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Political Economy of Regulating Competition in a Challenged Global Metropolis: The Hong Kong Blueprint

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Political Economy of Regulating Competition in a Challenged Global Metropolis: The Hong Kong Blueprint

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Political Economy of Regulating Competition in a Challenged Global Metropolis: The Hong Kong Blueprint

Miron Mushkat[†] & Roda Mushkat[†]

I.	Introduction	293
II.	From a Barren Rock to a Global Metropolis	302
III.	From a Quintessentially Colonial Outpost to a “Flawed Democracy”	311
IV.	Key Characteristics of the Micro-Level Regulatory Environment	320
V.	From a Loose Patchwork to an Elaborate Control System	329
	A. Historical Backdrop	329
	B. The Competition Ordinance.....	334
	C. Support and Reservations	337
VI.	Macroscopic Assessment and Concluding Observations ..	343

I. Introduction

With the exception of the United States, industrial countries were severely enfeebled by the Second World War, but proceeded to enjoy, for the first time since the Great Depression, over two decades of continuing prosperity.¹ This period was not devoid of cyclical shifts in the pace of economic activity and challenges to financial stability, but on the whole, the dynamism exhibited and

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¹ See Sara Burke & Claudio Puty, *The Post World War II Golden Age of Capitalism and the Crisis of the 1970s*, GLOVES OFF, www.glovesoff.org/features/gjamerica_1.html (last visited Sept. 23, 2014).

progress recorded justifies its portrayal as the “golden age of . . . capitalism.”² This period was also a phase in the evolution of the global economy characterized by a meaningful degree of international cooperation and institution-building—as evidenced by the creation of the General Agreement on Tariffs and Trade (GATT), International Bank for Reconstruction and Development (World Bank), International Monetary Fund (IMF), and USD-based gold exchange standard.³

The steady forward movement came to an end in the 1970s, when economic expansion, coupled with price stability, gave way to stubborn stagflation.⁴ The conventional-style “Keynesian” policies, featuring fiscal and monetary laxity, were believed to be largely responsible for the malaise and therefore were significantly discredited.⁵ The post-1945 overarching edifice of embedded liberalism, broadly and collectively combining trade openness with the pursuit of domestic welfare,⁶ displayed enormous strains and effectively unraveled.⁷ One of the most concrete manifestations of the sharp deterioration in the global economic climate, notably the serious decline in international cooperation and widespread reversion to strategies reflecting narrow national interests, was the collapse of the elaborate Bretton Woods exchange rate regime and the shift to a free-floating system.⁸

Mature industrial economies regained momentum in the 1980s in a pattern attributed to the disciplined and, for the most part, “market-friendly” or “supply-side oriented” policies of conservative governments on both sides of the Atlantic, and their

² *See id.*

³ *See id.*

⁴ *See id.*

⁵ *See generally* ROBERT J. SAMUELSON, *THE GREAT INFLATION: THE PAST AND FUTURE OF AMERICAN AFFLUENCE* (2008) (arguing that social, political, and psychological pressures give rise to the cyclical nature of the United States' economy).

⁶ *See generally* John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic System*, 36 *INT'L ORG.* 379, 379–415 (1982) (differentiating “embedded liberalism” from liberal international economic order and laissez-faire liberalism).

⁷ *See* MARK BLYTH, *GREAT TRANSFORMATIONS: ECONOMIC IDEAS AND INSTITUTIONAL CHANGE IN THE TWENTIETH CENTURY* 126–250 (2002).

⁸ Although significant, this deterioration of the global economic climate was still not as drastic as in the period between World War One and World War Two. *See* BARRY J. EICHENGREEN, *GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM* 93–135 (1996).

centrist successors.⁹ The strategies followed have been closely associated with the names of trail-blazing individual leaders and have found symbolic expression in terms such as Reagonomics,¹⁰ Thatcherism,¹¹ Clintonomics,¹² and Blairism.¹³ However, the developed world has not experienced a genuine economic renaissance.¹⁴ Rates of growth have generally been satisfactory, but scarcely impressive.¹⁵ The upward trajectory has also been uneven, as evidenced by the immense severity of the 2008-09 “Great Recession.”¹⁶

When a commodity becomes scarce, its perceived value normally increases in markets for both goods and ideas.¹⁷ Insofar as the market for ideas is concerned, it typically attracts more attention and intellectual resources.¹⁸ Economic dynamism, while an abstract concept rather than a tangible product, is no exception

⁹ See generally MATTHIAS MATHIJS, *IDEAS AND ECONOMIC CRISES IN BRITAIN FROM ATTLEE TO BLAIR (1945-2005)* (2011) (analyzing why Thatcher and Attlee were so successful with regard to economic policy); BRIAN DOMITROVIC, *ECONOCLASTS: THE REBELS WHO SPARKED THE SUPPLY-SIDE REVOLUTION AND RESTORED AMERICAN PROSPERITY* (2012) (discussing the impact of supply-side economics).

¹⁰ See generally BRUCE R. BARTLETT, *REAGONOMICS: SUPPLY-SIDE REVOLUTION IN ACTION* (1981) (describing Ronald Reagan’s political and economic policies).

¹¹ See generally ERIC J. EVANS, *THATCHER AND THATCHERISM* (2004) (describing Margaret Thatcher’s political and economic policies).

¹² See generally JACK GODWIN, *CLINTONOMICS: HOW BILL CLINTON REENGINEERED THE REAGAN REVOLUTION* (2009) (describing William Clinton’s political and economic policies).

¹³ See generally Gyorgy Simon, Jr., *The Impact of the British Model on Economic Growth*, *ECON. ANNALS*, Dec. 31, 2007, at 45, available at papers.ssrn.com/sol3/papers.cfm?abstract_id=1288591 (describing Tony Blair’s political and economic policies).

¹⁴ See generally NIALL FERGUSON, *THE GREAT DEGENERATION: HOW INSTITUTIONS DECAY AND ECONOMIES DIE* (2012) (exploring causes of the “stationary state”).

¹⁵ See *id.* at 1–20.

¹⁶ See generally DAVID BECKWORTH, *BOOM AND BUST BANKING: THE CAUSES AND CURES OF THE GREAT RECESSION* (2012) (discussing the 2008 economic collapse); ALAN S. BLINDER, *AFTER THE MUSIC STOPPED: THE FINANCIAL CRISIS, THE RESPONSE, AND THE WORK AHEAD* (2013) (discussing the immense financial liabilities of banks and other holding companies).

¹⁷ See DAVID COLANDER, *MACROECONOMICS* 85 (9th ed. 2012) (Stating that “[w]hen quantity demanded is greater than quantity supplied, prices tend to rise.”).

¹⁸ See HENDRIK VAN DEN BERG, *ECONOMIC GROWTH AND DEVELOPMENT: AN ANALYSIS OF OUR GREATEST ECONOMIC ACHIEVEMENTS AND OUR MOST EXCITING CHALLENGES* 2-29 (2d ed., 2012).

to the rule.¹⁹ Where and when it turns elusive, the quest for gaining a better appreciation of its underpinnings tends to widen and intensify.²⁰ This pattern has been amply observed in the past three decades or so, a period characterized by an accelerating and progressively more sophisticated search—across the entire social science spectrum and beyond—for clues to the determinants of economic growth and development.²¹

A notable feature of the process has been the discovery, or rediscovery, of the crucial role played by institutions in social life generally,²² and in influencing economic performance particularly.²³ The scholarly inquiries geared toward shedding light on this relationship have followed two parallel paths. On the first, especially constitutional economists, have made analytical efforts to identify demand-side and supply-side institutional impediments, often political in nature, to the efficient functioning of established Western capitalist systems.²⁴ On the second path, a major subject of empirical and policy-oriented research has emerged, due to the considerable admiration from social scientists of the vibrancy exhibited by fundamentally different forms of capitalist organization, mostly the kind relied upon by late

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See generally JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* (1989) (contextualizing social stratification as a political and economic mechanism).

²³ See DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* (1990); Daron Acemoglu, Simon Johnson, & James A. Robinson, *Institutions as Fundamental Cause of Long-Run Growth* 1 *HANDBOOK OF ECONOMIC GROWTH* 385–472 (2005); RICHARD R. NELSON, *TECHNOLOGY, INSTITUTIONS, AND ECONOMIC GROWTH* (2005); DANI RODRIK, *ONE ECONOMICS, MANY RECIPES: GLOBALIZATION, INSTITUTIONS, ECONOMIC GROWTH* (2007); JUSTIN F. LIN, *ECONOMIC DEVELOPMENT AND TRANSITION: THOUGHT, STRATEGY, AND VIABILITY* (2009); DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* (2012). See generally LANCE E. DAVIS & DOUGLASS C. NORTH, *INSTITUTIONAL CHANGE AND AMERICAN ECONOMIC GROWTH* (1971) (examining the long-term economic effects of social, political, and institutional change).

²⁴ See Miron Mushkat & Roda Mushkat, *Conversationalism, Constitutional Economics, and Bicameralism: Strategies for Political Reform in Hong Kong*, 13 *ASIAN J. POL. SCI.* 23, 23–50 (2005) [hereinafter Mushkat, *Strategies for Political Reform in Hong Kong*]; Miron Mushkat & Roda Mushkat, *The Economic Dimension of Hong Kong's Basic Law: An Analytical Overview*, 7 *N.Z. J. PUB. & INT'L L.* 273, 273–316 (2009) [hereinafter Mushkat, *An Analytical Overview*].

industrializers in the Eastern hemisphere.²⁵

The first strategy has typically yielded neo-liberal insights designed to shield market institutions from untoward political influences. The advocated measures have included: balanced-budget constitutional provisions; tax and expenditure limitations; a line-item veto (permitting the head of the executive branch to exercise veto power over the budget on an item-by-item basis); an item-reduction veto (providing similar authority to curtail the level of funds without removing the entire item from the budget); tax earmarking (using taxes to strictly fund a specific category of expenditure by imposing the burden entirely on the beneficiaries); regulatory restrictions; mandatory voter consent for fiscal initiatives; and supermajority requirements (e.g., two-thirds majority for tax proposals) for economically significant legislative schemes.²⁶

In the same vein, ideas have been floated to enhance efficiency and liberty—and, by implication, reinvigorate the economic

