such situation should be deemed a monopoly.
Oligopoly is defined as a condition wherein the oligopolistic firms as a whole create a monopolistic condition and do not engage in price competition among themselves and will be treated as though they were monopolies. Therefore, the regulations of monopoly can also be applied to oligopoly.

B. Proposals to Incorporate Monopoly Regulation in the Draft FTL

As stated above, there are two major weaknesses in the draft FTL's monopoly regulation proposals: failure to define a market and to provide criteria to measure market power, and a lack of reasonable standards for determining monopolistic conduct. These weaknesses led to the consideration of some proposals to improve the new antitrust statute.

Professor Yen, who has taught in the National Central University, is a specialist in finance and economics. He has proposed a solution for such problems. He indicates the necessity of providing further regulations on these ambiguous definitions and legal standards; while suggesting that they should be left to the judgment of the court with their accumulated case law experiences. Because this proposal leaves the responsibility to the court instead of the legislature, it is both risky and unrealistic.

The proposal is risky because normally not all judges have a specialized knowledge of economics, especially in the
field of antitrust practices which involves many complicated marketing and corporation concepts. Due to the influence that large-scale enterprises may have on the national economy, an judgment to prohibit or punish a monopoly may cause irreparable damage to the society. Hence with such a potentially significant effect on the social economy, it is too risky to leave such gaps to the judicial branch when they can be filled in with better regulations by the legislature.

In addition, imposing the burden of creating new antitrust law upon judges is unrealistic. Under the continental legal system, judges are bound by the statutes made by the legislature. They are not allowed to decide cases by their own beliefs and judgments unless such beliefs and judgments are confirm to the law. Thus, to expect judges to make new laws without proper underlying laws is too unrealistic to be executed.

Therefore, leaving these gaps in the draft FTL and expecting the courts to fill them in makes the statute too risky and unrealistic to be a good law. From the legislative standpoint, it would be better to improve the draft FTL than to leave these gaps to be filled in by the courts. In fact, this is the reason that scholars are eager to study legislative and judicial experiences of other advanced countries that may fill these gaps and be incorporated into the draft FTL.
It is possibly that the executive branch intended for the courts to fill these gaps while the FTL was drafted. If this is true, the advanced experiences of other countries become even more important. Because by referring to others' experiences, the courts in Taiwan may avoid the weaknesses and incorporate strong points into the draft FTL.

1. Monopoly Power

When dealing with the problem of monopoly power, professor Liou suggests a solution based on West German antitrust law. Considering the variety of factors affecting the definition of markets and the difficulties of determining the measurement of monopoly power, he suggests a West German approach to solving the problem of monopoly power.

According to professor Liou, there are a variety of factors which determine whether a firm possesses monopoly power, a power which is strong enough to control prices or exclude other competitors from the market. First, the market must be appropriately defined before monopoly power can be measured. Several factors must be carefully considered when defining a market, including the availability of substitutes for a product, distance and transportation factors affecting equivalent products, and the analysis of the market structure. Second, a firm's marketing conduct is also an important consideration when determining monopoly power of a firm, especially when the
firm can freely decide its own strategy of operation and disregard other competitors' reactions in the market.

Due to such a variety of factors affecting the market and the difficulties of measuring monopoly power, professor Liou has proposed that an enterprise which possesses one third share or more of a particular market will be presumed to be a existing or potential monopoly. Similarly, any three enterprises which together control half of a particular market, or any five enterprises which together control two thirds of a particular market be presumed an oligopoly.

By proposing to measure a firm's monopoly power by its market share, Professor Liou has attempted to simplify the practical difficulties of determining a monopoly by objective criteria.

Another significant proposal, which has been supported by several legal scholars, refers to the U. S. antitrust laws. In order to study this proposal, details of the U. S. antitrust laws and case experience will be given below.

In the U. S., monopoly power has been defined as power to control price or to exclude competition from the market. When a firm has market power which is strong enough to affect the price or to exclude other competitors from the market, the firm has monopoly power. The usual procedure for dealing with the issue of whether a firm has monopoly power is first to delineate a relevant market, then to measure the firm's market power by its market share, and finally to base the determination on that share.
Therefore, before measuring market power, a relevant market should first be delineated.

a. Relevant Market

A relevant market is the narrowest market in which products from adjacent areas or from other producers in the same area can not compete on substantial parity with those included in the market.\(^{18}\) It is usually defined in product and geographic terms.

When delineating a product market, the availability of homogeneous and substitutable products are major factors to be considered.\(^{19}\) Whether the homogeneous or substitutable products in the market should be included must be first determined.

In the landmark case, United States v. Aluminum Co. of America,\(^{20}\) the defendant Alcoa, the only domestic producer of virgin aluminum ingot, was charged with monopoly in the production of virgin aluminum ingot.\(^{21}\) In this case, the issue of the product market involved homogeneous products: the virgin aluminum ingot sold, the virgin aluminum ingot fabricated by Alcoa itself, and the secondary ingot made by recycling scrapped aluminum fabrications, which was produced by other traders.

The court delineated the product market by including the ingot Alcoa sold and the ingot it produced and fabricated but excluding the secondary ingot. The court reasoned that Alcoa's fabricating activities caused a reduction in demand for ingot. Alcoa, by fabricating, displaced non-integrated
fabricators who would otherwise have bought Alcoa's production. Thus the ingot produced and fabricated by Alcoa should be included. As for the secondary ingot, the court thought that Alcoa, knowing that current production could be reclaimed, would take into account the production's return as scrap to compete with Alcoa's future production. Since the secondary production was subject to Alcoa's control in the past, it was excluded when delineating the product market.

In Alcoa, the court, by analyzing market demand and the monopolist's production plan, delineated the product market among products that were functionally and physically similar. In another significant case, Telex Corp. v. I.B.M. Corp., the court delineated the product market of products that are physically dissimilar though functionally interchangeable in some uses.

In Telex, the plaintiff Telex, with other firms, made peripheral equipment compatible with an IBM computer. IBM reduced prices and changed its pricing method, cutting into the profits of the defendant and others. The defendant brought an action claiming that IBM possessed monopoly power in both the basic computer market and in the market for peripheral devices compatible with the IBM computer. When delineating the product market, the court stressed the low cost and easy technology for switching from making equipment compatible with one manufacturer's central processing units to making equipment compatible with those of others. Thus
the court defined the product market as the one including peripheral devices compatible with IBM and those not compatible with IBM.\textsuperscript{25}

Substitutability is the other factor to be taken into account when defining the product market. In the famous case, \textit{United States v. E.I. DuPont De Nemours & Co.},\textsuperscript{26} the defendant Du Pont, which produced seventy five percent of the cellophane sold in the U. S., was charged with monopolizing trade in that product. The court used the test of the cross-elasticity of demand to determine whether the products are reasonably interchangeable by consumers for the same purposes. The evidence showed that relatively small reductions in the price of cellophane caused relatively large numbers of buyers to switch to cellophane from other wraps. The court inferred that there was a high cross-elasticity of demand between cellophane and other flexible wrapping materials, that is, the substitutability by consumers of other flexible wrapping materials for cellophane was great.\textsuperscript{27} On the basis of this evidence, the court defined the market as all flexible wrapping materials, and not cellophane alone.\textsuperscript{28}

In the \textit{Cellophane} case, the court used the cross-elasticity demand test to determine the substitutability of the product in the market, and accordingly to delineate a proper product market. Although the courts' reasoning in these cases is not completely persuasive,\textsuperscript{29} the analysis of
the cases and the rationale underlying the decision are worthy for the courts in Taiwan to refer to.

A geographic market is a geographic area within which sellers of a product can increase price or cut production without causing a prompt flow of supply from sellers in other areas. Geographic location is less important in delineating a geographic market than the presence of buyers and sellers who are in such free intercourse with one another that the prices of the same foods tend to equality easily and quickly. Hence, a central station security alarm service, for example, can be considered local because each station serves a 25 mile radius. Despite its limited geographic range, the security service is affected by its national planning, nationwide contracts and insurance rates. As a result, the geographic market of the service was delineated as a national one rather than a local one. On the other hand, although a newspaper was distributed out of state and its publisher engaged in considerable interstate commerce, the geographic market was delineated as a local market because the paper's daily newspaper monopoly covered 99% of the local families.

The scope of the geographic market may vary with several factors, including transportation costs and legal restrictions. A domestic producer has a transportation cost advantage over a foreign producer. If a domestic producer sets a price below the cost of a foreign producer, the foreign producer will be excluded from the geographic...
market. On the contrary, if the domestic producer sets a price at which the foreign producer can enter the market, the geographic market will be enlarged and include the foreign producer. Legal restrictions such as city licensing requirements or custom duties may also influence the matter.

Being an island, Taiwan's geographic market problems are not as complicated as those of the U. S. The geographic market is usually both the national and regional one - the Taiwan market, except in cases which involve an international market. Because Taiwan's economy mainly relies on import-export trading, a study of geographic markets at an international level is necessary.

Alcoa is the only case in the U. S. which deals with differentiation between a national and an international market. Alcoa produced all of the virgin aluminum ingot in the U. S., but the court did not hold that Alcoa had 100% of the national market. By adding the total amount of imported ingot sold in this country to the measuring base, the court computed Alcoa's share at 90%. The court considered only the portion of foreign production which had reached America, not all foreign production, as the relevant foreign source to compute the market share. The court thought that the foreign sellers had a tariff and transportation cost disadvantage, and thus excluded foreign competitors from being considered part of the market. Consequently, the court defined the geographic market as national rather than international.
Some scholars propose a diversion approach to geographic market definition. They argue that if a foreign seller has some sales in a market, all his sales, wherever made, should be considered a part of that market for purposes of computing the market share of a domestic seller. This is because, having proved his ability to sell in the market, the foreign sellers could increase his sales there simply by diverting sales from other markets if the market price should rise.

Although this proposal may be true, there are non-economic reasons for hesitating to consider a geographic market to be international. For example, there would be potential political blocks to transnational responses within the international market, including the tariff and a variety of commercial barriers to international trade. Therefore, a geographic market could hardly be defined as an international market.

b. Market Power

Once a relevant market has been defined, measuring the market power of a firm is the next step in determining whether or not the firm has monopoly power in the market. Market share is the primary basis which most courts rely on to measure a firm's market power. In addition to market share some courts also take market structure into account in determining a firm's market power.

The market share approach uses market share percentage to measure a firm's market power. The underlying rationale is
that the more market share a firm has, the greater is its ability to control prices, particularly when it has already had a very large market share.

The amount which courts use market share to determine monopoly power is illustrated in *United States v. Aluminum Co. of America*: a ninety percent share is enough to constitute a monopoly, sixty or sixty-four percent share is doubtful to be enough, and thirty-three percent share is certainly not enough. The court in *United States v. Grinnell Corp.* further held that an eighty-seven percent market share leaves no doubt that the defendants have monopoly power. In fact, for a market share of less than approximately seventy percent, the Supreme Court has never affirmed a finding of monopolization against a defendant.

However, this does not mean that a firm with a market share of less than seventy percent could not be found possessing monopoly power. Some courts take market structural evidence into account in determining monopoly power. The structure of a market is characterized by a number of factors. The presence of barriers to market entry and the size and distribution of competitors in the market are major factors. These factors influence a firm's ability to control prices or exclude competition.

A barrier to entry has been defined as anything which prevents outside competitors from freely entering into a market. For example, in *United States v. United Shoe Machinery Corp.*, the Supreme Court found that United's
accumulated patents and its business practices constituted barriers to entry. The business practices included the policy of machinery for lease only and not for sale, the long rental term of ten year, and free maintenance service with the leased machinery. These barriers forced competitors wanting to enter the market to have to either invent around the United patents or purchase expensive licenses. Thus, the court found that competitors in the shoe industry suffered great barriers to entry in the form of cost disadvantages. Therefore, relying not only on defendant's seventy-five percent market share, but on the barriers to entry it created, the court inferred defendant's ability to control prices and held that the defendant had monopoly power.

The size and distribution of competitors is another important structural consideration. If the remainder of the market is fragmented, a firm with overwhelming market share could control prices more easier than if the remainder of the market is concentrated in a few firms. When the remaining competitors are small, they are more likely to be price takers. Thus, for a finding of monopoly power, each competitor's having a small share could be more critical than a dominant firm's having a particular market share.

Some lower courts also support the theory that, with appropriate structural evidence, a firm may be found to possess monopoly power even when its market share is lower than seventy percent. For example, a market share of
approximately sixty percent, together with evidence of high barriers to entry, may support a finding of monopoly power. In another case, a share of only fifty percent was sufficient.

In dealing with motions to dismiss, or for summary judgment, a number of courts are more willing to accept the possibility of monopoly power even when market share is low. For example, in Broadway Delivery Corp. v. United Parcel Service, the Second Circuit found improper a jury charge to the effect that possession of a market share of less than fifty percent fails to constitute monopoly power. The court concluded that motions for summary judgment could be granted only when the defendant's share is less than fifty percent, or even somewhat above the figure, and the record contains no significant structural evidence to show the defendant's monopoly power.

Moreover, in Hayden Publishing Co., Inc. v. Cox Broadcasting Corp., the Second Circuit further clarified its Broadway Delivery holding by indicating that the structure of the market must be considered in determining whether monopoly power exists, and that the burden of demonstrating the absence of significant structural evidence of monopoly power rests with the moving party.

Hence, while market share has been the primary basis for measuring monopoly power, there is a trend to take market structure into account, because a firm may be able to control price, despite low market share, due to the market
structure.\textsuperscript{61} This can be done by creating barriers to entry, or because of the small size of competitors. It is appropriate to consider market structural evidence in additions to market share in determining monopoly power.

c. Suggestions for the Draft FTL

Among these proposals, Professor Yen's proposal, which asserted that the definition of ambiguous terms and standards should be left to judicial decisions rather than to legislation, is both risky and unrealistic.\textsuperscript{62} Professor Liou's proposal, which tried to solve such complicated problems as measuring monopoly power by a criterion of one third percentage of market share, oversimplified the problem.\textsuperscript{63} Measuring monopoly power on the basis of market share percentage alone, without considering other market factors cannot provide a good judgement of anticompetitive and economic efficiency. In addition, holding that one third of market share constitutes monopoly power is unpersuasive.

Therefore, the suggested proposal for improvement of the draft FTL would be the one that refers to the U. S. antitrust law. First, the market should be well defined. The term "a particular market" in Art. 5 should be replaced by "the relevant market," and the relevant market be defined in product and geographic terms. When defining product market, the factors of homogeneous and substitutable products should be taken into account.
Next, appropriate standards for measuring monopoly power should be provided. Criteria for measuring market power should be added to the original ambiguous power "to exclude competition" proposed in the article. The new trends in the U. S. courts, which measure a firm's market power based primarily on market share and secondarily on such market structure factors as barriers to entry, would be a good example for Taiwan to follow. Therefore, establishing a certain percentage of market share pursuant to the practical needs of Taiwan and also considering the structural factors of the market would be an improvement for the draft FTL.

2. Monopolization

The regulation of monopolization in Taiwan's draft FTL is provided in Article 10. It prohibits monopolistic enterprises from engaging in three activities: unfair exclusion of other competitors, inappropriate determination or maintenance of prices, and unjustifiably requesting favored treatment. Since Taiwan's monopoly policy allows the existence of monopolistic enterprises and prohibits only the conduct of monopolization, the regulation on monopolization becomes a significant part of the draft FTL. However, the regulation in the draft FTL has been generally criticized to be incomplete and too restrictive because it limits prohibited monopolistic conduct to three activities.

Professor Yen suggested a statement of principle to replace this article of prohibition. This statement would
indicate that monopolistic enterprises are prohibited from abusing their monopoly power, and would let the courts decide what conduct constitutes the abuse of monopoly power. Professor Yen's suggestion of leaving the problem of determining monopolistic conduct to the court is inappropriate when the legislation can provide a better solution.67

Further criticism came from Professor Liou, who criticized that although the listed three activities are the common and major types of monopolistic conduct, they can never include all possible monopolistic conduct.68 He raises such questions as whether the forced merger of other enterprises by price reduction can be considered an exclusion of competition, and whether cost reduction by refusal to adopt new production technology can be considered inappropriate price maintenance.69 Therefore he proposed to add a clause of general prohibition to the original article to the effect that monopolistic enterprises are prohibited from abusing their monopoly power.70 As a result, all abuses of monopoly power would be prohibited, and the three listed activities would merely provide examples of abuses, not definitions.

Several conduct tests for monopolization adopted by the U.S. Supreme Court can provide a good reference. In United States v. Aluminum Co. of America,71 the court adopted a deliberateness test to determine the monopolistic conduct of the defendant. The court held that monopoly power thrust
upon the defendant does not constitute monopolization offense; monopoly power acquired deliberately does. The defendant was held to be monopolized because it had achieved monopoly rather than being a passive beneficiary of monopoly power. Under this test, monopoly resulting from superior skill, foresight, and industry does not violate the law, but monopoly obtained through dishonest industrial conduct does.

In United States v. United Shoe Mach. Corp., Judge Wyzanski formulated two tests for monopolistic conduct: the exclusionary conduct test and the prima facie approach. The exclusionary conduct test asserts that a firm is monopolized when it obtains or maintains monopoly power by conduct which is either predatory or exclusionary in purpose and effect. The predatory conduct means conduct which is not a normal industrial response to market opportunities, but is primarily aimed at limiting the opportunities of competitors and driving them out of the market. The exclusionary conduct further refers to conduct which tends to exclude competition not only by utilizing existing market opportunities, but by raising barriers to entry. This test focuses on conduct which could be identified as anticompetitive.

a. Suggestions for the Draft FTL

The prima facie approach indicates that once a firm has monopoly power, it prima facie monopolizes; but the firm may escape statutory liability by proving that its monopoly
power is attributable solely to a cause which the law does not discourage, such as superior skill, superior product, natural advantages, or economic or technological efficiency.

Among these tests, the exclusionary conduct test appears to be suitable to Taiwan's FTL. The exclusionary conduct test focuses on conduct which is identified as exclusionary and harmful in the market. It avoids the complicated inquiries resulting from the realities of the market place. The deliberateness test outlaws deliberate actions taken to achieve or maintain monopoly power and justifies the passive beneficiaries of monopoly. Since all firms are run to maximize benefits, hardly any firm seems to be a passive beneficiary of monopoly power. This test is close to a statement that mere possession of monopoly power will be unlawful. As for the prima facie approach, it considers mere possession of monopoly power to be prima facie unlawful, yet reserves for the defendant the right to prove that the causes of its possessing such power are innocent. This approach is too strict for Taiwan, where monopoly is allowed as a policy consideration. Therefore, the exclusionary test is the best test for the FTL.

A proposal for improvement of the draft FTL would clearly include a conduct test, specifically the exclusionary test for monopolization. Thus, the suggested proposal would be Professor Liou's proposal, which adds to Article 10 a general prohibition clause prohibiting abuses of monopoly
power should be added to Article 10. In addition, the exclusionary test is suggested to be the standard for determining abusive conduct. As a result, enterprises engaging in conduct which is exclusionary in purpose and effect, such as limiting competitors' opportunities and driving them out of the market or raising barriers to entry and blocking potential competitors, would be found to be monopolized.
1. See, Draft FTL, Art. 5.
2. See id.
3. See id Art. 10.
4. See Draft FTL, General Explanation for the Draft FTL.
5. See id.
7. See id. at 3-4; see also, Yen, A Review and Suggestions for the Draft Fair Trade Law, at 4, 1987. (an Article presented in the Hearing for the Fair Trade Law.)
8. See Liou, supra, at 3.
10. Draft FTL, Art. 5 (2).
11. See, Yen, supra, at 8.
12. Liou, supra, at 3.
13. Id.
14. Id.
15. These Professors include Professor Chou, Professor Yen, and Professor Liang.
17. See L. Sullivan, Antitrust, at 33 (1977)
18. See id. at 41.
19. See id. at 44, 51.
20. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
21. See id. at 424.
22. See id.
23. See id. at 424-25.
24. Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975).
25. Id. at 903-07.
27. Id. at 394-404.
28. Id. at 404.
29. See L. Sullivan, supra note 17, at 53 and accompanying text.
30. Id. at 67.
34. See L, Sullivan, supra note 17, at 67.
36. 148 F.2d, at 424-25.
38. See L. Sullivan, supra note 17, at 71-2.
39. Id. at 75.
40. See Wentz, Monopoly Power in Completed and Attempted Monopolization Litigation; the Convergence of Law and Economic, . . . , at 276-77, and accompanying notes.
41. 148 F.2d 416,424 (2d Cir. 1945)
43. Wentz, supra, at 271, and accompanying note.
44. At least in two cases, market shares of 60% were found monopoly power with evidence of high barriers to entry. In another case, even a market share of 50% was sufficient. See Amplex of Med., Inc. v. Outboard Marine Corp., 380 F.2d 112, 114 (4th Cir.1967), cert. denied, 398 U.S. 1036 (1968); United Banana Co., v. United Fruit Co., 245 F.Supp. 161,170 (D. Conn. 1965), aff'd, 362 F.2d 849 (2d Cir. 1966); see also Associated Radio Serv. Co.v. page Airways, 624 F.2d 1342, 1352 (5th Cir. 1966).
45. L. Sullivan, supra note 17, at 77.
48. Id. at 332-33
49. Id.
50. Id. at 314-25.
51. See American Tabacco Co. v. United States, 328 U.S. 781, 795-96 (9146); see also, L. Sullivan, supra note 17, at 79.
52. See Landes & Posner, supra note 37, at 944 n.15.
53. See infra note 43.
54. See infra note 44.
55. Id.
56. See Wentz, supra note 40, at 277, and accompanying note.
58. Id. at 128.
60. Id. at 68 (quoting Heyman v. Commerce & Industry Insurance Co., 524 F.2d 1317, 1320 (2d Cir. 1975).
61. See Wentz, supra note 40, at 276-78.
62. See infra text at 13-4.
63. See infra text at 14-6.
64. Draft FTL, Art. 10.
65. See Liou, supra note 6, at 4-5.
66. See Yen, supra note 7, at 8.
67. See infra text at 14.
68. Liou, supra note 6, at 3-4.
69. Id.
70. Id. at 4.
71. 148 F.2d 416 (2d Cir. 1945).
72. Id. at 429.
73. Id. at 429-30.
74. Id. at 431.
77. See id.
78. See id. at 100-01.
80. See, e.g., L. Sullivan, supra note 17, at 97.
IV. MERGERS AND COMBINATIONS

A. Mergers and Combinations in the Draft FTL

A combination as defined in Article 6 of the draft FTL contains five categories: merger, acquisition of one-third voting stock of another enterprise, acquisition by leasing or transfer the principal part of another enterprise's business or property, joint operation with another enterprise on a regular basis or operation of another enterprise by (an arrangement of )entrustment, and direct or indirect control of another enterprise's business operation or personnel arrangement.¹ A combination of enterprises in the following situations are required by the draft FTL to apply for permission to the authority in advance. First, if, as a consequence of the merger, the market share of the merging enterprise reaches one-third of the total market; second, if, one of the merging enterprises has a market share of up to one-fourth of the total market; and finally if sales of one of the merging enterprises in the preceding fiscal year exceeds the amount publicly announced by the (central competent) authority.²

Applications are judged by a cost-benefit analysis; if the benefits to the economy as a whole derived from the merger are larger than the bad effects resulting from
restraining of the merger, the competent authority may grant its permission. A combination failing to obtain a prior permission may incur divestiture, compulsory dissolution of assets, cessation of business and fines.