²⁵ See generally CHALMERS A. JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925-1973* (1982) (evaluating Japan's "lifetime" employment system, seniority wage system, and enterprise unionism); FREDERIC C. DEYO, ET AL., *THE POLITICAL ECONOMY OF NEW ASIAN INDUSTRIALISM* (1987) (encouraging fuller integration of the Asian industrialization into mainstream development theory); ALICE H. AMSDEN, *ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION* (1989) (exploring the areas of growth during East Asia's industrial revolution); ROBERT WADE, *GOVERNING THE MARKET: ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION* (1990) (analyzing the role of the state in creating and implementing economic policies); WORLD BANK, *THE EAST ASIAN MIRACLE: ECONOMIC GROWTH AND PUBLIC POLICY* (1993) (defining Asia's role in the "export-push" strategy); ANDREW J. MACINTYRE, *BUSINESS AND GOVERNMENT IN INDUSTRIALIZING ASIA* (1994) (exploring the nature of relations between business and government in Northeast and Southeast Asia); PETER B. EVANS, *EMBEDDED AUTONOMY: STATES AND INDUSTRIAL TRANSFORMATION* (1995) (asserting that the role of the state is increasingly economic in nature); STEVE CHAN, CAL CLARK, & DANNY LAM, *BEYOND THE DEVELOPMENTAL STATE: EAST ASIA'S ECONOMIES RECONSIDERED* (1998) (presenting general theoretical and substantive critiques of the "developmental state" model); MEREDITH WOO-CUMINGS, *THE DEVELOPMENTAL STATE* (1999) (explaining the theory of the "development state"); MING XIA, *THE DUAL DEVELOPMENTAL STATE: DEVELOPMENT STRATEGY AND INSTITUTIONAL ARRANGEMENTS FOR CHINA'S TRANSITION* (2000) (discussing the limitations of the "development state" model); KA H. MOK & RAY FORREST, *CHANGING GOVERNANCE AND PUBLIC POLICY IN EAST ASIA* (2009) (exploring how countries have variably implemented capitalist-based policies in their respective countries).

²⁶ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 37; Mushkat, *An Analytical Overview*, *supra* note 24, at 287–88.

edifice—by rendering the Bill of Rights more conducive to safeguarding individual rights against infringements by other parties, rulers, and fellow citizens, and by introducing an Economic Bill of Rights.²⁷ The underlying argument has been that such rights have not been afforded sufficient constitutional, statutory, regulatory, and judicial protection—a pattern that has become increasingly pronounced in recent years.²⁸ This assertion has specifically and vigorously been directed at rights relating to property.²⁹ The focus has not been on property rights in the broad sense of the term, but the rights of both individuals and groups to control property uses (a domain where, for example, the issue of trespassing arises).³⁰

While this is commonly perceived to be the realm of scholars in the field of political science, the neo-liberal quest of constitutional economists for an institutional façade supportive of private sector dynamism has extended into areas with which questions of government accountability, responsiveness, organizational flexibility, and transparency are systematically grappled with.³¹ In the process, researchers have favorably explored a host of strategic options—including citizen-initiated legislation, readily enacted referenda, strict term limits for politicians, uncomplicated recall of public officials, meaningful disclosure across entire executive and legislative branches of governments, and flattening of the centralized policy apparatus with a view toward firmly embedding it in the community and substantially enhancing its information gathering-processing-utilization capabilities.³²

Such “participationist” blueprints, designed to circumvent malfunctioning representative institutions that are thought to

²⁷ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 37-38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284.

²⁸ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284.

²⁹ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284.

³⁰ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284.

³¹ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284-85.

³² See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284-85.

impede the expression of true preferences by citizens, amounting to manifestations of direct democracy, have not been conceived in isolation without reference to prevailing political realities.³³ Considerable intellectual resources have also been channeled toward potentially improving the functioning of the “middlemen,” the organizational vehicles that convert grassroots demands into concrete strategies in the indirect democracy segment of the political arena.³⁴ Interestingly, the “representationist” schemes examined and recommended have departed in several respects from the neo-liberal credo pervading constitutional economics.³⁵

Some of the issues addressed, in an essentially empirical and largely neutral fashion, merely concern the economic consequences of different institutional configurations—for example, presidential versus parliamentary regimes or unicameral versus bicameral legislatures.³⁶ However, there is often an additional analytical element that cannot readily be reconciled with the neo-liberal ethos. Specifically, the merits of corporatist systems—entailing close top-down cooperation between government officials, the business sector, and labor, as seen in some Northern European countries—are highlighted, and evidence is presented to demonstrate that they may engender prosperity and stability in certain circumstances.³⁷ Whether valid or not, the claim is scarcely in tune with the predominantly bottom-up, market-centered proposals emphatically put forward by constitutional economists.

European-style corporatism is not the sole preserve of constitutional economists. Its key attributes, notably the German institutional framework of “social market” capitalism, the active role played by the State at both the macro and micro levels, as well as the hierarchical and horizontal patterns of corporate governance and business relationships, are extensively dissected by political

³³ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 38; Mushkat, *An Analytical Overview*, *supra* note 24, at 284–85.

³⁴ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 39–46; Mushkat, *An Analytical Overview*, *supra* note 24, at 286.

³⁵ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 39–46; Mushkat, *An Analytical Overview*, *supra* note 24, at 286.

³⁶ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 39–46; Mushkat, *An Analytical Overview*, *supra* note 24, at 286.

³⁷ See Mushkat, *Strategies for Political Reform in Hong Kong*, *supra* note 24, at 44–46.

economists.³⁸ The latter tend to be more favorably disposed toward institutional constellations involving partial and potentially productive reliance on non-market coordination mechanisms.³⁹ The political economy field is also one where generally sympathetic assessments are provided of the “guided capitalism” that has characterized East Asia’s remarkably successful modernization.⁴⁰ Those who have been engaged in the search for lessons that this model offers can be said to have followed the second strategic path purporting to lead to a better understanding of economic growth and its management.

Their analytical insights and policy prescriptions revolve around the concept of the “developmental state.”⁴¹ This institutional configuration combines substantial government direction with a significant degree of civil society/private sector initiative, coupled with a fairly high measure of organizational certainty and transparency.⁴² The key actors in the policy process share common strategic objectives (with economic growth being accorded priority over redistribution) and cooperate closely in seeking their implementation.⁴³ The state machinery is insulated from external pressures along Weberian lines (and hence exhibits neutrality), but at the same time it is firmly rooted in the surrounding social environment.⁴⁴ The barriers shielding it from

³⁸ See ROBERT GILPIN, *GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER* 168–74 (2001).

³⁹ See *id.* at 175–79.

⁴⁰ See *id.* at 156–68, 175–79; See also KENNETH D. COCKS, *DEEP FUTURES: OUR PROSPECTS FOR SURVIVAL* 24 (2003).

⁴¹ See JOHNSON, *supra* note 25; DEYO, *supra* note 25; AMSDEN, *supra* note 25; WADE, *supra* note 25; WORLD BANK, *supra* note 25; MACINTYRE, *supra* note 25; EVANS, *supra* note 25; CHAN, CLARK, & LAM, *supra* note 25; WOO-CUMINGS (ed.), *supra* note 25; XIA, *supra* note 25; MOK & FORREST (eds.), *supra* note 25.

⁴² See JOHNSON, *supra* note 25; DEYO, *supra* note 25; AMSDEN, *supra* note 25; WADE, *supra* note 25; WORLD BANK, *supra* note 25; MACINTYRE, *supra* note 25; EVANS, *supra* note 25; CHAN, CLARK, & LAM, *supra* note 25; WOO-CUMINGS (ed.), *supra* note 25; XIA, *supra* note 25; MOK & FORREST (eds.), *supra* note 25.

⁴³ See JOHNSON, *supra* note 25; DEYO, *supra* note 25; AMSDEN, *supra* note 25; WADE, *supra* note 25; WORLD BANK, *supra* note 25; MACINTYRE, *supra* note 25; EVANS, *supra* note 25; CHAN, CLARK, & LAM, *supra* note 25; WOO-CUMINGS (ed.), *supra* note 25; XIA, *supra* note 25; MOK & FORREST (eds.), *supra* note 25.

⁴⁴ See JOHNSON, *supra* note 25; DEYO, *supra* note 25; AMSDEN, *supra* note 25; WADE, *supra* note 25; WORLD BANK, *supra* note 25; MACINTYRE, *supra* note 25; EVANS, *supra* note 25; CHAN, CLARK, & LAM, *supra* note 25; WOO-CUMINGS (ed.), *supra* note 25; XIA, *supra* note 25; MOK & FORREST (eds.), *supra* note 25.

partisan pressures, reinforced by deep entrenchment in the community, furnish it with transformative capacity to foster change through governed interdependence between public authorities and private agents.⁴⁵

The original East Asia developmental states have now matured and have joined the ranks of industrial countries.⁴⁶ Interest appears to have shifted to the BRICs (Brazil, Russia, India, and China) and their successors.⁴⁷ This group does not constitute a homogeneous category, which is a disadvantage from a conceptual and policy perspective. Nevertheless, certain common features may be discerned. The countries that are currently attracting attention had long been at the interventionist end of the strategic continuum, but are presently liberalizing, albeit in a controlled fashion.⁴⁸ They are also almost invariably large. An inference may be drawn that an institutional cocktail, featuring some optimal blend of spontaneous bottom-up and thoughtful top-down elements, may provide the ideal policy formula for sustaining a healthy economic expansion, and that size too greatly matters in this respect.

Without necessarily challenging the broad thrust of that argument, it is appropriate to note that it does not properly reflect the diversity of economic experience. Small countries, frequently less interventionist and more open than their large counterparts, often consistently outpace the titans.⁴⁹ Hong Kong, a former British colony and, since 1997, a special administrative region (HKSAR) of the People's Republic of China (PRC), is a case in

⁴⁵ See JOHNSON, *supra* note 25; DEYO, *supra* note 25; AMSDEN, *supra* note 25; WADE, *supra* note 25; WORLD BANK, *supra* note 25; MACINTYRE, *supra* note 25; EVANS, *supra* note 25; CHAN, CLARK, & LAM, *supra* note 25; WOO-CUMINGS (ed.), *supra* note 25; XIA, *supra* note 25; MOK & FORREST (eds.), *supra* note 25.

⁴⁶ See JOHNSON, *supra* note 25; DEYO, *supra* note 25; AMSDEN, *supra* note 25; WADE, *supra* note 25; WORLD BANK, *supra* note 25; MACINTYRE, *supra* note 25; EVANS, *supra* note 25; CHAN, CLARK, & LAM, *supra* note 25; WOO-CUMINGS (ed.), *supra* note 25; XIA, *supra* note 25; MOK & FORREST (eds.), *supra* note 25.

⁴⁷ See generally JIM O'NEILL, *THE GROWTH MAP: ECONOMIC OPPORTUNITY IN THE BRICS AND BEYOND* (2011) (noting Brazil, Russia, India and China's eagerness to enter the global economic exchange); RUCHIR SHARMA, *BREAKOUT NATIONS: IN PURSUIT OF THE NEXT ECONOMIC MIRACLE* (2012) (finding emerging markets such as Russia, Brazil, and China have a much higher tolerance than richer nations).