As a result, the merger policy in the draft FTL allows the existence of combinations, yet requires certain highly concentrated enterprises to apply for approval for combinations. Such a policy consideration is based on the characteristics of the combination which carry both good and bad economic effects for the society.

Unlike concerted actions such as cartels, combinations of enterprises are not intended to restrict competition in the market. In fact, combinations provide several social benefits. Vertical combinations may secure sources of material or sale markets for the products; horizontal combinations may save cost and promote efficiency and quality; conglomerate combinations may diversify investments and separate risks.

Consequently, combinations provide the social benefits of securing the channel of production and sale, reducing costs, and promoting efficiency and technology.

On the other hand, although combinations are not intended to restrict competition, they may result in changes in market structure and thus bring probable bad effects to free competition, especially when the combination creates a high concentration of the market. Therefore, a policy which
approves a combination by balancing the resulting cost and benefit is an appropriate principle.

Most scholars upheld the principle that grants permissions upon a basis of cost-benefit analysis. As Professor Liou pointed out in his article "The Supervision of Enterprises' Combinations in the Draft FTL," combinations may create monopoly power, change the market structure, and thus result in the danger of restricting free competition. On the other hand, they may also encourage invention, reduce costs, and thus enrich Taiwan's competitive competence in the international market. Under such circumstances, legislation which supervises combinations by evaluating their costs and benefits from the standpoint of the economy as a whole will be appropriate legislation.

Nevertheless, the method of supervising combinations which requires an application for permission in advance has been commonly criticized. There are two alternatives for supervising combinations: the permission approach and the objection approach. The permission approach requires the combining enterprises to apply for permission prior to their combination. The enterprises cannot combine until permission is granted; the combination will be prohibited if the application is denied. The objection approach requires the combining enterprises to report their combining plan to the authority prior to the combination; the combination as described in the reported plan would be legal unless the authority objects during a certain period.
Apparently, the FTL draft adopts the permission approach to supervise combinations. The permission approach has been criticized as a waste of enterprises' and government's resources and a probable impairment of the combining enterprises' legal rights and interests. As Professor Yen indicated, the cost or benefit of a combination is hard to estimate in advance. Thus, under the permission approach, if the authority postpones applications for enterprises' combinations, the timing of the combinations and the potential profits resulting from them would be affected, and as a consequence, the legal rights and interests of the combining enterprises would be impaired. In addition, if all combinations are required to apply for permission, not only do combining enterprises have to consume much time and effort, but the government has to use many resources for examining applications.

From a practical view, Professor Liang also asserted that to adopt the permission approach is to ignore the reality of Taiwan's current economic situation and is against the consistent government policy. Due to the high percentage of middle and small sized enterprises in Taiwan and the limited market of Taiwan, Taiwan's government has encouraged mergers of enterprises and enlargement of enterprises' operation scale to reduce operating costs and to enrich the competitive competence in the international market. The advance application for permission for large-scale
combinations increases enterprises' burdens and is also unrealistic to Taiwan's current economic circumstances.

Therefore, most of Taiwan's scholars upheld the FTL draft with the principle of conditional supervision of enterprises' combinations, which grants permissions by balancing the social benefits and the costs of the combinations; nevertheless they oppose the manner of supervision, the permission approach that requires the combining enterprises to apply for permission before their actual combination and prohibits any combinations before the authority grants permission. They prefer the objection approach to the permission approach on the ground that it will encourage combinations of middle and small sized enterprises, promote economical efficiency, and protect the legal rights of the combining enterprises.

As a matter of fact, mergers and combinations would take place much more often in Taiwan than would monopolies. Taiwan's economy is based on middle and small sized enterprises. For their own profits and through the government's encouragament of their mergers, these middle and small sized enterprises will merger with each other to reduce costs and to promote their competitive competency. Therefore, mergers in Taiwan become increasingly significant. Due to a lack of relevant laws or cases in Taiwan, the development and regulations of mergers and combinations in the U.S. will be introduced.
B. Mergers and Combinations in the U.S.

1. The Development of Mergers and the Congress Reactions

The development of mergers in the U.S. and Congress's reaction to them can be divided into three stages. The first stage began in 1879 when the great industrial trusts and combinations took place. Concerned with the great effect which the merged industrial giants had brought on the national economy, Congress enacted the first antitrust law, the Sherman Act, to outlaw all contracts and combinations in restraint of trade. By using the Sherman Act, the government successfully broke up several great consolidations in the fields of railroad, oil, and tobacco, and thus brought an end to the first stage of mergers.

Although the Sherman Act served as a good device to prohibit some industrial mergers in the 1890s, the development of industry revealed a loophole in the act: a lack of a particular regulation on stock acquisition. Such a loophole in the Sherman Act and the flexible "rule of reason" formulated by the Supreme Court in the oil and tobacco cases created concern that certain trade practices might escape regulation through the use of stock acquisition or other methods. In respond to this concern, Congress passed the Clayton Act to reinforce the Sherman Act. Section 7 of the Clayton Act specifically outlawed a corporation's stock acquisitions of another.

In the 1920s Congress's fear of applying the "rule of reason" to industrial mergers came true. In the United
States Steel case, the Supreme Court took a view that unless a combination had achieved monopoly, the Sherman Act could not be applied to it, even though it created a dominant firm in the oligopolistic steel industry. As a result, a second stage of mergers and combinations occurred during the 1920s.

In addition to the court's application of the "rule of reason", there was another loophole in Section 7 of the Clayton Act: a lack of regulation on assets acquisitions also contributed to Congress's amendment of Section 7 of the Clayton Act. In United States v. Columbia Steel Co., the Supreme Court held that the Sherman Act was not applicable to a purchase of the assets of another corporation, even though the purchasing company was the largest in the field. This started the third stage of mergers and combinations.

Section 7 of the Clayton Act was amended in 1950. The amendment eliminated the asset loophole; nevertheless it left the problem of developing standards of illegality to the courts and to the Federal Trade Commission. Under the amended Section 7, a merger is illegal where its effect may be substantially to lessen competition or tend to create a monopoly.

From the development of mergers and combinations in the U.S., the U.S. Supreme Court's efforts to protect procompetitive mergers has been apparent. Applying the Sherman Act by a "rule of reason", the Supreme Court made flexible the fixed rule of the act, which prohibited all kinds of mergers, procompetitive or anticompetitive. Then
Congress revised their opinion on mergers and combinations by presenting the 1950 Amendment to Section 7 of the Clayton Act. The amended Section 7 was intended not only to prevent potential high economic concentration, but also to protect small businesses when mergers between them would not substantially lessen competition.

As a matter of fact, the U.S. is the only advanced nation in the world to make mergers illegal. U.S. merger laws serve the purpose of lessening, if not preventing, giant industrial trusts which may result from mergers of large companies. However, such an antimerger law is not suitable to Taiwan.

Unlike the U.S., Taiwan has many middle and small sized enterprises and few large companies. For the sake of reducing costs and promoting quality, these middle and small enterprises have to seek to merge with each other. For the sake of the national economy, Taiwan's government also encourages them to merge into large scale companies so that Taiwan can raise its competitive competence in the international market. As a result, a strict antimerger law of the U.S. pattern is not suitable to Taiwan. Therefore, the draft FTL's conditional supervision proposal on mergers and combinations, which balances the costs and benefits each merger may bring, is an appropriate one for Taiwan.

However, the draft FTL provides no criteria for the authority or the court to evaluate a merger on a cost-benefit basis. Consequently, a study of the standards for
illegality of mergers in the U.S. and the underlying policy considerations is necessary.

2. Standards for Illegality of Mergers and Underlying Policy Considerations

Mergers can be basically divided into three types: horizontal mergers, vertical mergers, and conglomerate mergers. Horizontal mergers are mergers between firms which compete directly, selling the same products, in the same market. Vertical mergers are mergers between firms standing in a supplier-customer relationship to each other. Conglomerate mergers involve neither horizontal nor vertical elements, and most of them are market or product extension mergers.21

Horizontal mergers have been the main target for antitrust regulation because they may create new market power and affect competition in the market.22 By reducing the number of competing firms and enlarging the market share of the merged firm, a horizontal merger may change the market structure and create a new market power, by which the merged firm may lessen its competition in the market and thus achieve the effect of monopoly. Because of such an effect, horizontal mergers become the main target for antitrust regulation.23

However, not all horizontal mergers will create such a result. Some horizontal mergers benefit competition instead of impairing it.24 For example, a horizontal merger between
two small firms can reduce cost, promote efficiency, and thus raise their competitive ability against other big firms in the market. Therefore, according to the Justice Department Merger Guidelines, a horizontal merger should be challenged only when it creates or facilitates the exercise of market power or actually lessens competition.25

Considering the costs and benefits which horizontal mergers may produce, nevertheless, there are two legal defenses available: the efficiencies defense and the failing-firm defense.26 The primary benefit of mergers is their probable enrichment of efficiencies, which can increase the competitiveness of firms and result in lower prices for consumers. As a result, the efficiencies-enriching effect has been considered as an affirmative defense, although they have served only as part of the legal analysis, not as a separate defense.27 For example, in Brown Shoe Co. v. United States,28 the Supreme Court indicated that Section 7 would not bar a merger between two small firms when the merger would enrich their competitiveness against larger firms in the market.

The failing company defense justifies certain otherwise illegal mergers when one of the merging companies would probably fail if the merger is prohibited. Consequently, merger defendants would be able to assert a failing company defense when it is suitable.29

Vertical mergers are combinations between buying firms and selling firms in the same market. The sellers are often
referred to as "upstream" firms; and the buyers are "downstream" firms. There are two opposing views of vertical mergers' effect on competition. The favorable view is that vertical mergers have no anticompetitive effects in the market. It reasons that after the merger, the number of firms and the market share of the firms are the same as before, thus the vertical merger leaves competitive conditions in both the seller and buyer markets unchanged.

On the other hand, the unfavorable view stresses that a vertical merger changes the competitive conditions down the distribution ladder. It argues that a vertically merged firm will deal with its constituent units on terms more favorable than with nonmerged competitors. The downstream market will contain only nonmerged firms and thus become more concentrated. Such effects can be anticompetitive.

The Supreme Court took the unfavorable view of vertical mergers in the 1960s. In the famous case, Brown Shoe Co. v. United States, the Supreme court held illegal the merger of Brown, a manufacturer with four percent of production on the market, and Kinney, a retail shoe store with sale of only 1.6 percent in the market. The court reasoned that the vertical integration might foreclose competition from a substantial share of the market for shoes.

However, in the 1980s only mergers that might increase entry barriers or facilitate collusion in the market would likely be challenged. In Fruehauf Corp. v. FTC, the Second Court indicated that the legality of a merger should
be determined, case by case, on the merger's particular economic and historical circumstances. The court then factually distinguished this case from Brown Shoe and held the merger lawful for its not raising entry barriers, notwithstanding foreclosure effects. In fact, no cases have been brought by either the Justice Department or the FTC in recent years.

Conglomerate mergers are usually defined as neither horizontal nor vertical mergers. They do not affect the market structure, but merely change the identity of firms already in the market. Therefore, the Department's Guidelines entirely ignore conglomerate mergers. However, despite the Guidelines' silence, the court has still challenged conglomerate mergers on three grounds: potential competition, reciprocity, and entrenchment.

A conglomerate merger may inhibit potential competition. Without the merger, the acquiring firm may have to enter the field by starting a new firm or otherwise internally expanding itself, thus entering into competition with the acquired firm. Nevertheless, because a sufficient probability of injury is hard to prove, the potential competition alone is unlikely to provide a basis for successful prosecutions.