⁴⁸ See O'NEILL, *supra* note 47.

⁴⁹ See generally William Easterly & Aart Kray, *Small States, Small Problems?*, (World Bank Dev. Res. Group, Working Paper No. WPS2139, 1999) (noting that "microstates do not appear to be especially open financially" either).

point. Despite its stellar economic record and distinct institutional features, it occupies a rather modest place in the literature on economic development and growth (the equally vibrant yet differently structured city-state of Singapore is also marginalized).⁵⁰ The purpose of this paper is to put Hong Kong's economic architecture back in the spotlight by describing and assessing its regulation of competition, a process that has recently culminated in the introduction of legislation to address the issue. However, the territory's relevant economic and political characteristics must be outlined first.

Another preliminary step taken is an evaluation of Hong Kong's overall regulatory regime. Specific measures taken to correct market failure need to be placed in a broad economic and political context because such contexts are key determinants of the particular nature of the measures, although this is not a one-way relationship. However, such mechanisms are often best understood as a component of a wider regulatory system, which may be tightly or loosely integrated, but which is seldom devoid of any internal coherence. Indeed, the conclusion drawn here is that the effectiveness of the emerging framework for regulating competition in Hong Kong must be judged in light of its fit with the economic, political, and overall micro-level governance regime in which it is embedded.

II. From a Barren Rock to a Global Metropolis

Although this is not duly captured, qualitatively or quantitatively, in Western legal and social science writings, Hong Kong has long served as a source of intellectual fascination. Some of this fascination has been expressed in the form of casual, but insightful, observations,⁵¹ and some has been systematically articulated.⁵² Whatever the mode of communication, the appeal has persistently stemmed from the territory's extraordinary capacity to deliver—in the face of enormous challenges, constraints, and vulnerabilities—freedom, prosperity, and stability.⁵³ As will be shown in the following section, Hong Kong has not progressed beyond the stage of “flawed democracy” on the

⁵⁰ See ALVIN RABUSHKA, *HONG KONG: A STUDY IN ECONOMIC FREEDOM* (1979).

⁵¹ See, e.g., JON WORONOFF, *HONG KONG: CAPITALIST PARADISE* (1980).

⁵² See, e.g., RABUSHKA, *supra* note 50.

⁵³ See, e.g., *id.*; RICHARD CULLEN, *THE RULE OF LAW IN HONG KONG* (2005).

political front, but it has nevertheless embraced the rule of law⁵⁴ and *laissez-faire* economics⁵⁵ in a determined and mostly successful fashion. In terms of key yardsticks, no jurisdiction better embodies the neo-liberal institutional vision of a dynamic economic order.

Hong Kong became a British possession in the mid-nineteenth century, following a decisive victory over imperial China in the Opium Wars, which was triggered by a series of diplomatic and trade disputes.⁵⁶ The process of colonization began with the establishment of control over Hong Kong Island and Kowloon Peninsula.⁵⁷ It accelerated with the acquisition of the New Territories in the late nineteenth century.⁵⁸ The circumstances under which the physical expansion initially took place, and the seemingly dubious quality of the assets obtained, are believed to have caused Queen Victoria considerable distress.⁵⁹ Hong Kong Island amounted to little more than a “barren rock.”⁶⁰ “The original population was sparse, with just a few fishing villages, and it was also a place for pirates to prey on passing ships.”⁶¹

The mere act of territorial consolidation boosted economic activity: “[The] offices of the British companies, some colonial trappings, a military and naval base, and a veneer of civilization, put it in business.”⁶² Allowing the Chinese free access to the island for trading purposes enhanced its attractiveness and turned it into a magnet for mainlanders—which, in turn, led to rapid

⁵⁴ See generally RICHARD CULLEN, *THE RULE OF LAW IN HONG KONG* (2005) (synthesizing how Hong Kong both protects and advances its Rule of Law).

⁵⁵ See Edward K.Y. CHEN, *BUSINESS ENVIRONMENT IN HONG KONG*, 3–46 (Ng Sek Hong & David G. Lethbridge eds., 4th ed., 2000); KUI-WAI LI, *THE HONG KONG ECONOMY: RECOVERY AND RESTRUCTURING* (2006). See generally RABUSHKA, *supra* note 50 (explaining the competitive market of Hong Kong in the face of resourcelessness, political geography, and constitutional and administrative status); MIRON MUSHKAT, *THE ECONOMIC FUTURE OF HONG KONG* (1990) (concluding that the Hong Kong economy is characterized by continuity rather than by reform); DAVID MOLE, *MANAGING THE NEW HONG KONG ECONOMY* 1–17 (1996) (characterizing the Hong Kong economy as “positive non-intervention”).

⁵⁶ See WORONOFF, *supra* note 51, at 5–6.

⁵⁷ See *id.* at 6–7.

⁵⁸ See *id.* at 7–8.

⁵⁹ See *id.* at 5.

⁶⁰ See *id.* at 5–6.

⁶¹ See WORONOFF, *supra* note 51, at 5–6.

⁶² See *id.* at 6.

population growth.⁶³ This, as well as competitive pressures exerted by France and Russia, prompted the extension of British control over Kowloon Peninsula and, subsequently, the New Territories.⁶⁴ At that point, the colony “consisted of both sides of [Victoria Harbor], all approaches to it, and some agricultural land in the New Territories.”⁶⁵ Yet, “it was still nothing more than a rear base for trade with China.”⁶⁶

Before long, that activity took off dramatically.⁶⁷ It continued to expand at an impressive rate, periodically interrupted by exogenous shocks, the most severe of which was that unleashed by the Japanese invasion of the early 1940s.⁶⁸ This happened at an economically difficult juncture because Hong Kong’s population was swelling due to the influx of mainlanders fleeing the harsh consequences of the Sino-Japanese War, which had erupted a decade earlier.⁶⁹ The heavy and burdensome flow of refugees resumed as the civil war between the communists and nationalists reached its climax in the late 1940s.⁷⁰ When the communists gained the upper hand, they proceeded to forcefully nationalize the factors of production, as well as embark on massively disruptive experiments such as the Great Leap Forward and the Cultural Revolution, in the 1950s and 1960s.⁷¹ However, Hong Kong’s trading business remained generally robust, defying the pull of gravity typically prevailing when conditions in the external environment markedly deteriorate and internal pressures greatly

⁶³ See *id.* at 6–7.

⁶⁴ See *id.* at 7–8.

⁶⁵ *Id.* at 8.

⁶⁶ WORONOFF, *supra* note 51, at 8.

⁶⁷ See *id.*

⁶⁸ See *id.* at 8.

⁶⁹ See *id.* at 8–9.

⁷⁰ See LI, *supra* note 55

⁷¹ See WORONOFF, *supra* note 51, at 9; LI, *supra* note 55, at 3; BERTRAND DE SÉVILLE, HONG KONG: POLICY INITIATIVES AGAINST CORRUPTION 12–13 (Organization for Economic Cooperation and Development, 1997); Chi-Kwan Mark, *The “Problem of People”: British Colonials, Cold War Powers, and the Chinese Refugees in Hong Kong*, 41 MOD. ASIAN STUD. 1145, 1145–81 (2007); Laura Madokoro, *Borders Transformed: Sovereign Concerns, Population Movements, and the Making of Territorial Frontiers in Hong Kong*, 25 J. REFUGEE STUD. 407, 407–27 (2012); Glen Peterson, *The Uneven Development of the International Refugee Regime in Postwar Asia: Evidence from China, Hong Kong, and Indonesia*, 25 J. REFUGEE STUD. 326, 326–43 (2012).

intensify.⁷²

Indeed, rather exceptionally, the British colony turned a formidable challenge into an overwhelming opportunity by responding creatively and resourcefully to the threat posed to it by the imposition of a United Nations embargo against China, on account of its support for the North during the Korean War waged in the early 1950s.⁷³ Having experienced a rapid erosion of its status as a thriving, but geographically limited and relatively low value-added, China-dependent entrepôt, Hong Kong swiftly transformed itself into a leading manufacturing center for labor-intensive consumer goods.⁷⁴ In the process, it re-oriented itself toward affluent markets in the developed world, capitalizing on both buoyant external demand and a rich pool of comparatively inexpensive, yet skilled workers at home.⁷⁵

Another opportunity of historic proportions presented itself on much more favorable terms, with the opening up of China in the late 1970s.⁷⁶ It brought to an end Hong Kong's three-decade long economic estrangement from the mainland and provided the impetus to reintegration, which is still ongoing.⁷⁷ As access to China's low-priced labor and land became readily available, Hong Kong transferred its labor-intensive manufacturing base across the border and successfully shifted the focus to capital-intensive and knowledge-intensive service industries, by then consistent with its changing factor endowments.⁷⁸ Reintegration with the mainland was a two-step undertaking, initially shallow and thereafter deep,

⁷² See WORONOFF, *supra* note 51, at 8–9; LI, *supra* note 55, at 3.

⁷³ See DAVID R. MEYER, HONG KONG AS A GLOBAL METROPOLIS 143–78 (2000); STEPHEN CHIU & TAI-LOK LUI, HONG KONG: BECOMING A CHINESE GLOBAL CITY 26–34 (2009).

⁷⁴ See MEYER, *supra* note 73, at 143–78; CHIU & LUI, *supra* note 73, at 26–34.

⁷⁵ See MEYER, *supra* note 73, at 143–78; CHIU & LUI, *supra* note 73, at 26–34.

⁷⁶ See NICHOLAS R. LARDY, CHINA'S ENTRY INTO THE WORLD ECONOMY: IMPLICATIONS FOR NORTHEAST ASIA AND THE UNITED STATES (1987).

⁷⁷ See generally YUN-WING SUNG, THE CHINA-HONG KONG CONNECTION: THE KEY TO CHINA'S OPEN-DOOR POLICY (1991) [hereinafter CHINA'S OPEN-DOOR POLICY] (explaining China's mainland opening and slow reintegration); YUN-WING SUNG, THE EMERGENCE OF GREATER CHINA: THE ECONOMIC INTEGRATION OF MAINLAND CHINA, TAIWAN, AND HONG KONG (2005) (explaining the evolution of China and Hong Kong's economic relationship) [hereinafter THE ECONOMIC INTEGRATION]; see also YUN-WING SUNG, HONG KONG AND SOUTH CHINA: THE ECONOMIC SYNERGY (1998) [hereinafter THE ECONOMIC SYNERGY].