Reciprocity is also an element which the court condemned. With its purchase power, a selling firm can force another firm which also sells products to the selling firm to purchase its products. This is so-called reciprocity. A
conglomerate merger that creates opportunities to engage in such reciprocity may be challenged by the court.\textsuperscript{47} The Supreme Court indicated in \textit{FTC v. Consolidated Foods Corp.}\textsuperscript{48} that the reciprocity made by such a merger is one of the congeries of anticompetitive practices at which the antitrust laws are aimed.\textsuperscript{49} In \textit{United States v. International Telephone & Telegraph Corp.},\textsuperscript{50} the court further provided three prerequisites to a finding of illegal merger on reciprocity grounds: a significant increasing in the opportunities for reciprocal dealing; a reasonable probability that those opportunities will be exploited; and a tendency substantially to lessen competition resulting from the reciprocal dealing.\textsuperscript{51}

Enrichment is another element which the court condemned. By a conglomerate merger, the merged firm may become so large that it can obtain certain cost savings, such as buying supplies and distribution services, which are not available to a small firm.\textsuperscript{52} For example, in \textit{FTC v. Procter & Gamble Co.},\textsuperscript{53} the merger of Procter and Clorox had enabled the merged firm to obtain significant advertising discounts not available to competitors. With such a cost saving, Procter could thus increase its share in the market by price reductions, ignoring the loss in revenue. Therefore, The court concluded that the cost savings resulting from the merger would have entrenched Clorox's position in its market and increased entry barriers.\textsuperscript{54} This anticompetitive effect is the object that antitrust laws have condemned.
C. Suggestions for the Draft FTL

The development of the U.S. merger laws, which started by treating mergers as illegal per se, now allow the efficiencies defense and the falling company defense, showing a realization that mergers are not all anticompetitive and per se illegal. Therefore, making mergers unconditionally illegal is inappropriate. Instead, conditional supervision, whichs require notifications of certain large scale mergers, is a better way to regulate mergers because it can not only avoid a waste of effort and time-consuming investigation of procompetitive mergers of small companies, but can also efficiently control mergers of large companies which may lessen competition.55

Therefore, referring to the U.S. experience, the established principle of conditional supervision in the draft FTL, which requires certain large companies mergers to notify the authority, will be an appropriate merger legislation, and will be particularly suitable to Taiwan which has many middle and small sized enterprises rather than large scale companies. In addition, such a regulation will also match Taiwan's government's economic policy of encouraging mergers and combinations between middle and small sized enterprises in order to raise Taiwan's international competitiveness.

Approval of merger applications in the draft FTL is based on a cost-benefit analysis; a merger will be approved if the
benefit it brings to the society is greater than the damage. This cost-benefit analysis will allow the court too much discretion and is too vague for enterprises to predict and follow. Certain standards for approving mergers should be established to supplement it. The standards for illegality of mergers in the U.S. antitrust laws and the underlying policy considerations can provide a good reference in such areas as creating market power and lessening competition for horizontal mergers, foreclosure and market entry barriers for vertical mergers, and reciprocity and entrenchment for conglomerate mergers.

Although the principle of conditional supervision of mergers has been unanimously upheld, the manner of conditional supervision has been commonly criticized. The proposal adopted in the draft FTL is the permission approach, which requires an application for permission prior to merging. This approach was intended to save the cost of the forced dissolution of a completed merger. Once a merger of enterprises is declared to be illegal after the fact and is forced to dissolve, the great cost of the dissolution will damage not only the merged enterprises but the whole social economy. The draft FTL adopted the permission approach for these considerations.

However, there is a fear among enterprises and scholars that, due to the inefficiency of the administrative authority, a long period of investigation for permission would delay the mergers, make the enterprises lose their
potential profits, and thus not only impair enterprises' legal interests, but also damage the economy as a whole. Accordingly, some of the scholars prefer the objection approach, which merely requires a prior notification of merger, and after a period of time, if the authority has not objected, the completed merger is legal. As a result, the timing of mergers will not be affected and the profits and legal interest of merging enterprises will not be impaired.

Since each of these two approaches has its good points and drawbacks, further consideration is necessary to solve the problem. The main drawback of the permission approach is the possibility that the authority will delay permission, thus cause damage to merging firms. Accordingly, a limited period of time for evaluation should be expressly provided for in the draft FTL. Thus, the main disadvantage of the permission approach can be avoided. On the other hand, since the economic policy of Taiwan is to encourage mergers and combinations, if the benefit of favoring the merging enterprises outweighs the cost of possible dissolution, the objection approach can be a reasonable one. Therefore, two proposals of conditional supervision of mergers and combinations will be suggested: one is the revised permission approach that sets a reasonable time limitation on permitting applications under the permission approach; the alternative is the objection approach under the consideration that the benefit of favoring merging enterprises would outweigh the cost of dissolution.
1. Draft FTL, Art. 6.
2. Draft FTL, Art. 11.
5. See Liou, Comments on Monopoly and Mergers Regulations of the Draft Fair Trade Law, an Article for the Producing Policy Committee, at 6, June 2, 1986.
6. See id.
7. See id. at 7; see also, Liang, Suggestions for the Draft Fair Trade Law, at 5-6, 1987. (an Article presented in the Hearing for the Fair Trade Law.)
8. See Liou, supra note 5, at 6.
10. See id.
12. See id.
13. See id.
16. The textual material which follows is based on Professor Blake's illustration in the above article. See Blake, supra, at 78-84.
17. The "rule of reason" was formulated in Standard Oil Co. v. United States, 221 U.S. 1 (1911). See also, United States v. American Tobacco Co., 221 U.S. 106 (1911).
19. Id.
20. No country other than the U.S. has made mergers illegal. See Blake, supra note 15, at 79-80 and accompanying notes.
21. See id. at 86-90; see also, ABA Antitrust Section, Monograph No. 7, Merger Standards under U.S. Antitrust Laws, at 47, 50, 52 (1981).
22. See Blake, supra note 15, at 86.
24. See id.
26. See id. 3.5.; see also, Brunner, supra, at 36.
27. See Brunner, supra, at 36 and accompanying note.
29. Id. at 331.
30. See Brunner, supra note 23, at 51.
31. See id. at 52.
32. See id.
34. 370 U.S. 294 (1962).
35. 370 U.S. 294, at 332.
36. See U.S. Department of Justice Merger Guidelines 4.21, 4.22 (June 14, 1984); see also, Brunner, supra note 23, at 53.
37. Fruehauf Corp. v. FTC, 603 F.2d 456 (2d Cir. 1979).
38. Id. at 462-66.
39. Id.
40. See Brunner, supra note 23, at 52.
41. See id. at 61; see also, ABA Antitrust Section, Monograph No. 7, Merger Standards under U.S. Antitrust Laws, at 52.
42. Brunner, supra note 23, at 61.
43. Id. at 61-2.
44. See United States v. Penn-Olin Chemical Co., 378 U.S. 158, 174 (1964); see also, Blake, supra note 15, at 89.
45. Blake, supra note 15, at 89.
46. See ABA Antitrust Section, Monograph No. 7, Merger Standards under U.S. Antitrust Laws, at 62.
47. See id.
49. Id. at 594.
52. See Merger Standards, supra not 46, at 65.
54. 386 U.S. 568, 577 (1967).
55. See infra p.4 and accompanying notes.
56. See infra p. 1.
57. See infra p. 8.
58. See Liou, supra note 5, at 7-8.
59. See infra p. 4.
V. CONCERTED ACTIONS

A. Concerted Actions in the Draft FTL

Concerted actions can be divided into horizontal concerted actions and vertical concerted actions. Horizontal concerted actions are basically prohibited in the draft FTL. Nevertheless, because the anticompetitive effects of vertical concerted actions are less harmful than those of horizontal ones, resale price maintenance is the only vertical concerted action regulated by the draft FTL.

Article 14 of the draft FTL prohibits Taiwan's enterprises from engaging in concerted actions. Concerted action has been defined in the draft FTL as an action between competing enterprises to restrict each other's commercial activities, such as price, quantity, customers, or territory. Accordingly, enterprises in Taiwan are prohibited from engaging in horizontal concerted actions such as horizontal price-fixing, horizontal market division, output restrictions, and boycott.

Although cartels are basically prohibited in the draft FTL, those which benefit the economy as a whole and are approved by the authority can be allowed. Cartels can be approved if they are found to increase efficiency, unify standards, increase joint research and development, maintain
the orderly export of an important commodity, or to avoid bankruptcy. Accordingly, the authority will evaluate the applied concerted actions on a "rule of reason" basis. In granting approval for cartels, the authority should establish time limitations not exceeding three years. The approvals can be extended upon enterprises' reasonable requests. However, when granting such approvals, the authority may add to the cartels conditions or restrictions, such as requiring them to follow the publicly set price or maintain specific quality.

Thus, concerted actions are basically prohibited, but can be allowed exceptionally in the draft FTL. Such a policy consideration is based on the thinking that although concerted actions restricts competition in the market and thus impair customers' interests, some concerted conducts may benefit the economy as a whole, for example, the types mentioned in Article 14, therefore they should not be prohibited. Since Taiwan's economic policy is to encourage cooperation between enterprises, such a concerted actions policy is practical to the society.

However, scholars are not satisfied with the scope and the approval method of the excepted concerted actions. Professor Liou proposed to restrict prohibited concerted actions to those which have the power to affect market structure. He reasoned that if the concerted enterprises or concerted market share is insignificant, such practices cannot affect the market or the prices, and thus the social
economy and customer interests will not be impaired; on the contrary, it may serve good purposes such as saving costs and promoting efficiency. Therefore, the prohibited concerted actions should be limited to those which have the power to affect the market.\textsuperscript{14}

Professor Yen and Professor Liang both made comments on the method of approving the excepted concerted actions.\textsuperscript{15} According to them, since the government's policy is to encourage cooperation between enterprises, to require enterprises engaging in such forms of cooperation as concerted actions to apply for approval in advance is to overlook the needs of Taiwan's economic structure, and contradicts the established government policy.\textsuperscript{16} As a result, they suggested an objection approach to replace the approval approach: the authority punishes the enterprises engaging in concerted actions only when they abuse their market power and affect markets and prices.\textsuperscript{17}

Scholars fear that by adopting the approval approach, the FTL will grant the authority (the Fair Trade Commission, or FTC) the power to approve concerted actions without any objective standards, thus making it difficult for enterprises to decide on employing these concerted actions.\textsuperscript{18} It would be very difficult for enterprises in Taiwan to prepare a justification of their concerted practices attempt since the FTC is likely to adopt a case by case approach based on the "rule of reason."\textsuperscript{19} In addition, a body of administrative precedents is to be expected when the FTC
builds up its case load. To allay the scholars' fear of a lack of objective standards and to help the FTC with the initial reference of its administrative decisions, the U. S. experience of the related practice of price-fixing, horizontal market division, and boycotts will be introduced below.

B. Cartel Practices in the U. S.

1. Price Fixing

Enterprises engage in price fixing practices when they reach any agreement among competitors which directly or indirectly inhibits price competition.20 Since United States v. Socony-Vacuum Oil Co.,21 price fixing arrangements in purpose or effect to inhibit price competition is a per se violation of Section 1 of the Sherman Act and cannot be justified.22

In Socony-Vacuum, the defendants' oil companies intended to raise the price of gasoline by purchasing distress gasoline from independent refiners to prevent a depressive effect on the market. Rejecting defendants' defense that the aim of such a price control is to eliminate a trade evil and to bring about fair competitive prices, the court held that the action taken to raise the price of such commodity constituted a violation of the Anti-trust Law irrespective of the reasonableness of the increased price or the good intentions of the members of the combination.23 Hereafter, any price fixing arrangements among competitors that in
purpose or effect, directly or indirectly inhibits price competition is per se illegal, irrespective of its reasonableness.