⁷⁸ See CHINA'S OPEN-DOOR POLICY, *supra* note 77, at 16–28.

but this distinction should not obscure the fact that structural adjustment was swift, as witnessed at similar historical junctures.⁷⁹

Deindustrialization proved to be beneficial not only because it allowed Hong Kong to lessen its dependence on increasingly low-margin exports that, owing to steadily climbing labor and land costs, were beginning to lose their competitiveness, but also in allowing Hong Kong to move up the value chain by reinventing itself as China's facilitator, financier, middleman, and trading partner.⁸⁰ The late 1970's, hermetically closed mainland economy sorely needed an effective bridge to re-engage with the world, and Hong Kong promptly and decisively stepped in to assume that role by rapidly developing a wide array of intermediary services whose breadth and depth enabled it to productively and sustainably exploit crucial economies of scale and agglomeration.⁸¹

That dynamic process, which coincided with progressive liberalization in Taiwan, has transformed Hong Kong into a vibrant pivot of the so-called "China Circle."⁸² This informal but highly integrated economic entity consists of three concentric layers.⁸³ Greater Hong Kong, or the Hong Kong-Guangdong Province nexus, constitutes the core of this expanding region.⁸⁴ Greater Southeast China (GSC)—which extends over Hong Kong, Taiwan, and the southeast coastal provinces of the mainland (Guangdong, Fujian, Jiangsu, Shanghai, and Zhejiang)—is considered to be the inner layer.⁸⁵ And Greater China, or the Chinese Economic Area, is regarded as the outer layer.⁸⁶

However, the portrayal of present-day Hong Kong as the pivot of a geographically broad and multilayered China Circle falls short

⁷⁹ See THE ECONOMIC SYNERGY, *supra* note 77, at 5–8; THE ECONOMIC INTEGRATION, *supra* note 77, at 51–52, 54–56.

⁸⁰ See CHINA'S OPEN-DOOR POLICY, *supra* note 77, at 16–28.

⁸¹ See *id.* at 28–43.

⁸² See THE ECONOMIC SYNERGY, *supra* note 77, at 1–2; THE ECONOMIC INTEGRATION, *supra* note 77, at 9–10.

⁸³ See THE ECONOMIC SYNERGY, *supra* note 77, at 1–2; THE ECONOMIC INTEGRATION, *supra* note 77, at 9–10.

⁸⁴ See THE ECONOMIC SYNERGY, *supra* note 77, at 1–2; THE ECONOMIC INTEGRATION, *supra* note 77, at 9–10.

⁸⁵ See THE ECONOMIC SYNERGY, *supra* note 77, at 1–2; THE ECONOMIC INTEGRATION, *supra* note 77, at 9–10.

⁸⁶ See THE ECONOMIC SYNERGY, *supra* note 77, at 1–2; THE ECONOMIC INTEGRATION, *supra* note 77, at 9–10.

of fully reflecting the scope and diversity of its international economic activities. Hong Kong has evolved into a genuine “global metropolis,” a lofty status attained by only a handful of cities.⁸⁷ In a nutshell, this means that “[i]ts intermediaries of capital, who include traders, financiers, and corporate managers, have made Hong Kong the [epicenter for] decision-making about the exchange of capital within Asia and between the region and the rest of the world.”⁸⁸

There is a distinct duality to this phenomenon in that it possesses a social, as well as economic dimension, and entails an elaborate linkage between Chinese and foreign socio-economic relationship clusters.⁸⁹ The point is that Hong Kong intermediaries operate as “two social networks of capital, a Chinese and a foreign network, and those networks intersect[] . . .”⁹⁰ in their global metropolis. Importantly, “[t]he term ‘social networks’ emphasizes that intermediary decision-making about the exchange of capital rests on bonds that extend beyond pure market calculations of profit and loss to include deeper, wider social relations.”⁹¹ Such ties “are essential to build trust and monitor malfeasant behavior, thus reducing the risks of exchange.”⁹²

An intriguing side of the picture is that this sophisticated operational configuration is not the product of deliberate strategic design.⁹³ Rather, it appears to have emerged spontaneously, notwithstanding Hong Kong’s historically peripheral political position and Britain’s consistently modest ambitions for its colonial outpost on the fringes of the empire.⁹⁴ After all, “this tiny

⁸⁷ See generally MEYER, *supra* note 73 (tracing the history of Hong Kong as a “global metropolis”); CHIU & LUI, *supra* note 73 (exploring how Hong Kong grew into an international economic hub).

⁸⁸ MEYER, *supra* note 73, at 1.

⁸⁹ See generally *id.* (“Traders and financiers in Hong Kong always operated in multitiered national, world-regional, and global economies.”); CHIU & LUI, *supra* note 73 (“Hong Kong’s connections with the world economy are an example of . . . the ‘buyer-driven’ type . . . governance structures in global commodity chains.”).

⁹⁰ MEYER, *supra* note 73, at 3.

⁹¹ *Id.*

⁹² *Id.*

⁹³ See generally *id.* (explaining how Hong Kong has become the pivot of decision-making around the world due to various spontaneous events); CHIU & LUI, *supra* note 73 (discussing the multitude of factors that contributed to Hong Kong’s rapid industrial growth).

⁹⁴ See MEYER, *supra* note 73, at 1–2.

island and adjacent peninsula could not even lay claim to status as a city-state.”⁹⁵ By the same token, “[t]he British viewed Hong Kong as their emporium of trade in the Far East, but they did not aspire to transform it into a commercial-military power similar to the earlier aggressive city-states of Genoa and Venice.”⁹⁶ Notably, “during World War II, Britain conceded Hong Kong to Japan and concentrated its defensive resources in Singapore.”⁹⁷

It is tempting to attribute Hong Kong’s remarkable adaptability, creativity, dynamism, resilience, and rise, to cultural heritage, locational advantages, physical profile, proximity to China, and unique relationship with the mainland. The relevance of such factors cannot be dismissed lightly, but their explanatory power is inevitably limited, individually and collectively.⁹⁸ Ultimately, it cannot be overlooked that Hong Kong experienced substantial economic progress and smooth adjustment to changes in its external environment during the three-decade long estrangement from China. It would have doubtless been a more challenging proposition in the present set of circumstances, yet this does not negate the basic argument, which is that the fundamental driving force has been institutional capital.⁹⁹

The complexity of this concept leaves room for varying interpretations, albeit moderately so.¹⁰⁰ The focus here is primarily on the institutional architecture, how it is configured, and how the system functions. Another way of expressing the notion would be in terms of the structural and operational characteristics of the governance regime or, more simply, the “rules of the game” and their organizational underpinnings. In the Hong Kong context, this has traditionally implied placing overwhelming value on private initiative, or economic freedom, and going to great lengths

⁹⁵ *Id.* at 1.

⁹⁶ *Id.*

⁹⁷ *Id.* at 2.

⁹⁸ See MUSHKAT, *supra* note 55, at 5–7.

⁹⁹ See *id.* at 7–10.

¹⁰⁰ See ROBERT D. PUTNAM, *DEMOCRACIES IN FLUX: THE EVOLUTION OF SOCIAL CAPITAL IN CONTEMPORARY SOCIETY* (2002); LAURA BRUNELL, *INSTITUTIONAL CAPITAL: BUILDING POST-COMMUNIST GOVERNMENT PERFORMANCE* (2005); HIROFUMI UZAWA, *ECONOMIC ANALYSIS OF SOCIAL COMMON CAPITAL* (2005). See generally ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* (1993) (“[T]he level of economic development has a pronounced effect on political democracy, even when noneconomic factors are considered.”).

to exercise public sector discipline (strong society-small government rather than strong society-weak government).¹⁰¹ For purposes of capturing the essence of this institutional pattern, the following time-honored depiction remains useful:

In Hong Kong, economic affairs are conducted in an environment of virtually unfettered free enterprise. Government policy has long dictated a virtually hands-off approach toward the private sector, an approach that seems well suited to Hong Kong's exposed and dependent economic and political situation. The philosophy that underlies government in Hong Kong can be summed up in a few short phrases: law and order, minimum interference in private affairs, and the creation of an environment conducive to profitable investment. Regulatory economic controls are held to a minimum, no restrictions are placed on the movement of capital, little protection and few subsidies are given to industry, and the few direct services provided by government are operated on a commercial basis.¹⁰²

This unadulterated institutional variant of neo-liberalism has not been without its critics. Some have argued that it is not sufficiently sensitive to market failures in the form of social inequities, macroeconomic instability, and negative externalities (notably air and water pollution).¹⁰³ Critics have also contended that the above portrayal is overly backward-looking, and that it does not fully correspond with current government policies, which are indicative of a shift from a "hands-off" posture vis-à-vis the economy to one of "positive non-interventionism."¹⁰⁴ The emphasis on the positive element in the equation reflects a stance whereby the government actively endeavors to complement and enhance the working of market forces, particularly through investment in physical and social infrastructure.¹⁰⁵ Yet, although

¹⁰¹ See MUSHKAT, *supra* note 55, at 7–10.

¹⁰² RABUSHKA, *supra* note 50, at 44.

¹⁰³ See MUSHKAT, *supra* note 55, at 8; Miron Mushkat & Roda Mushkat, *The Political Economy of Hong Kong's Transboundary Pollution: The Challenge of Effective Governance*, 9 J. OF INT'L TRADE LAW & POL'Y 175, 175–92 (2010); Miron Mushkat & Roda Mushkat, *Endemic Institutional Fragility in the Face of Dynamic Economic Integration in Asia: The Case of Transboundary Pollution in Hong Kong* in EAST ASIAN ECONOMIC INTEGRATION: LAW, TRADE, AND FINANCE 49, 49–80 (Ross P. Buckley, Richard W. Hu, & Douglas W. Arne eds., Edward Elgar Publishers, 2011).

¹⁰⁴ See MUSHKAT, *supra* note 55, at 8–10; MOLE, *supra* note 55, at 2–5; LI, *supra* note 55, at 17–20.

¹⁰⁵ See MUSHKAT, *supra* note 55, at 8–10; MOLE, *supra* note 55, at 2–5; LI, *supra*

this more assertive strategy amounts to a notable departure from early colonial era practices, it unquestionably continues to bear the hallmarks of the neo-liberal institutional blueprint:

One may, of course, quibble and complain that this is a weak and defective *laissez-faire*, since it has been contaminated by some of the concerns of present-day welfare. On the other hand, it is still as close to the real thing as one can come. If Hong Kong no longer boasts as much freedom as 18th century England or the free-wheeling days of 19th century Shanghai, it is still a far throw from the mixed economies of the West today, let alone socialist or communist regimes. Let us say it is early 20th century *laissez-faire*, although its critics might dispute the fact that it has got so far. In some ways, it is even an improved form, as compared with the more spontaneous *laissez-faire* of earlier times, for the Hong Kong Government is following the policy consciously and purposefully, taking advantage of the benefits it does offer If one wishes to find a well-preserved and healthy specimen of an otherwise vanishing species, there is no other place to see and study *laissez-faire* than Hong Kong.¹⁰⁶

The corollary is that institutional neo-liberalism is a continuum, rather than the sharp edge of a heavily segmented conceptual space, and that Hong Kong has by no means exited its confines by moving away measurably, but not substantially, from the “pure” post-Industrial Revolution version. Several factors, including persistent government efforts to develop physical and social infrastructure conducive to private sector flexibility and vitality, have contributed directly and indirectly to Hong Kong’s economic strength and versatility, but none have played a role comparable to that of the neo-liberal institutional design geared toward maximizing, subject to modest constraints, economic freedom.¹⁰⁷ More than anything else, this accounts for the territory’s much-vaunted adaptive capacity, or unparalleled ability to efficiently and fruitfully respond to cyclical and structural

note 55, at 17–20.

¹⁰⁶ WORONOFF, *supra* note 51, at 41. See also A. JOHN YOUNGSON, HONG KONG: ECONOMIC GROWTH AND POLICY 115–59 (1982); MA NGOK, POLITICAL DEVELOPMENT IN HONG KONG: STATE, POLITICAL SOCIETY, AND CIVIL SOCIETY 21–23 (2007); *End of an Experiment*, THE ECONOMIST, July 17, 2010, available at <http://www.economist.com/node/16591088>.

¹⁰⁷ See MUSHKAT, *supra* note 55, at 7–10; LI, *supra* note 55, at 9, 17–24.

opportunities and threats.¹⁰⁸

III. From a Quintessentially Colonial Outpost to a “Flawed Democracy”

The regulatory environment is shaped by political, as well as economic, forces. In the Hong Kong context, these two sides of the picture show intriguingly divergent patterns. On the one hand, in the domain of economics, one encounters freedom and spontaneity, which marginally diminish over time. On the other hand, in the realm of politics, one observes barriers to entry and control, which are also slightly relaxed over time. While the two systems appear to be moving in the same direction, given the expectation that the political sphere would eventually acquire some of the “participationist” and “representationist” attributes of its economic counterpart, no convergence is on the horizon.¹⁰⁹

The exclusion of the grassroots community was a salient characteristic of the political process in early-colonial-era Hong Kong.¹¹⁰ The fledgling local civil society was in the initial phases

¹⁰⁸ See MUSHKAT, *supra* note 55, at 7–10; LI, *supra* note 55, at 9, 17–24.

¹⁰⁹ See SONNY SHIU-HING LO, *THE POLITICS OF DEMOCRATIZATION IN HONG KONG* (1997); ALVIN Y. SO, *HONG KONG’S EMBATTLED DEMOCRACY: A SOCIETAL ANALYSIS* (1999); NICHOLAS THOMAS, *DEMOCRACY DENIED: IDENTITY, CIVIL SOCIETY, AND ILLIBERAL DEMOCRACY IN HONG KONG* (1999); SONNY SHIU-HING LO, *GOVERNING HONG KONG: LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY* (2001) [hereinafter LO, *LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY*]; MING SING, *HONG KONG’S TORTUOUS DEMOCRATIZATION: A COMPARATIVE ANALYSIS* (2004); Sonny Shiu-Hing Lo, *The Mainlandization and Recolonization of Hong Kong: The Triumph of Convergence over Divergence with Mainland China in THE HONG KONG SPECIAL ADMINISTRATIVE REGION IN ITS FIRST DECADE 179–231* (2007) [hereinafter Lo, *The Triumph of Convergence over Divergence with Mainland China*]; Sonny Shiu-Hing Lo, *The Political Culture of Hong Kong and Mainland China: Democratization, Patrimonialism, and Pluralism in the 2007 Chief Executive Election*, 29 *ASIA PAC. J. PUB. ADMIN.* 101, 101–28 (June 2007) [hereinafter Lo, *Democratization, Patrimonialism, and Pluralism*]; Benny Y.T. Tai, *Basic Law, Basic Politics: The Constitutional Game of Hong Kong* 37 *H.K. L.J.* 503, 503–78 (2007); SONNY SHIU-HING LO, *THE DYNAMICS OF BEIJING-HONG KONG RELATIONS: A MODEL FOR TAIWAN?* (Hong Kong University Press, 2008) [hereinafter LO, *A MODEL FOR TAIWAN?*]; SUZANNE PEPPER, *KEEPING DEMOCRACY AT BAY: HONG KONG AND THE CHALLENGE OF CHINESE POLITICAL REFORM* (2008); SONNY SHIU-HING LO, *COMPETING CHINESE POLITICAL VISIONS: HONG KONG VS. BEIJING ON DEMOCRACY* (2010) [hereinafter LO, *HONG KONG VS. BEIJING ON DEMOCRACY*]. See generally Mushkat, *An Analytical Overview*, *supra* note 24 (discussing Hong Kong’s economic institutions as being structured along distinctly libertarian lines, whereas, the political realm involves a multitude of barriers).

¹¹⁰ See Miron Mushkat & Roda Mushkat, *The Political Economy of Loose*

of development firmly split along racial lines, with top British civil servants and prominent British merchants occupying the upper layers of the socio-bureaucratic pyramid, and Chinese merchants and workers the lower ones.¹¹¹ Robust economic expansion and tactically astute deployment of newly gained wealth to effectively promote group-specific interests enabled the fragmented Chinese merchant network to attain sufficient cohesion and strength to convert itself into a credible institutional entity that had to be reckoned with.¹¹²

The racial distinction persisted, but its practical relevance gradually dwindled as common class interests came to loom larger in the decision calculus.¹¹³ The semi-organized Chinese merchant network was thus absorbed into the policy establishment, which continued to be spearheaded by the colonial civil service elite.¹¹⁴ Co-optation did not amount to full-fledged integration, but it allowed the group and its key members to play a meaningful, albeit not vital, role in strategy formulation in a number of areas essential to Hong Kong's prosperity and stability.¹¹⁵ Chinese workers, on the other hand, continued to be politically marginalized.¹¹⁶

This configuration did not undergo a fundamental adjustment even following the outbreak of the Korean War, which resulted in the imposition of a UN embargo on China, and the influx of refugees from the mainland in the wake of the intensification of communization, notably the calamitous Great Leap Forward and Cultural Revolution.¹¹⁷ Hong Kong's manufacturing base expanded dramatically during this period and so did the pool of workers in that sector, who nevertheless did not transform themselves into an industrial proletariat and refrained from flexing their political muscle.¹¹⁸ Arrivals from China also included

Regulation: Modernity Meets Tradition in Hong Kong, 7 INT'L J. REG. & GOVERNANCE 101, 101-45 (2007).

¹¹¹ *See id.* at 127.

¹¹² *See id.* at 127-28.

¹¹³ *See id.* at 128.

¹¹⁴ *See id.*

¹¹⁵ *See id.*

¹¹⁶ *See* Mushkat & Mushkat, *supra* note 110, at 128.

¹¹⁷ *See id.*

¹¹⁸ *See id.*

successful businesspeople and middle class professionals, although on a more modest scale, but they too chose not to exercise their collective voice.¹¹⁹

The political reticence exhibited by this new, but sizeable, segment of the population has been attributed to a refugee mentality, stemming from an “administratively precarious position in an alien and unfamiliar institutional setting,”¹²⁰ commonly associated with a “do-not-rock-the-boat mentality.”¹²¹ Long exposure to authoritarian practices in the mainland is believed to have reinforced this attitudinal disposition, “which carried the hallmarks of a familistic and parochial orientation, not conducive to the formation of class consciousness and identity.”¹²² Another, more palpable element in the equation, is thought to have been the shrinking of old-style, capital-intensive industries (e.g., docking and shipbuilding, known for breeding class solidarity), and the emergence of new ones, dominated by small and medium-size enterprises (SMEs).¹²³ Such an organizational milieu typically features high labor mobility, which fosters a sense of individualism, rather than *esprit de corps*.¹²⁴

The structural transformation ushered in by the opening up of China in the late 1970s had an inevitable impact on Hong Kong’s polarized, essentially two-tier social pyramid, largely consisting of a cohesive ruling elite and an amorphous laboring class.¹²⁵ Another, potentially significant layer materialized, “encompassing administrators, managers, representatives of the learned professions, and other white-collar workers.”¹²⁶ Its members were mostly locally born and bred, not heavily burdened with the harsh refugee experience and fragile mentality of the waves of mainland arrivals.¹²⁷ Yet, they too were slow to undergo a political awakening.¹²⁸

¹¹⁹ *See id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See* Mushkat & Mushkat, *supra* note 110, at 128.

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.* at 128–29.

¹²⁶ *Id.* at 129.

¹²⁷ *See id.*

¹²⁸ *See* Mushkat & Mushkat, *supra* note 110, at 129.

The hesitant quest by the rising middle class to realize its decision rights has been ascribed to Hong Kong's "minimally integrated socio-political system, resting on two unconnected pillars—an autonomous bureaucratic polity and an atomistic Chinese society."¹²⁹ The first of these two elements was historically "composed of the civil service or its top expatriate echelon, and its socio-economically privileged local partners, owing to the former their political status."¹³⁰ This narrow coalition functioned as "an exclusive, inward-looking, and tightly controlled institution not prone to welcoming new [groups] and their ideas."¹³¹ At the other side of the social divide, "[t]he Chinese community . . . reflecting its mainland origins (a legacy of malevolent government) and local tradition of self-reliance also displayed virtually no interest in matters other than those concerning the family (exhibiting utilitarianistic familism/utilitarian familism)"¹³².

Hong Kong's minimally integrated socio-political system has evolved considerably in the past three decades.¹³³ Partly due to top-down British pressures during the pre-1997 negotiations with China regarding the future of the territory,¹³⁴ and, to some extent, on account of persistent, bottom-up demands emanating from the grassroots community, notably the increasingly assertive middle class,¹³⁵ the channels of political participation have been readjusted to provide for more meaningful input from outside the entrenched, bureaucratic-business establishment (although, at the same time, an opposite trend has been observed toward the re-bureaucratization of politics), and unorganized political activity has gained significant momentum.¹³⁶ Formal political institutions, including independent parties, have taken root, and a vibrant civil

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *See id.*

¹³⁴ *See* Roda Mushkat, *The Dynamics of International Legal Regime Formation: The Sino-British Joint Declaration on the Question of Hong Kong Revisited*, 22 *EUR. J. INT'L L.* 1119, 1128–32 (2011).