However, there are two exceptional situations which are beyond the application of the per se rule: arrangements affecting price by improving competition and arrangements partially integrating some activities of two or more producers in order to achieve economies of scale. In a market which is not fully competitive, a private arrangement might make it more competitive, which might also similarly affect price. For example, an arrangement to standardize products or to exchange information could make a market function better as long as the purpose and effect of these practices is to facilitate price comparison or competition. Therefore, as long as these kinds of practices would make a market more competitive, even if affecting price, they should be analyzed under the rule of reason, and ought not to be illegal per se.

The court in Chicago Board of Trade v. United States made a distinction between arrangements which affect price in purpose and effect to impair competition and those which promote competition. In Chicago Board of Trade, the arrangement of the defendant required its few members who traded at night to do so at the prices established on the exchange during the day. Such an arrangement facilitated the operation of the exchanging market, yet also fixed the price.
The court in this case established a test of the legality of such price fixing arrangements. The court indicated that the true test does not depend on whether or not the arrangement restrains competition, but on whether the restraint imposed merely regulates, and thereby promotes competition, or whether it suppresses competition. Here, the court did not apply the per se rule, but balanced the negative and positive effects of the arrangement. The court held that the restriction was not aimed at price control, and had only an incidental effect on price. Therefore, such arrangements, which aim at perfecting a market and may have the purpose and effect of enhancing competition, ought not to be forbidden without analysis.

Similarly, regulatory arrangements for operating tobacco auction warehouses and bid depositories for the building trades also provide good examples. These regulations have an effect on price formation, but arguably they aid in perfecting the market. As a result, in cases involving such regulatory arrangements, the court have rejected the per se rule and have utilized the rule of reason to balance the negative and positive effect these arrangements have on the market.

For arrangements involving partially integrated functions of producers, although they may eliminate price competition between the participating firms, they may also achieve significant economies of scale and thus improve economic performance. If the economic benefit which an arrangement
brings through its integration is greater than its effect on price competition, the arrangement ought not to be illegal because it is promoting competition, not impairing competition. Consequently, such integrating arrangements should not be forbidden without rule of reason analysis.  

The rationale for applying the rule of reason instead of the per se rule to arrangements involving integration of functions is based on an assumption that the benefits integration brings may be greater than the reduction it effects in price competition. For instance, an integration arrangement of two small companies may enable them to research, produce, or distribute more economically; they may take advantage of scale economies. If market-wide competition is not significantly affected because of their small share in the market, such an arrangement may not reduce competition, and instead may improve competition with their ability to put downward pressure on price. Consequently, an arrangement involving a partial integration of functions, which may achieve significant economies of scale and inevitably resulting in a price restraint, may escape the per se illegality as long as it does not significantly affect market-wide price competition. Therefore, the determination for the legality of an integration arrangement should be based on a full analysis to balance the extent of impairment in competition with the extent of benefits it may bring.
In United States v. Sealy, Inc., bedding manufacturers established a joint subsidiary which developed mattress specifications and adopted a trade name. The subsidiary licensed the parent manufactures to manufacture and sell mattresses under the brand name, but fixed the sale prices. The Supreme Court ignored the price fixing arrangement and held that defendant's arrangements for exclusive market territories constituted horizontal restraints. Nevertheless, as the District Court's opinion, such an arrangement which conspires with its licensees to fix and police retail prices violated Section I of the Sherman Act and thus was illegal per se. Therefore, an arrangement involving integration of functions will be analyzed under the rule of reason if it results in unavoidable price fixing, but is illegal per se if it insists on avoidable price fixing.

Generally price fixing arrangements establish a minimum sale price to secure the profits of the participating firms, nevertheless there is another type of price fixing arrangement which establishes a maximum price. Despite the probable good intent of the participating firms to hold prices down, the court reaffirmed the decision in Socony-Vaccum: a combination formed in purpose and effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity is illegal per se. In Kiefer-Stewart v. Seagram, two distillers agreed to set a maximum resale price for their distributors to charge. There, the court
directly emphasized the horizontal element and held that agreements to fix maximum resale prices of their product, which are not less than those to fix minimum prices, cripple the freedom of traders and thus restrain their ability to sell as they wish.\(^4\)

The decision in *Kiefer-Stewart* is justified and appropriate. The maximum price arrangement appears to hold down prices and seems to benefit consumers; nevertheless, there must be some self-interested grounds for the participating firms to do so.\(^4\) According to Professor Areed, fear of attracting new entry if prices go higher is the most likely ground, and the suggestion that the agreement aims at inhibiting changes in products which would demand higher prices may serve as another ground.\(^4\)

Such self-interested grounds probably impair the public interest. For successful functioning of the price system, prices in an industry ought to be able to respond freely and honestly to real market demand. A maximum price arrangement in order to avoid new entry into the market or to inhibit product changes could ruin the function of the price system or seriously stifle competition.\(^4\) Therefore, maximum price arrangements are as per se illegal as minimum price ones.

2. Horizontal Market Division

A cartel involving horizontal market division means an arrangement by which the participating firms divide territories and allocate the business among themselves.
Cases involving horizontal market division are usually accompanied by price fixing practices. Until United States v. Topco Associates, the Supreme Court made a clear decision on pure horizontal market division practices: horizontal territorial limitations, even though unaccompanied by price fixing, were per se illegal regardless their reasonableness.

In Topco, the defendants, operators of independent supermarket chains, formed an association adopting the Topco brand and mark to compete with other large chains. This association purchased products bearing this brand label from packers, and distributed these name brand products to the participating independents. For protecting each independent's territory, the members were given exclusive territories for the sale of such products, and were required to agree to restrict such sales to a specific geographic area.

The trial court, applying the rule of reason, concluded that since the joint action to obtain private label merchandise was necessary for the defendants to compete effectively with the large chains, the arrangement was procompetitive instead of anticompetitive, and thus the territorial restrictions were reasonably valid. Nevertheless, the Supreme Court reversed the ruling of the trial court. The reversion was not because the Supreme Court disagreed with the trial court's analysis of the arrangement's reasonableness, but because the congressional
policy is to invalidate arrangements which restrict competition, as territorial restraints surely do. The Supreme Court further indicated that it is Congress which must make such a decision to uphold such arrangements.

The Topco decision did not persuade scholars. Professor Sullivan criticized the court's ignoring of the integration characterization of the arrangement and holding it illegal per se. Referring to cases involving integrating price fixing, Professor Sullivan presumed that if the Topco conspirators had fixed prices, their conduct ought to be legal under the analysis of the rule of reason.

Thus, Professor Sullivan suggested a proposal to correct the unreasonableness of the Topco decision. As with price fixing, the basic guide is purpose and effect. If the goal of the arrangement or its overriding effect is division of market, it should be characterized as market division; however, if it is aimed at establishing or improving market, or involving partial integration like those in price fixing, rule of reason analysis should be utilized.

According to Professor Sullivan, market division should be dealt with just as is a price fixing when used to create or improve an organized market. The court should evaluate the affirmative and the negative consequences of the arrangement under the rule of reason before deciding its illegality per se. As for market division involving an integration, he asserted that if the arrangement does not appear to affect market-wide competition (that means their
market power cannot substantially affect the markets,) and that the division of the market is a consequence of the integration, the legality of the arrangement should be determined by more fully analyzing its costs and benefits under the rule of reason. On the other hand, if the arrangement would substantially affect market-wide competition, or aims to divide market by territory, the arrangement would be illegal per se.\(^\text{52}\)

3. Boycott

A boycott indicates an arrangement among a group of concerted firms which uses their concerted buying or selling power to ask wholesalers or retailers not to sell or buy from their competitors, and thus seeks to protect them from competition from nongroup member competitors.\(^\text{53}\) Such a group boycott is unduly restrictive, and hence is forbidden by the Sherman Act. In other words, it is illegal per se irrespective of the reasonableness of the concerted conduct.\(^\text{54}\) For example, in Eastern States Retailers' Association \textit{v. United States},\(^\text{55}\) a group of lumber retailers engaged in a boycott action to induce retailers not to deal with wholesalers who are listed in their periodic circulation, the court held such an arrangement to be per se unlawful because such a concerted action with a purpose to coerce wholesalers form entering the retail market was against the antitrust law per se.\(^\text{56}\)
Fashion Originators' Guild of America v. FTC\textsuperscript{57} has been often cited as the case supporting the per se rule to boycott.\textsuperscript{58} The defendant Guild was an organization of manufacturers which designed and manufactured women's dresses and the textiles used in making them. To combat the competition of other manufacturers who were copying their designs and fabrics, the members of the Guild agreed not to sell to retailers which dealt in garments copied from designs of Guild members.

The court found the arrangement violated the Sherman Act because it narrowed the outlets to which manufacturers could sell and the sources from which retailers could buy, and thus it subjected all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott.\textsuperscript{59} The defendant contended that the concerted action was reasonable and necessary to protect members from "style piracy." The court rejected this contention and noted that the original creations of members were neither copyrighted nor patented, and copying can be deemed as one type of manufacture and sale which competed with Guild members.\textsuperscript{60} The court concluded that the purpose of the combination and the coercion it could and did practice bring it within the prohibition declared by the Sherman Act.\textsuperscript{61}

Despite its often being cited as supporting the per se approach to boycott, Fashion Originators was actually grounded in the analysis of reasonableness.\textsuperscript{62} The opinion of the court was reached under an analysis of the effect the
arrangement brought to competition. When all evidences pointed to the adverse effects on competition which the conspiracy produced, the court accordingly condemn the arrangement as an undue restrain.63 Another case, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 64 presented a complete support of the per se rule.

In *Klor's*, the plaintiff, a small appliance retailer, sued for damages resulting from a conspiracy between its competing retailer and leading appliance manufacturers to boycott plaintiff. The alleged conspiracy of boycott was not disputed, but it had not produced any anticompetitive effect because there were hundreds of other household appliance retailers in the trade area, and thus the opportunities for customers to buy in a competitive market had not been reduced.

Despite the fact that there was no market-wide effect on competition and no public injury, the Supreme Court held that such a boycott arrangement was illegal per se.65 The court reasoned that some classes of restraints were by their nature and character unduly restrictive, and hence forbidden, and cited the decision in *Fashion Originators* to indicate that group boycott have long been held to be in the forbidden category.66 Here, the prohibition of boycott will not even require an element of purpose or effect to suppress competition.

The boycott rule formulated in *Klor's*, which was completely disconnected from competition, the ultimate
concern of the Sherman Antitrust Law, has been severely criticized. Professor Rahl asserted that a boycott rule which is not geared to a cogent test of effect on competition is completely unmanageable. Professor Chadwell also thought that the court's rule that all concerted refusals to deal are illegal per se is so broad that it probably goes beyond the boundaries of antitrust policy.

To compromise the ruling of the court, Professor Sullivan even proposed a notion to separate explicit boycotts and other concerted conducts which tend to have the effect of a boycott. He suggested that all explicit boycotts, in which the participators agree not to deal with the victims, should be barred by the per se rule since they always threaten competitive injury and seldom promise any benefit to competition or any benefit which cannot be achieved in less restrictive ways. Nevertheless, other concerted actions, which may have the foreseeable but indirect effect of inducing others not to deal with other competitors of the participating firms, should be characterized under the guides of purpose and effect; they should be characterized as a boycott and held illegal per se only when they have no purpose or effect which may benefit competition, or where the anticompetitive effect upon the arrangement outweighs beneficial effects.