¹³⁵ *See generally* SING, *supra* note 109, at 107–10, 116–17, 137–39 (using a graphical depiction to display the interaction of bottom-up demands with top-down British pressures).

¹³⁶ *See* Mushkat & Mushkat, *supra* note 110, at 129.

society has substantially expanded its sphere of influence.¹³⁷

Nevertheless, Hong Kong has barely advanced to a level equated by the Economist Intelligence Unit (EIU) with a “flawed democracy,” having until recently been less favorably categorized as a “hybrid regime.”¹³⁸ As matters stand, the territory’s political system is heavily skewed in favor of the executive branch of government, which is significantly controlled, perhaps even dominated, by its head, the chief executive (CE).¹³⁹ The latter is chosen by a 1200-member Election Committee (EC) rather than a popular vote.¹⁴⁰ The EC is also not a product of the expressed will of the people.¹⁴¹ Rather, it represents four broad-based sectors (industrial, commercial, and financial; the professions; labor, grassroots, religious, and related; and political), over many of which China, or its ruling party, exerts considerable influence.¹⁴²

The CE and the supporting administrative machinery are the source of virtually all government strategic initiatives.¹⁴³ Generally, no approval by the Legislative Council (LegCo) is required, unless policies entail changes to existing laws or new financial measures.¹⁴⁴ The CE is independent of LegCo, as the method of election and reality that the latter has no power to pass a vote of no confidence that would lead to the office-holder’s dismissal,¹⁴⁵ illustrates. The option of impeachment is theoretically available, but it poses serious practical difficulties.¹⁴⁶ The CE initiates legislation, and government bills enjoy priority over those from other sources.¹⁴⁷ All bills adopted by LegCo must

¹³⁷ See *id.*

¹³⁸ See Ernest Kao, *Hong Kong Upgrades to ‘Flawed Democracy’ Status on Economist Index*, SOUTH CHINA MORNING POST, Mar. 21, 2013, available at <http://www.scmp.com/news/hong-kong/article/1195234/hong-kong-upgrades-flawed-democracy-status-economist-index>.

¹³⁹ See MA, *supra* note 106, at 58–59.

¹⁴⁰ See *id.* at 58; *Facts and Figures*, 2011 ELECTION COMMITTEE SUBSECTOR ELECTIONS (Oct. 31, 2011), www.elections.gov.hk/ecss2011/eng//figures.html.

¹⁴¹ See MA, *supra* note 106, at 76–77.

¹⁴² See *id.*

¹⁴³ See *id.* at 58.

¹⁴⁴ See *id.*

¹⁴⁵ See YASH GHAI, *HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 285* (1999).

¹⁴⁶ See *id.* at 285.

¹⁴⁷ See MA, *supra* note 106, at 58.

have the CE's signature to become effective laws.¹⁴⁸ The CE has extensive appointment powers, which extend to the judiciary.¹⁴⁹ For the most part, these are not subject to legislative or judicial scrutiny.¹⁵⁰

It should be added that the CE might return to LegCo, for further consideration, a bill he/she deems incompatible with the overall interests of Hong Kong.¹⁵¹ Moreover, the CE may dissolve LegCo if he/she does not wish to pass the new version of the bill, or if LegCo rejects the annual budget or any bill considered essential by the administration.¹⁵² LegCo itself cannot be said to constitute a mirror of society because a large number of its members are indirectly, rather than directly, elected.¹⁵³ To complicate matters further, it is a highly fragmented institution.¹⁵⁴ Beijing's, or the Chinese Communist Party's (CCP), large shadow hangs over the entire executive and legislative policy-making apparatus.¹⁵⁵

The responsibility for Hong Kong's retarded democratic development has been placed on Beijing's intrusive shoulders.¹⁵⁶ Social scientists have argued that the "CCP's obstructive policy square[s] well with its interests."¹⁵⁷ China is believed to have adopted a "third-way" type of a reform strategy that involves economic but not political liberalization.¹⁵⁸ Its leaders thus earnestly pursue modernization while persistently endeavoring to maintain their tight grip on power.¹⁵⁹ A freewheeling Hong Kong economy dovetails with Chinese leaders' overarching goals, but a

¹⁴⁸ *See id.* at 58.

¹⁴⁹ *See id.*

¹⁵⁰ *See id.* at 58-59.

¹⁵¹ *See id.* at 59.

¹⁵² *See id.*

¹⁵³ *See MA, supra* note 106, at 100-02.

¹⁵⁴ *See id.* at 104-07, 119-22.

¹⁵⁵ *See id.* at 34-36; LO, LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY, *supra* note 109; LO, *Triumph of Convergence over Divergence with Mainland China, supra* note 109; LO, *Democratization, Patrimonialism, and Pluralism, supra* note 109; LO, A MODEL FOR TAIWAN?, *Supra* note 109; LO, HONG KONG VS. BEIJING ON DEMOCRACY, *supra* note 109.

¹⁵⁶ *See SING, supra* note 109, at 204-07.

¹⁵⁷ *Id.* at 204.

¹⁵⁸ *See id.*

¹⁵⁹ *See id.*

genuinely democratic one presents the risk of dangerous cross-border political contamination and rapid erosion of top-down controls.¹⁶⁰

Indeed, some social scientists have contended that the CCP has methodically been engaged in a policy of “mainlandization” in Hong Kong, gradually aiming to engineer a convergence, or at least a higher degree of convergence, between the politico-legal institutional infrastructure in the mainland and that in the increasingly politically assertive capitalist enclave.¹⁶¹ In the process, it has managed to co-opt sizeable segments of the Hong Kong socio-economic establishment, intensifying the conflict between proponents of “top-down” and “bottom-up” models of governance in the territory.¹⁶²

The strategy of mainlandization is thought to have been not without success.¹⁶³ The evidence offered includes manifestations of political decay in various forms.¹⁶⁴ Specifically, it has been noted that the post-1997,

HKSAR is characterized by a more personal style of governance; a chaotic implementation of public policies; an increasingly politicized judiciary whose decisions have been . . . challenged by Beijing and its supporters in Hong Kong; endangered civil liberties including academic freedom; an

¹⁶⁰ See *id.*

¹⁶¹ See Lo, *The Triumph of Convergence over Divergence with Mainland China*, *supra* note 109; Lo, *Democratization, Patrimonialism, and Pluralism*, *supra* note 109; LO, A MODEL FOR TAIWAN?, *supra* note 109; LO, HONG KONG VS. BEIJING ON DEMOCRACY, *supra* note 109. See generally LO, LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY, *supra* note 109 (detailing the political and economic changes in Hong Kong over several years).

¹⁶² See LO, A MODEL FOR TAIWAN?, *supra* note 109, at 29–34; LO, HONG KONG VS. BEIJING ON DEMOCRACY, *supra* note 109, at 202–27.

¹⁶³ See LO, HONG KONG VS. BEIJING ON DEMOCRACY, *supra* note 109, at 202–27 (describing Hong Kong democrats as “bold idealists” who will not succumb easily); LO, LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY, *supra* note 109 (explaining that pro-democracy activists face constant frustration and articulating prospects of political development and decay); Lo, *The Triumph of Convergence over Divergence with Mainland China*, *supra* note 109; Lo, *Democratization, Patrimonialism, and Pluralism*, *supra* note 109 (asserting that the process is slow because the “Beijing and the HKSAR government maintain that democratization has to proceed in a gradual and orderly manner”). See generally LO, A MODEL FOR TAIWAN?, *supra* note 109 (arguing that governance of the HKSAR was “superficially ‘successful’ but substantially turbulent”).

¹⁶⁴ See LO, LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY, *supra* note 109, at 11–28.

amalgamation of political labelling and mobilization; a failure of political institutions to absorb public pressure and demands; and a governmental insensitivity to public opinion.¹⁶⁵

The notion of mainlandization does not take into account trends across the border that may mitigate its impact. After all, the political scene in China is not entirely static because, according to other social scientists, the country is undergoing “Hong Kongization” or “Westernization.”¹⁶⁶ The two perspectives are not easy to reconcile. However, it may realistically be suggested that mainlandization poses a short-term or medium-term challenge, while Hong Kongization or Westernization is characterized by complex evolutionary dynamics whose cumulative and uneven effects may not be fully and productively observed for years to come.¹⁶⁷

A number of features of the partially mainlandized Hong Kong political system have been singled out as fundamentally problematic.¹⁶⁸ These include soft authoritarianism;¹⁶⁹ self-censorship, political correctness, and threats to press freedom;¹⁷⁰ strong promotion of nationalist sentiment;¹⁷¹ disarticulation, or segmentation of the policy machinery;¹⁷² and low government legitimacy.¹⁷³ There may also have been a corrosion of the rule of

¹⁶⁵ *Id.* at 13.

¹⁶⁶ See generally RANDALL P. PEERENBOOM, CHINA'S LONG MARCH TOWARD RULE OF LAW (2002) (emphasizing the boom of law in China); RANDALL P. PEERENBOOM, CHINA MODERNIZES: THREAT TO THE WEST OR MODEL FOR THE REST (2007) (deeming one China as “the envy of developing countries” based on the millions of people rising out of poverty, development of a legal system, and increasing international influence); Peter T.Y. Cheung, *Who Is Influencing Whom? Exploring the Influence of Hong Kong on Politics and Governance in China* 51 ASIAN SURV. 713, 713–38 (2011) (exploring “how Hong Kong has influenced Chinese politics and governance in the constitutional, political, ideational, and intergovernmental dimensions”).

¹⁶⁷ See Miron Mushkat & Roda Mushkat, *Economic Growth, Democracy, the Rule of Law, & China's Future* 29 FORDHAM INT'L L.J. 229, 243–47 (2005).

¹⁶⁸ See Lam Wai-Man, *Political Context*, in CONTEMPORARY HONG KONG POLITICS: GOVERNANCE IN THE POST-1997 ERA 1–17 (2007); IAN SCOTT, THE PUBLIC SECTOR IN HONG KONG 295–97 (2010).

¹⁶⁹ See Lam, *supra* note 168, at 11.

¹⁷⁰ See *id.*

¹⁷¹ See *id.* at 11–12.

¹⁷² See SCOTT, *supra* note 168, at 295–96.