For example, the periodical in Eastern States, which did not ask members not to deal with listed wholesalers, should not be characterized as an explicit boycott agreement, but a
concerted conduct tending to have the boycott effect. Thus it should be analyzed under the rule of reason. Due to its purpose of reducing competition and its effect of reducing those wholesalers' trade, this concerted conduct had the purpose and effect of a boycott, and thus was illegal. Similarly, the manufacturers' associations' circulation in *Cement Manufactures Protective Association v. United States,* which provided credit information about contractors, though it led to some contractors not being supplied, was not thought to be illegal per se. Although the circulation did reduce competition, the manufacturers did not aim to barricade themselves from competition at their own level. Therefore, the per se rule to boycotts did not apply, and instead it was analyzed under the rule of reason.

C. Suggestions for the Draft FTL

The Fair Trade Law is the first antitrust law in Taiwan and provides no objective standards for illegality of cartel conduct, at least not initially. It is therefore reasonable for scholars to fear that enterprises in Taiwan will hesitate to engage in beneficial concerted actions which have been encouraged by the government because the outcomes of the concerted actions are difficult for them to participate and to justify. To solve this problem, the U. S. experience and the scholars' comments on it may provide a good reference.
The rule for horizontal concerted actions is primarily a illegal per se rule, such as the per se rule established in Cocony-Vacuum concerning price fixing arrangements, in Topco concerning concerning horizontal market division arrangements, and in Klor's concerning boycott arrangements. However, in some exceptional situations, these concerted actions would be analyzed under the rule of reason and be balanced with the benefits and reduction of competition they may bring, such as the arrangement to facilitate the operation of the exchanging market in Chicago Board of Trade.

Basically it is similar to the regulation in the draft FTL, the draft FTL also established a basically prohibited and exceptionally approved approach to these horizontal concerted actions. The difference is that the scope of the justified cartel conduct in the draft FTL is larger than that in the U. S. Antitrust Law, and that cartel conduct is justified by the legislation, not by the court.76

In the U. S., the court could make illegal a concerted arrangement which impairs no competition and shifted the responsibility to the legislation, such as the boycott arrangement in Klor's.77 Nevertheless, in Taiwan the approach of the rule of reason and the scope which this approach can be applied to are provided for in the draft. Since protection of free competition is the ultimate concern of antitrust laws, an analysis based on competition effects which cartel conduct may bring on is a more logical and
appropriate test for determining the illegality of the cartel conduct. Therefore, the rule of reason approach adopted by the draft FTL is a better regulation for Taiwan.

Since the draft adopts the approval approach on a rule of reason basis, the standards for the FTC to determine approvals become significant. Two guides suggested by Professor Sullivan may serve as the approval standards: improving market and partial integration of functions which may achieve significant economies of scale.

For those arrangements which may exceptionally be allowed, the FTC ought to balance their effects on competition with their improvement of the market or their achievements of significant economies of scale for determining their legality. If an arrangement aims to improve the market and incidentally affects price, but does not aim to fix price, it ought not to be illegal, for example, those operation regulations of exchange market and tobacco auction warehouse. Applying this theory to the draft FTL, if the exceptional cartels increase efficiency or unify standards and incidentally affect prices, they ought to be legal; otherwise, if they aim at fixing price under cover of promoting efficiency or unifying standards, they ought to be illegal.

Similarly, the arrangements involving a partial integration of functions may achieve significant economies of scale, and inevitably lessen competition. Balancing the extent of reduction in competition with the extent to which
integration benefits may be obtained is necessary if and only if the arrangements meet two conditions: first, the price must arise inevitably from the integration; second, the elimination of price competition must not appear to significantly lessen market-wide competition. Consequently, other exceptional cartels in the draft FTL, when meeting these two conditions, should be analyzed by balancing reduction of competition with the economy scale benefit which they may bring in order to determine their legality.

In conclusion, the two objective standards of improving the market and integration achieving economies of scale will be suggested as the basis on which to determine the approval of those exceptional cartels in the draft FTL. In addition, as economic circumstances have changed so much and rapidly, justifiable cartels other than the seven exceptional ones will probably be formed in the future. To avoid their escaping the regulation of the FTL, a clause to include other situations with the same effect is suggested.

As for the method of approving the exceptional cartels, the objection approach suggested by Professor Yen and Professor Liang, which proposes to cancel the approval of cartels and punish them when they abuse their market power and affect the market, is inappropriate in two ways. First, cartel actions are themselves anticompetitive, and thus impair not only the function of price and market, but public interest. Cartels are justified by benefits which they bring to the whole economy, which does not mean that
the actions are legal themselves. To adopt an objective approach amounts to recognizing their legality and to encouraging enterprises to engage in anticompetitive practices. As a result, the economy as a whole and the public interest will eventually be seriously impaired.

Second, one of their reasons for adopting the objection approach is the fear that uncertain standards of approval will make it difficult for enterprises to follow the law or predict the legality of their cartel practices. Since the two suggested standards and the case load which will be built up in the future will solve this problem, there is no significant reason to adopt the objection approach. Therefore, the approval approach is an appropriate one for supervision of the exceptional cartel actions.
ENDNOTES

2. See Draft FTL, General Explanation for the Draft FTL.
6. Id.
7. See id.
8. Draft FTL, Art. 15.
9. Id.
10. Id.
12. Professor Liou criticized the scope of the excepted concerted actions; Professor Yen and Professor Liang both opposed the method of approving the excepted concerted actions. Their opinions appear in the following text.
14. Id.
16. Id.
17. Id.
18. See id.
22. L. Sullivan, supra, at 198, and accompanying note.
23. Socony-Vacuum, 310 U.S. at 223, 60 S.Ct. at 844.
25. See id. at 200.
26. See id. at 200, 205-06.
29. 246 U.S. 231 (1918).
30. See V. Sullivan, supra note 20, at 205.
31. See id. note 2, 3, at 206 and accompanying texts.
32. See id.
33. See id. at 200.
34. See id. at 206-08.
35. See id. at 206.
36. See id at 206-08.
38. Id.
39. See id.
42. See L. Sullivan, supra note 20, at 211.
43. See P. Ardee, Antitrust Analysis, Problem, Text, Cases 317 (2d ed. 1974).
44. See L. Sullivan, supra note 20, at 211-12.
45. See id. at 213.
47. Id.
48. See id.; see also, L. Sullivan, supra note 20, discussion at 216-18.
51. The text which follows is based on Professor Sullivan's theory of Characterization of horizontal market division arrangements.
52. See L. Sullivan, supra note 20, at 219-24.
53. See id. at 230.
56. Id. at 614, 34 F.Ct. at 955.
58. See L. Sullivan, supra note 20, at 234.
59. Id. at 465, 61 S.Ct. at 707.
60. Id.
61. Id. at 467-68, 61 S.Ct. at 707.
63. See id. at 50-51.
65. Id. at 211.
66. Id.
67. See Joliet, supra note 62, at 53; L. Sullivan, supra note 20, at 236.
68. See Joliet, supra note 62, at 53.
69. See J.t. Chadwell, Competition and Section 1 of the Sherman Act - Instant Antitrust or Long-run Policy, 27 ABA Antitrust Section, 60, 65 (1965).
70. L. Sullivan, supra note 20, at 241.
71. Id. at 241-45.
72. See id. at 241-42.
74. Id.
75. See infra p. 3.
76. There are seven justifications for cartel conduct in the draft FTL. See Draft FTL, Art. 14.
77. See infra p.12-14.
78. See infra p.6 and accompanying note.
79. See infra p.3.
80. See id.
VI. VERTICAL CONCERTED ACTIONS

A. Vertical Concerted Actions in the Draft FTL

The only vertical restraint regulated by the draft FTL is agreements which involve resale price maintenance. This is because the legislature intended to regulate vertical concerted actions loosely.\(^1\) Article 18 of the draft FTL makes null and void any agreement between a seller and its buyer fixing the price at which the buyer may resell a commodity.\(^2\) Nevertheless, daily necessities for the general consumer are excepted if there are goods of the same category in free competition on the market.\(^3\)

Professor Liou criticized such a regulation of resale price maintenance in two ways.\(^4\) First, he states that an agreement is not the only way for a seller to force its buyer to fix resale price. There are other means by which the seller may achieve the same purpose, such as discriminating treatment and refusal to deal, thus merely making void an agreement is not enough to prohibit resale price maintenance practices.\(^5\) Therefore, Professor Liou suggested a provision prohibiting enterprises from engaging in actions which fix resale price. This provision would replace the original agreement prohibition and provide regulation for other forms of resale price maintenance.\(^6\)
Second, Professor Liou also criticized the exceptional regulation of Article 18: which makes lawful a resale price maintenance on daily necessities for the general consumer when there are other similar goods available in the market. He first questioned why resale price fixing on consumers' daily necessities should be allowed exceptional. He thought that the rationale underlying it was unpersuasive. Then he illustrated the probable consequence of the exception and concluded that there should be no exception for prohibiting resale price fixing. He asserted that if exception is allowed under the condition that there are goods of the same category freely competing in the market, the manufacturer would give the same commodity different brand names and different resale prices to give a false impression of competition. In addition, resale price maintenance impairs consumers interest and retailer competition, and therefore, no exceptions should be allowed.

Although other types of vertical restraints are not expressly regulated in the provisions of the draft, they may still be prohibited through the application of Clause 6 of Article 19 which prohibits enterprises from engaging in activities which make a trade conditional on unduly restricting the commercial activities of its trading counterpart.

Professor Liou was not satisfied with the general and ambiguous regulation of the Clause 6. He thought it actually indicated other types of vertical restraints of
trade, such as tying arrangements, customer and territorial restrictions, and exclusive dealing. These vertical restraints are so popular and important in the course of transactions that a general and ambiguous regulation on them is inappropriate to the practices. Moreover, the consequences of these vertical restraints cannot be determined without an analysis under the rule of reason; they may have varied consequences, good or adverse economic effects, in different situations. Therefore, Professor Liou suggested that these vertical concerted actions should be specific regulated in particular articles.

To evaluate Professor Liou's comments on resale price maintenance agreements and to supplement the ambiguous regulation of other vertical concerted actions, a study of vertical restraints in the U. S. is necessary.

B. Vertical Restraints in the U. S.

1. Resale Price Maintenance

Resale price fixing agreement or combination in the U. S. is per se a violation of Section 1 of the Sherman Antitrust Act. This per se rule of resale price maintenance was formulated in Albrecht v. The Herald Co.

In Albrecht, the plaintiff, an independent newspaper distributor, violated a resale price fixing agreement with the newspaper publisher defendant and charged his customers higher price than the fixed price. The defendant hired a circulation sales company to solicit plaintiff's customers,
and consequently one fourth of plaintiff's customers were assigned to another distributor. Then the defendant informed the plaintiff that he could have his customers back if he charged the suggested price. The court indicated that the defendant's conduct to force the plaintiff to conform to the suggested prices was price fixing for the resale of the defendant's newspaper and held that such a resale price fixing per se constituted an illegal restraint of trade under Section 1 of the Sherman Act.\(^\text{16}\)

The rationale for prohibition of resale price maintenance is based on its economic effects. When the manufacturer fixes the resale price, price competition among dealers is ended. Consequently resale price fixing facilitates dealer cartels or aids manufacturer cartels.\(^\text{17}\) In addition, it has bad effects on two levels: on the dealer itself and on the public customer. First, when the manufacturer sets a resale price on his commodities, the dealers would likely face unfair competition. For example, if one dealer is able to make his resale price lower than others and thus attract more customers because of his operating efficiency, the resale price fixing restricts his ability to compete with other dealers. On the other hand, if a dealer bears a higher operating cost, such as higher rental cost or labor cost resulting from locating in a city with a higher living standard, the fixed resale price makes his competition with other dealers unfair because of his higher cost. Thus,
resale price fixing would likely result in unfair competition among the retailers themselves.\textsuperscript{18}

Second, and more importantly, the public benefit resulting from free price competition among the retailers would be impaired. When the resale price competes freely, some variation among dealer prices resulting from differences in efficiency is reasonably expected, and thus the customer can choose among the dealers and benefit from the lower price. As a result, resale price fixing impairs the public benefits of choice among the dealers and price reduction from the efficient dealer.\textsuperscript{19}

These bad economic effects of resale price fixing forced the Congress to repeal the states' power to authorize fair trade pricing in 1975.\textsuperscript{20} In the 1930s, under pressure from retail trade associations to prevent price cutting among retailers marketing goods, state legislatures enacted fair trade laws, which allowed resale price fixing agreements, and made it unlawful to knowingly and willfully sell the commodities at a lower price.\textsuperscript{21} In response, the Congress passed the Miller-Tydings Amendment and the McGuire Act to exempt certain types of resale price maintenance agreements from the Sherman Act if they were otherwise valid under state law.\textsuperscript{22} In 1975, a period of severe inflation led to the Congress's repeal of the fair trade exemption. Consequently, resale price maintenance falls within the illegal per se rule without any exemption.\textsuperscript{23}
In addition to resale price fixing agreement, there are other indirect means to achieve resale price maintenance. Consignment arrangements and refusals to deal are two significant examples.  