¹⁷³ See *id.* at 296–97.

law, although only very modest in nature.¹⁷⁴ These symptoms of institutional dislocation have adversely affected the overall effectiveness of the governance regime, detracting from “State capacity” in key areas and undermining State-society relations.¹⁷⁵

There are countervailing forces at work. Technically speaking, civil service (as distinct from State service) capacity remains substantial.¹⁷⁶ By the same token, Hong Kong does not lack reliable, stability-enhancing institutional mechanisms. Most crucial is its robust rule of law system, including a largely autonomous judiciary;¹⁷⁷ combative and not yet materially impeded media;¹⁷⁸ lively and resilient civil society;¹⁷⁹ and Independent Commission Against Corruption (ICAC).¹⁸⁰ Also of considerable importance are the Code on Access to Information;¹⁸¹ Privacy Commissioner;¹⁸² Equal Opportunities Commission (EOC);¹⁸³ LegCo redress channel;¹⁸⁴ Ombudsman;¹⁸⁵ Complaints Against the Police Office (CAPO);¹⁸⁶ departmental complaint-handling units;¹⁸⁷ administrative tribunals and Administrative Appeals Board;¹⁸⁸ and Audit Commission.¹⁸⁹ The existence of such institutional checks and balances, notwithstanding the partially mainlandized Hong Kong political system, due to its notable frailties, may reasonably be portrayed as “challenged,” which has inevitable implications for the design and assessment of policy control instruments.

¹⁷⁴ See MA, *supra* note 106, at 79-82.

¹⁷⁵ See *id.* at 199-219.

¹⁷⁶ See JOHN P. BURNS, GOVERNMENT CAPACITY & THE HONG KONG CIVIL SERVICE 348-51 (2004).

¹⁷⁷ See Lam, *supra* note 168, at 10-11; MA, *supra* note 106, at 83-85.

¹⁷⁸ See Lam, *supra* note 168, at 11; MA, *supra* note 106, at 164-79.

¹⁷⁹ See Lam, *supra* note 168, at 12-13; MA, *supra* note 106, at 199-219.

¹⁸⁰ See SCOTT, *supra* note 168, at 267-70.

¹⁸¹ See *id.* at 260-61.

¹⁸² See *id.* at 261.

¹⁸³ See *id.* at 261-64; MA, *supra* note 106, at 87-89.

¹⁸⁴ See SCOTT, *supra* note 168, at 264-67.

¹⁸⁵ See *id.* at 271-78; MA, *supra* note 107, at 86-87.

¹⁸⁶ See SCOTT, *supra* note 168, at 278-84.

¹⁸⁷ See *id.* at 284-85.

¹⁸⁸ See *id.* at 285-88.

¹⁸⁹ See MA, *supra* note 106, at 90.

IV. Key Characteristics of the Micro-Level Regulatory Environment

As indicated, Hong Kong's highly productive and very telling economic experience has not been accorded the close attention it merits. This has been attributed to the territory's modest physical size and the atypical nature of its regime which, although extraordinarily successful, has fundamentally diverged from the perhaps more intellectually intriguing developmental state model commonly embraced elsewhere in Asia.¹⁹⁰ However, there is in fact a modest but selectively informative literature on the Hong Kong economy. Most of it is macro oriented, highlighting the overall structure, with special emphasis on the non-discretionary monetary policy and the consistently rule-based—and thus, for all intents and purposes, also non-discretionary—fiscal counterpart.¹⁹¹ Given the exceptional openness of the system, foreign trade, and the related subject of regional integration, is also generally treated in considerable detail and in a systematic fashion.¹⁹²

The micro side, which is inherently more fragmented and opaque, has been less extensively explored. No regime-wide description and evaluation is available. A number of narrowly focused studies have been undertaken, without being meaningfully synthesized.¹⁹³ A degree of caution thus needs to be exercised in drawing broad inferences on that basis. With this caveat in mind, the insights produced may be tentatively weaved together to yield a picture that captures salient features of the system to a sufficient extent to render it relevant and usable across the entire regulatory spectrum.

It should be noted at the outset that the Hong Kong government has long been engaged, in one form or another, in the control of private sector activities—albeit, more often than not, on a limited scale and indirectly rather than directly—and that its

¹⁹⁰ See LI, *supra* note 55, at 135-252; see also ALVIN RABUSHKA, VALUE FOR MONEY: THE HONG KONG BUDGETARY PROCESS (1976); GAVIN PEEBLES, HONG KONG'S ECONOMY: AN INTRODUCTORY MACROECONOMIC ANALYSIS 139-73 (1988).

¹⁹¹ See LI, *supra* note 55, at 135-252; see also ALVIN RABUSHKA, VALUE FOR MONEY: THE HONG KONG BUDGETARY PROCESS (1976); GAVIN PEEBLES, HONG KONG'S ECONOMY: AN INTRODUCTORY MACROECONOMIC ANALYSIS 139-73 (1988).

¹⁹² See LI, *supra* note 55, at 299-428; see also PEEBLES, *supra* note 191, at 174-214; YOUNGSON, *supra* note 106, at 92-114.

¹⁹³ See, e.g., Mole (ed.), *supra* note 45; Lethbridge and Ng eds., *supra* note 45.

involvement, even when marked by restraint, has at times provoked controversy. A telling case in point is the issue of whether the territory suffered from “excessive” competition in the banking industry, and whether the measures gradually introduced at the behest of incumbents to curtail oversupply were appropriate.¹⁹⁴ Despite two serious financial crises experienced during that period, a subsequent, elaborate empirical examination of the data revealed that both the diagnosis and remedies were flawed.¹⁹⁵ This suggests that an inadequately insulated and technically ill-equipped light-touch regulatory regime is by no means immune to exogenous pressures, misleading signals, and temptation to succumb to pro-status quo impulses.

This example is relevant because it refers to a policy domain where Hong Kong, a leading financial center, has not stood still, but has in fact been willing to establish rather elaborate micro-level mechanisms to control private sector behavior.¹⁹⁶ The evolution of the territory’s financial regulatory regime, with the Hong Kong Monetary Authority (HKMA) and Securities and Futures Commission (SFC) as its two institutional pillars, has been a piecemeal and reactive process, rather than one characterized by decisiveness and foresight.¹⁹⁷ The current configuration is largely a product of crises and responses thereto, as well as British and international (via standard setting) influences.¹⁹⁸ Nevertheless, whatever the origins, the corollary is that there are strategic sectors where the regulatory edifice qualifies as substantial, and despite the breadth and depth of system, questions arise regarding its effectiveness, or less controversially, the optimal way forward.¹⁹⁹

¹⁹⁴ See e.g., Catherine R. Schenk, *The Origins of Anti-Competitive Regulation: Was Hong Kong “Over-Banked” in the 1960s* (H.K. Institute for Monetary Research, Working Paper No. 9, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1008230 (last visited Aug. 20, 2014) (concluding that anti-competitive regulation was not enacted because of excessive competition, but in an effort to increase supervision of banks that had threatened liquidity and solvency).

¹⁹⁵ See *id.*

¹⁹⁶ See BERRY F.C. HSU ET AL., *FINANCIAL MARKETS IN HONG KONG: LAW AND PRACTICE* (2006); Douglas W. Arner, Berry F.C. Hsu, & Antonio M. Da Rosa, *Financial Regulation in Hong Kong: Time for a Change*, 5 *ASIAN J. COMP. L.* 1-47 (2010) (describing a three tier system to financial regulation).

¹⁹⁷ See HSU, *supra* note 196; Arner et al., *supra* note 196.

¹⁹⁸ See HSU, *supra* note 196; Arner et al., *supra* note 196.

¹⁹⁹ See HSU, *supra* note 196; Arner et al., *supra* note 196.

This is not an isolated example. In fact, the issue of business competition and its regulation has long loomed on Hong Kong's policy agenda, both in the conceptual and practical sense of the term, albeit the former element may have overshadowed the latter.²⁰⁰ The territory's transformation, from an international manufacturing center to a service-oriented one, has heightened the focus and has reinforced the perception that appropriate government intervention could strengthen, rather than undermine, the sturdy but not unbreakable foundations of a quintessentially market-based economy.²⁰¹ Prior to that pivotal structural change, Hong Kong's manufacturing firms, mostly SMEs, operated in fiercely competitive segments of the global economy and were highly motivated to maximize efficiency.²⁰² This, in turn, exerted downward pressure on costs and prices and encouraged the pursuit of innovation and quality, a mix conducive to the realization of consumer welfare.²⁰³

That has not been the case, invariably and sufficiently, in the service industries, some of which preceded the northward migration of their manufacturing counterparts, but a move toward efficiency in service industries has subsequently gained momentum. In such industries, barriers to competition are common, even in a liberal and open economic environment as seen in Hong Kong.²⁰⁴ Typically, these barriers assume the form of institutional, technological, and strategic hurdles that enhance firms' market power.²⁰⁵ This pattern is normally attributable to regulatory initiative (institutional dimension; e.g., licensing requirements and granting of limited franchises), nature of the production process (technological dimension; e.g., learning-by-doing and economies of scale and scope), and corporate tactics to dampen competition (strategic dimension; e.g., control of key inputs and preemptive capacity expansion).²⁰⁶

Not all the service industries that have flourished in Hong

²⁰⁰ See generally LEONARD K. CHENG & CHANQI WU, COMPETITION POLICY AND THE REGULATION OF BUSINESS (1998) (examining the shift in the Hong Kong economy).

²⁰¹ See *id.* at 1-2.

²⁰² See *id.* at 1.

²⁰³ See *id.*

²⁰⁴ See *id.*

²⁰⁵ See Cheng & Wu, *supra* note 200, at 1-2.

²⁰⁶ See *id.* at 5-7.

Kong's deindustrialized economy have necessarily been characterized by a significant concentration of market power and a subsequent attempt to curtail this via regulation.²⁰⁷ Some have been deemed to be essentially competitive and have thus been set apart from those lacking such features.²⁰⁸ However, both categories have been examined in considerable detail by economists concerned with the efficiency of the institutional infrastructure of the Hong Kong global metropolis.²⁰⁹ In the first case, the emphasis has been on the degree of competition, as distinct from its absence or presence; impediments to progress; and possible government measures to address manifestations of market failure.²¹⁰ In the second case, the focus has been on the effectiveness of regulatory responses; potential for a superior policy design; and the scope for instilling, whether through public or private channels, greater competitive spirit into the sprawling

²⁰⁷ See *id.* at 3.