A consignment arrangement is a vertical transaction which is a transfer, not a sale, of a product from a principal to an agent for the purpose of arranging sales of the product to third parties. Such a consignment arrangement may involve sale price fixing by the principal; however, the relationship between the two parties is a principal-agent relationship rather than a manufacturer-retailer one.

Sale price fixing in consignment arrangements was held lawful in the court's early view. This view was established in United States v. General Elec. Co. in 1926. In the G. E. case, the defendant, the manufacturer of a patented light bulb, arranged the sale of the products through some merchants at prices fixed by G. E., but retained the title until the goods were sold. The court thought that since the relationship between the defendant and those merchants was one of principal and agent and the control of sale as well as the risk of loss was on the defendant, there was consequently no illegal resale price maintenance involved. Therefore, the court held that such sale price fixing in a consignment arrangement was not invalid under the Sherman Act.

Nevertheless, the court's view about consignment arrangements has changed recently. A consignment
arrangement which attempts to fix price will be held invalid. In *Simpson v. Union Oil Co.*, the court struck down a consignment arrangement between a gasoline supplier and a gasoline retailer which fixed a minimum price for the sale of gasoline. There the defendant lessor refused to renew the lease of a gasoline station because the plaintiff lessee sold the gasoline consigned to him by the lessor at a price below the fixed price in the consignment agreement. By distinguishing the G. E. case by the fact that G. E. involved a patented product, the court held that the consignment agreement in Simpson was illegal under the antitrust law. With this case, the court established a rule that any coercion device used by a supplier on its retail outlet to achieve resale price maintenance is illegal per se.

Three years later, the court in *United States v. Arnold Schwinn & Co.*, once again confirmed the per se rule. In Arnold, the court upheld a consignment arrangement between the defendant bicycle manufacturer and its distributors to establish vertical territorial and customer limitation on the ground that the defendant consignor had not attempted to fix prices. There the court further ruled that vertical restraints as to territory or dealers are illegal per se if the restrictions are ancillary to price fixing. Therefore, any consignment arrangement which attempts to fix price, with an effect identical resale price maintenance, is illegal per se.
Refusal to deal is another significant means of indirectly achieving the effect of resale price fixing. In a refusal to deal situation, instead of asking the wholesaler or the retailer to adhere to the sale price, the manufacturer announces his price policy and refuses to deal with retailers who do not follow his set resale price. Most of the time, it will be followed by a combination between the manufacturer and wholesalers or retailers which refuses to sell the product to the offender.

In the early stage, focusing on the right of manufacturer or trader to freely select the customer, the court announced such refusal to deal to be lawful. In United States v. Colgate & Co., a soap and toilet article manufacturer combined with his wholesale and retail dealers to engage in resale price fixing by refusing to deal with the offending dealer. The court held that refusal to deal conduct of a manufacturer with the effect of resale price fixing did not constitute a violation of the Sherman Antitrust Act as long as there was no agreement obligating any dealer to resell at the fixed price.

However, this rule has been overruled, in effect, in recent cases. For example, in United States v. Parke, Davis Co, a case whose fact was similar to that of Colgate, a pharmaceutical product manufacturer told its retailers not to sell its product below the minimum price and otherwise refused to deal with them, and informed its wholesalers that
it would refuse to deal with them if they sold its product to the offending retailers.

In Parke, the court indicated that a unilateral refusal to sell to retailers who resell the product not to adhere to the fixed price may be lawful, but is not the same as an unlawful combination. The court thought that the combination with wholesalers and retailers which was created by defendant's practices went beyond a mere refusal to deal with offending dealers. Accordingly, the court reasserted the price restraint rule in Socony-Vacuum: a combination formed in purpose and effect of raising, depressing, fixing . . . the price of a commodity in interstate commerce is illegal per se. The court held defendant's refusal to deal with the effect of resale price maintenance, even if there was no agreement concerning price fixing, to be illegal.

Also, in Albrecht v. Herald, a newspaper manufacturer's refusal to deal with a distributor due to the distributor's overcharging customers constituted a combination to fix maximum prices, and thus was held an illegal restraint of trade under section 1 of the Sherman Act. Therefore, the court's view on resale price maintenance by means of refusal to deal is now that it is illegal per se.

2. Other Vertical Concerted Actions

In addition to resale price maintenance, there are other vertical concerted actions in common commercial activities. Most are due to the manufacturer's restraints in the
distribution process or outlet, including customer and territorial restriction and exclusive distribution. Moreover, a special type of sale arrangement, the tying arrangement, is another significant vertical concerted conduct.

a. Customer and Territorial Restrictions and Exclusive Dealing

The present law applied to other vertical restraints is the rule of reason. This rule of reason approach was formulated in the case of Continental T. V., Inc. v. GTE Sylvania, Inc., where the Supreme Court held that all nonprice vertical restrictions should be evaluated under the rule of reason, no matter whether customer, territorial, or location.

Before Continental T. V., cases were decided according to the holding of United States v. Arnold Schwinn & Co., which gave treatment differently according to the dealer's identity; the per se rule would be applied to the wholesaler who purchased and resold the commodity, and the rule of reason would be applied to the wholesaler who was agent for the manufacturer.

In Continental T. V., the defendant, television set manufacturer, arranged a location restriction which prohibited its retailers from selling defendant's products in areas other than the specified locations approved by the defendant. Despite defendant's alleging the Arnold Schwinn
rule, the court indicated that the per se rules of illegality are appropriate only when the involved conduct is manifestly anticompetitive. The court further announced that the standard for determining application of the per se rule or the rule of reason depends on whether the restriction has a pernicious effect on competition and lacks any redeeming virtue. Referring to the established evidences, the court rejected the per se rule and held that such a location restriction did not lack any redeeming virtue, and therefore, should receive a rule of reason analysis.

The rationale underlying the decision of Continental T. V. is based on an analysis of such vertical restrictions' effect on both intrabrand and interbrand competition. Undoubtedly, such customer or territorial restrictions will lessen, if not end, intrabrand competition since they help dealers from encountering each other. However, the efficiencies in product distribution achieved from such restrictions may promote interbrand competition. The promotion of interbrand competition constitutes a redeeming virtue of the restriction. Therefore, all nonprice vertical restrictions should receive an rule of reason analysis to evaluate their effect on both intrabrand and interbrand competition.

Like customer and territorial restrictions, exclusive dealing, which means a contract in which the manufacturer appoints a dealer as his sole or exclusive outlet in a
specified area, is also subject to the rule of reason. In general, despite its effect of eliminating intrabrand competition, an exclusive dealing arrangement is legal because a manufacturer has the right of choosing certain buyers with whom he will deal. However, under the rule of reason, if there is no interbrand competition, and thus intrabrand competition becomes more important, then a manufacturer's right of exclusive dealing may be accordingly more restricted.

b. Tying Arrangements

A tying arrangement is a sale arrangement in which the seller refuses to sell a tying product, which is highly desired by the buyer, unless the buyer also purchases a tied product, which is a less desired product, such as business machines (tying) and tabulating cards (tied) or a T. V. antenna system (tying) and service contract (tied). The seller usually uses tying arrangements to achieve (serve) at least four purposes: first, using its market power in the tying product to establish similar power in the tied product; second, engaging in a form of price discrimination; third, reducing distribution costs; and finally, protecting the seller's goodwill in the tying product.

The use of the seller's market power in one market to obtain a better position in another market is considered anticompetitive because it detracts from competition on the merits in the tied product market. Thus, in general, such tying arrangements are illegal under section 3 of the
Clayton Act or illegal per se under section one of the Sherman Act if the seller has sufficient economic power in the tying product market and makes an appreciable restraint upon competition in the tied product market. Moreover, a tying arrangement may also be illegal under section 1 of the Sherman Act on the basis of a rule of reason analysis even though there is no sufficient market power or commercial restraints involved.

Accordingly, a tying arrangement is illegal per se when it meets three criteria: separate products, sufficient economic power, and a more than de minimis amount of commerce. Usually, the issues on separate products criterion are not hard to resolve. However, in some situations it may be difficult to determine whether there are two products tied together or whether there is only one product consisting of two components, thus allowing the defendant to assert the one product defense and credibly argue that the product is a single one. For example, advertisement space in both a morning and an evening newspaper are regarded as merely one product due to commercial practicalities, but a prefabricated home and a financing loan were held to be two separated products.

In practice, a seller can engage in a tying arrangement only if he has sufficient economic power in the market for the tied product. There are several indicators for a finding of sufficient economic power: the seller's market monopoly or dominance in the tying product market; the
seller's large number of tied sales without buyer advantage; and the uniqueness of the seller's tying product.63

Sufficient economic power may result from a patent or copyright monopoly or other form of market dominance. For example, in *International Salt Co. v. United States*, the patented salt machines were tied to the purchase of salt; in *United States v. Loew's Inc.*, the copyrighted films were tied to the purchase of inferior films.

Sufficient economic power may also be found when the seller makes a large number of tied sales and there is no buyer advantage, such as package price reduction. For example, in *Northern Pacific Railway v. United States*, the Northern Pacific Railway sold the land on condition of the purchase of shipping goods on the Northern Pacific Railway. Relying on the evidence that the seller offered no buyer advantage and made a large number of tied sales, the court held that the defendant had sufficient economic power. In *United States Steel Corp. v. Fortner Enterprises*, the Supreme Court further announced that the standard for determining sufficient economic power is whether the seller has the power to raise prices, or to impose such tie-in term with respect to an appreciable number of buyers within the market.

Generally, the seller will be held to have sufficient economic power when his tying product is unique in the market, such as the copyrighted feature films of Loew's in *United States v. Loew's Inc.* However, even when his tying
product is unique, the seller can be held not to have sufficient economic power if the unique product provides the seller no cost advantage over his competitors. In *U.S. Steel*, the defendant offered unique no-interest loans to developers who purchased its highly priced prefabricated houses. The court thought that such credit terms did not establish defendant's market power in the credit market, but merely showed its willingness to accept a lesser profit, or to incur greater risks. Thus the court held that lacking any evidence to show the defendant had some cost advantage over its competitors, the defendant's sufficient economic power was not established.

To make a tying arrangement illegal per se, the third criterion, substantial amount of commerce involved, must be met. A market share analysis in not required to satisfy this requirement. Usually the proof of a more than de minimis dollar volume involved is sufficient. For example, foreclosure of $500,000 in salt was sufficient commerce in International Salt case; and even $60,800 was found not insubstantial in the *Loew's* case. In addition, in *U.S. Steel*, the court indicated that the relevant figure is the total volume of sales tied by the sales policy, not the amount of the particular plaintiff's sale.

Therefore, a tying arrangement will receive a per se illegal treatment if the seller has sufficient economic power in the tying product market to appreciably restrain competition in the tied product market, and a not
insubstantial amount of interstate commerce is affected. Otherwise, under section 1 of the Sherman Act, it will be examined under the rule of reason, on the basis of its purpose and effects. However, there are some affirmative defenses which may be alleged by the defendant, such as new industry defense and protection of goodwill defense.\(^7\)

New industry defense is a defense which indicates that since defendant's new business with a highly uncertain future, the tie is justified as necessary to assure proper functioning of special equipment.\(^8\) This defense has succeeded in some lower courts. For example, in United Stated v. Jerrold Electronics,\(^9\) a cable T.V. antenna manufacturer's tying arrangement which required installers to purchase service contract to assure proper functioning of the system was held legal. Nevertheless, the court emphasized that it was legal at outset, not after business had become established.\(^10\)

Protection of goodwill defense usually focuses on that the tie is necessary to protect the seller's goodwill of quality control.\(^11\) This defense rarely succeeded because less restrictive alternatives for such protection always appeared available, for example, the manufacturer can separate the products and give buyers opportunities to make their own choices.\(^12\)

C. Suggestions for the Draft FTL
Basically, the regulation in the draft FTL which makes a 
resale price maintenance agreement null and void is 
appropriate. It ends price competition among the retailers, 
thus impairs free competition at the retailer level and 
public benefits from price competition.

Truly, as Professor Liou indicated, there are some 
concerted actions other than resale price maintenance 
agreements that may indirectly have the effect of resale 
price maintenance, such as consignment agreements and 
refusal to deal. Nonetheless, interpretation of the term 
resale price maintenance should not be too limited; it may 
be broadly interpreted to include those actions which have 
the same effect as resale price maintenance agreements. 
Therefore, through broad interpretation, Professor Liou's 
proposal of replacing the term of resale price maintenance 
"agreements" with the term of "actions" becomes unnecessary.

As for the exceptional commodities in the draft FTL 
(daily necessities for the general consumer), the draft did 
not provide any persuasive basis for such an exception. In 
addition, any exception will lead the manufacturer to give 
the same commodity different brand names, and thus escape 
the regulation. Therefore, unless the Legislature can 
further illustrate a outweighing economic effect for such an 
exception, Professor Liou's proposal to delete the exception 
is suggested.

Regulation of vertical concerted actions other than 
resale price maintenance is a significant drawback of the
draft FTL. It seems to ignore other vertical concerted actions by regulating only resale price maintenance in Article 18, but, on the other hand, it tries to regulate them through the application of the general and ambiguous Clause 6 of Article 19, which prohibits transactions with an unduly restrictive condition on the commercial activities of the trading counterpart.\(^{87}\)

As Professor Liou pointed out, Clause 6 of Article 19 was intended to regulate other vertical concerted actions.\(^{88}\) This regulation presents two drawbacks itself. First, these vertical concerted actions other than resale price maintenance (such as customer and territorial restrictions, exclusive dealing, and tying arrangements) are so common and significant in commercial practices that a general regulation would overlook their importance in practice.

Second, these nonprice vertical restraints may result in different economic effects, good or adverse, in different situations, and thus should not be prohibited per se without an analysis of their purpose and effect in different situations. Consequently, the per se prohibition of nonprice vertical restraints in the draft FTL is not only inappropriate but is against the policy of the antitrust law.

To correct this oversight and to fill up the gap of Clause 6 of Article 19, the introduced U. S. experience may serve as a good reference. In the field of customer and territorial restrictions and exclusive dealing, the rule of
reason, an analysis of the restriction's effect on competition, should be received. In general, the test is based on balancing the effect of the restriction on intrabrand competition and interbrand competition. If the restriction promotes interbrand competition and thus outweighs the effect of lessening intrabrand competition, the restriction can be justified, otherwise, it should be illegal.

In dealing with tying arrangements, the criteria of per se illegality can be referred to. In U. S. antitrust laws, a tying arrangement is illegal per se if the seller has sufficient economic power in the tying product market to make an appreciable restraint on competition in the tied product market. Nevertheless, considering the different economic situation and different economic policy in Taiwan, the illegal per se elements should be loosely applied. A proposal basing on the rule of reason is suggested: when the per se illegality criteria in the U. S. laws are met, a rule of reason should be applied to evaluate the effect of such tying arrangements on the economy as a whole.
ENDNOTES

1. Draft FTL, Art. 18; Explanation for Article 7.
2. See Appendix I, Draft FTL, Art. 18.
5. Id. at 11.
6. Id.
7. Id.
8. Id.
9. Id.
10. See Draft FTL, Art. 19 (6); Liou, supra, at 12.
11. Liou, supra note 4, at 12.
12. See id.
13. Id.
18. See id. at 386.
19. See id.
23. See infra note 20; see also, L. Sullivan, supra note 17, at 379.
24. See Liou, supra note 4, at 11.
28. Id. at 494.
31. Id.
32. Id.
33. Id. at 21-22, 84 S.Ct.at 1057
35. Id.
36. See id.
39. Id. at 307-08.
41. 362 U.S. 29, at 32.
42. United States v. Socony-Vacuum Oil Co., 310 U.S. at 223, 60 S.Ct. at 844 (1940).
45. Id. at 152.
48. Id.
50. Id.
52. Id. at 46-48.
56. Packard Motor, 243 F.2d 418 (D.C. Cir. 1957).
59. See id. note 1, and accompanying text. Section 3 of the Clayton Act applies only to refusal to deal conduct which involves a commodity. See 38 Stat. 730, 15 U.S.C.A. sec. 3.
64. International Salt Co. v. United States, 332 U.S. 392 (1947)
65. Id.
67. Id.
69. Id.
71. Id.
74. Id.
75. Id.
82. Id.
84. See id.
85. See infra p.1 and accompanying notes.
86. See infra p.1-2.
87. See Draft FTL, Art. 14, 18, and 19(6).
88. See infra p.2-3.
VII. CONCLUSION

After many years’ debate and anticipation, Taiwan's new antitrust law, the Fair Trade Law, which is intended to replace the outdated law and to regulate current economic activities, has finally been drafted and submitted to the legislature. Nevertheless, the above study shows that there are significant drawbacks concerning ambiguous standards of illegality and incomplete scope of regulations in the draft. Maybe this is because the draft FTL is the first antitrust law attempt in Taiwan and the government lacks experience or relevant references to refer to. However, leaving these drawbacks uncorrected will cause problems when this draft is applied to real cases.

In the field of monopoly, The draft FTL's monopoly policy prohibits monopolistic conduct but allows monopoly structure. This policy is suitable for Taiwan because of Taiwan's specific economic circumstances. Taiwan's economy is primarily based on export-import trading, thus large scale enterprises are necessary for raising its competitiveness in the international economic market. In addition, monopolies attained by natural methods or superior skill are also allowed in the U. S. On the other hand, monopolistic conduct is prohibited to prevent its anticompetitive effect on...
Taiwan's market and economy. Therefore, the monopoly policy in the draft FTL is basically appropriate.

Nevertheless, the criticisms rest on a lack of criteria for monopolies and monopolization. The first suggestion for monopoly standards is to define the market in product and geographic terms. The U. S. experience in delineating market, which is described in Chapter III, can be referred to. Secondly, standards for measuring monopoly power should be provided. Referring to the relevant U. S. cases, a proposal which measures a firm's market power based primarily on a certain percentage of its share in the market and secondarily on market structure factors such as entry barriers will be suggested.

The regulation requiring the authority to publicly identify enterprises which are monopolies in structure should be deleted. It is unrealistic to expect the authority to investigate all enterprises in Taiwan to find out which of them are monopolies in structure.

Monopolization should not be regulated by such ambiguous terms as "unfair," "inappropriate," and "unjustifiable." A general prohibition clause which prohibits any abuses of monopoly power is suggested. As to the standard for illegality of monopolization, the exclusionary conduct test of the U. S. law which outlaws conduct identified as exclusionary and harmful in the market is suggested.

In the field of mergers and combinations, the draft FTL allows mergers for the sake of promoting efficiencies and
encouraging large scale enterprises, yet requires certain highly concentrated enterprises to apply for permission for mergers in order to supervise certain mergers which endanger free competition. Such a merger policy declares a clear merger test for enterprises and courts to anticipate and follow and participate is better than the corresponding U.S. regulation.

In the U.S., mergers are regulated by the use of the flexible "rule of reason" and the amended Section 7 of the Clayton Act which outlaws any mergers which may have the effect of lessening competition or creating a monopoly. Therefore, the U. S. legislation provide no clear standards for illegality of mergers but leave this problem to the court. Thus, a lack of predictability and certainty is the most significant criticism of the U.S. antitrust laws.

Compared with the U.S. merger laws, the merger regulation in the draft FTL provides a certain predictability and certainty of merger regulation. However, it has been criticized for the adopted permission approach for supervision of mergers. The main drawback of the permission approach is the possibility that the authority will delay permission and thus cause damage to the merging firms. Accordingly, a revised permission approach is suggested which provides a time limitation for evaluation of applied mergers.

The U.S. standards for illegality of mergers and underlying policies can serve as a reference to supplement
Taiwan's merger regulation. The standards in relevant areas can provide a basis for the cost-benefit analysis of an applied merger. For example, the criteria of creating market power and lessening competition for horizontal merger; foreclosure and market entry barriers for vertical merger; reciprocity and entrenchment for conglomerate merger.

Horizontal concerted actions are basically prohibited in the draft FTL, but can be allowed exceptionally if they benefit the economy as a whole and are permitted by the authority after application in advance. While there are two justifications, market improving and partial integration of functions achieving significant economies of scale, which are available in the U. S. laws, there are seven justifications for horizontal concerted actions in the draft FTL. The reason for the broader scope of justifications in the draft FTL is that Taiwan's economic policy encourages promotion of efficiencies to achieve large scale enterprises and to raise competitiveness in the international market. As a result, if a horizontal concerted action's benefit to the economy as a whole outweighs its cost of impairing free competition, it should be justified.

The regulation of vertical concerted actions is the most significant drawback in the draft FTL. The draft FTL regulates only resale price maintenance in Article 18 with the intent of ignoring other vertical concerted actions. Nevertheless, on the other hand, it ambiguously reserves the
regulation of vertical concerted actions other than resale price maintenance by Clause 6 of Article 19 which prohibits transactions which place undue restrictions on the commercial activities of the trading counterpart.

There are several common vertical concerted actions other than resale price maintenance in the course of commercial activities, which have significant influence in the market. Customer and territorial restrictions, exclusive dealing, and tying arrangements are significant examples. The draft FTL's silence on these nonprice vertical restraints ignores their importance of them in social commercial activities, and will cause problems in the future. When these practices take place, there will be no law to regulate them.

If the draft FTL intended to regulate these nonprice vertical restraint practices by applying Clause 6 of Article 19, a per se prohibition, it oversimplifies the problems. These nonprice vertical restraints may result in different economic effects, good or bad, in different situations. For example, these practices may promote interbrand competition in the market through the received advantages when they lessen intrabrand competition. Therefore, a treatment of per se prohibition for all these nonprice vertical restraints without a cost-benefit analysis will damage social commercial activities and contradict Taiwan government's economic policy.

Therefore, specific articles which regulate vertical concerted actions are recommend for addition to the draft
FTL. The standards for evaluating them are based on a cost-benefit analysis, an analysis which balances the restraints' effect on intrabrand competition with the effect on interbrand competition in the market.

Due to the draft FTL's significant drawbacks, as described above, it is foreseeable that the enforcement of the draft FTL and decisions of the court will encounter certain difficulties in practice. Perhaps as Senator Lin has said in the legislature, since the Fair Trade Law legislation has been delayed too long, the most significant step now is to enact an antitrust law for Taiwan, not to make it perfect. However, this thesis is intended not only to provide a reference for Taiwan's authorities and courts, but also to make suggestions for further revision of the Fair Trade Law.