²⁰⁸ See *id.*

²⁰⁹ See *id.*; MILTON MUELLER, INTERNATIONAL TELECOMMUNICATIONS IN HONG KONG: THE CASE FOR LIBERALIZATION (1991); see e.g., LEONARD K. CHENG & RICHARD Y.C. WONG, PORT FACILITIES & CONTAINER HANDLING SERVICES (1997) (stating that Hong Kong port facilities and handling services have been successful over the last decade, but likely will face challenges due to the changing economic climate); PUN-LEE LAM, COMPETITION IN ENERGY (1997) (examining increased competition in the energy and hesitance to reform); PUN-LEE LAM & SYLVIA CHAN, COMPETITION IN HONG KONG'S GAS INDUSTRY (2000) (suggesting ten ways to enhance competition in the gas industry in Hong Kong); Changqi Wu & Leonard K. Cheng, *Hong Kong's Business Regulation in Transition*, in DEREGULATION & INTERDEPENDENCE IN THE ASIA-PACIFIC REGION 157-85 (2000) (explaining regulation of monopolies in the past and the current landscape regarding "electricity telecommunications services, public transport, and airport services"); Patrick Xavier & Xu Yan, *Telecommunications Regulations in Hong Kong* 4 INFO 12-25 (2002) (concluding that Hong Kong's regulatory legislation is a good start to reform in a pro-competitive way); Thomas Cheng, *A Tale of Two Competition Regimes—The Telecom Sector Competition Regulation in Hong Kong & Singapore* 30 WORLD COMPETITION 501, 501-26 (2007) (comparing the economies of Hong Kong and Singapore based on their status as "two of the most successful and competitive economies in East Asia"); Richard W.S. Wu & Grace L.K. Leung, *Competition Regulation in the Hong Kong Telecommunications Sector—Challenges & Reforms* 32 TELECOMMS. POL'Y 652, 652-61 (2008) (arguing adoption of legislation is insufficient to meet the challenges of "cross-sector" bundling activities that are needed to influence a growing China); Chun-Yu Ho, *Deregulation, Competition, & Consumer Welfare: Evidence from Hong Kong* 37 J. OF REG. ECON. 70, 70-97 (2010) (determining that competition and customer welfare in the banking industry are better when there is little regulation).

²¹⁰ See CHENG & WU, *supra* note 200, at 3.

service sector.²¹¹

The academic research conducted in this area has been undertaken within a rigorous micro-economic framework—derived from a number of analytical perspectives, traditional, Schumpeterian, and the theory of constable markets.²¹² A substantial amount of empirical data has also been generated regarding industry structure, performance, and regulation in a wide range of sectors such as banking, insurance, legal services, residential properties, supermarkets, electricity and gas supply, telecommunications services, public transport, and transport infrastructure services.²¹³ In addition, the schemes of control relied upon by the government have been subjected to close scrutiny, conceptually and factually.²¹⁴

There is, consequently, adequate evidence to suggest that departures from the perfect competition model are not a rare occurrence in post-industrial Hong Kong and are not confined to sectors dominated by natural monopolies. Although scholarly consensus has not fully crystallized regarding these matters, attention has systematically been drawn to the prevalence of horizontal and vertical agreements between firms, abuse of dominant corporate position, complex monopolies, and mergers and acquisitions—practices that may prevent, restrict, or distort competitive behavior in the marketplace.²¹⁵ By the same token, it has been analytically and empirically demonstrated that public controls have not been implemented in a holistic fashion, resulting in potential gaps and inconsistencies in the regulatory façade.²¹⁶

While economists seldom venture deep into political territory, two issues raised in this context should be highlighted. First, it has been argued that caution should be exercised in unequivocally

²¹¹ See *id.*

²¹² See *id.* at 9-13.

²¹³ See *id.* at 23-212; PUN-LEE LAM, *THE SCHEME OF CONTROL ON ELECTRICITY COMPANIES* (1996). See also MUELLER, *supra* note 209; CHENG & WONG, *supra* note 209; LAM, *supra* note 209; LAM & CHAN, *supra* note 209; Wu & Cheng, *supra* note 209; Cheng, *supra* note 209; Xavier, *supra* note 209; Wu & Leung, *supra* note 209; Ho, *supra* note 209.

²¹⁴ See CHENG & WU, *supra* note 200, at 213-22; Wu & Cheng, *supra* note 209, at 160-72.

²¹⁵ See CHENG & WU, *supra* note 200, at 228-32.

²¹⁶ See *id.* at 213-253; Wu and Cheng, *supra* note 209, at 160-72. See also LAM, *supra* note 213.

acknowledging the need for government response to market failure and unreservedly advocating active intervention as an appealing option.²¹⁷ The reason lies in the fact that “officials in charge of economic policy making [may lack] perfect knowledge and foresight, and [may not] be completely disinterested.”²¹⁸ After all, “[a]s the experience of business regulation in Hong Kong and other economies has revealed, government regulators face serious principal-agent problems with serious information asymmetry.”²¹⁹ The corollary is that “[i]t is very probable that regulators are ‘captured’ by the regulated.”²²⁰

Second, the delicate Hong Kong-China relationship has inevitably entered into an otherwise predominantly technical discourse.²²¹ Specifically, the question has surfaced whether mainland State-owned-enterprises (SOEs) might be inclined to take advantage of their official or semi-official status in order to unfairly enhance their competitive position in post-1997 Hong Kong.²²² The problem has partly been framed in legal terms, reflecting a set of circumstances whereby “the exercise of such influences for the benefit of companies, rather for the individuals themselves, does not constitute a violation of Hong Kong’s anti-corruption laws.”²²³ This is a challenge for which there are no readily available legislative precedents from other jurisdictions, but one where it might be imprudent to relegate to the policy periphery since “Hong Kong is unique in the world because it is part of China’s ‘one country-two systems’ arrangement.”²²⁴

These two noteworthy issues have not been thoroughly explored due to the tendency of economists, lawyers, and political scientists in the territory to follow their own disciplinary path without seeking meaningful convergence. However, there are a number of detailed case studies that lend support to the notion of regulatory cartelization and capture, exemplified by both policies designed to satisfy special business or professional interests

217 See CHENG & WU, *supra* note 200, at 227.

218 *Id.*

219 *Id.*

220 *Id.*

221 See *id.* at 232-33.

222 See *id.*

223 CHENG & WU, *supra* note 200, at 232.

224 *Id.* at 233.

(cartelization) and rule application that is indicative of bias toward such interests (capture).²²⁵ The complex and controversial subject of mainlandization has primarily been examined in relation to political development, but the economic side of the phenomenon has also been selectively highlighted.²²⁶

With respect to the latter—in addition to broad-based, empirically grounded academic insights—concrete examples are periodically furnished in support of the (partial) economic mainlandization thesis. One that has attracted considerable attention involved China Light and Power (CLP), one of Hong Kong's two principal electricity utilities.²²⁷ Rather than building a shipping terminal for liquefied natural gas in the territory, the company was pressured by the government to enter into a long-term contractual arrangement with PetroChina, the mainland's largest energy producer and distributor.²²⁸ The ultimate loser has been the Hong Kong consumer, because the deal was struck at inflated prices, relatively speaking.²²⁹

Another pertinent example is that of China Mobile, the mainland's (and the world's) largest provider of telecommunications services.²³⁰ In this case, the Hong Kong government bent its own rules in order to accommodate a powerful corporate entity, which is an integral part of the Chinese politico-economic establishment.²³¹ The company conveniently preferred to rely on its own spectrum, rather than rent it from an existing

²²⁵ See Mushkat & Mushkat, *supra* note 110; Miron Mushkat & Roda Mushkat, *The Political Economy of Hong Kong's 'Open Skies' Legal Regime: An Empirical and Theoretical Exploration*, 10 SAN DIEGO INT'L L.J. 381, 381-438.

²²⁶ See LO, GOVERNING HONG KONG: LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY, *supra* note 109, at 2, 11-14, 67-78; Alva Butcher, Paul Y. Huo, & John K.C. Wei, *Money and Politics: A Study of Red-Chip Stocks in Hong Kong*, available at repository.ust.hk/dspace/handle/1783.1/2167 (last visited Aug. 20, 2014).

²²⁷ See *Two Systems, One Energy Price: Hong Kong Sells Consumers to Benefit a Chinese Company*, WALL ST. J., available at <http://online.wsj.com/news/articles/SB10001424127887324624404578255580435887020> (last visited Aug. 20, 2014).

²²⁸ See *id.*

²²⁹ See *id.*

²³⁰ See *Hong Kong's Dropped Call: The City's Government is Doing Favors for Mainland Firms*, WALL ST. J., available at http://online.wsj.com/article/SB10001424127887324600704578402030650436280.html?mod=WSJASIA_hpp_sections_opinion (last visited Aug. 20, 2014).

²³¹ See *id.*

license holder.²³² The Hong Kong authorities thus obligingly proceeded, contrary to the established practice, to reclaim a substantial portion of the spectrum controlled by the existing license holders and put it up for auction again.²³³ The maneuver did not result in an increased supply of spectrum, but rather redistribution, once more to the detriment of the local consumer, by potentially leading to rising costs and deteriorating quality of service.²³⁴

Cartelization and capture, even if not pervasive, may combine with imperfect knowledge and foresight to produce a rather erratic regulatory regime, bearing the hallmarks of the “garbage can” model of organizational decision making.²³⁵ There is some evidence that this pattern may be observed in the broadcasting industry, where Hong Kong authorities may have adopted fuzzy rules for controlling uncompetitive practices and may have applied them haphazardly.²³⁶ It is reasonable to assume that economic mainlandization may exacerbate bureaucratic strains by subjecting the government to additional pressures and thus increase the propensity to act in a sub-optimal fashion.

Two explanatory perspectives may be offered to complement—rather than supplant—the cartelization and capture theoretical propositions. First, it may be argued that Hong Kong’s policy architects and managers may have a general pro-business bias, reflecting a *laissez-faire* ethos and tradition, and they do not consistently and flagrantly discriminate against or favor one segment of industry or another. This is a view that has considerable support among economists, even those of a critical disposition.²³⁷ For instance, “[i]t has been broadly accepted by government that what is good for business is good for Hong

²³² See *id.*

²³³ See *id.*

²³⁴ See *id.*

²³⁵ See MICHAEL HOWLETT, M. RAMESH, & ANTHONY PERL, *STUDYING PUBLIC POLICY: POLICY CYCLES AND POLICY SUBSYSTEMS*, 151-53 (3d ed., Oxford: Oxford University Press, 2009); PAUL CAIRNEY, *UNDERSTANDING PUBLIC POLICY: THEORIES AND ISSUES*, 232-33 (Basingstoke: Palgrave Macmillan, 2012).

²³⁶ See Thomas Cheng, *Competition Law Enforcement in the Television Sector in Hong Kong: Past Cases and Recent Controversies*, 33 *WORLD COMPETITION* 317-43 (2010).

²³⁷ See MOLE, *supra* note 55, at 4.

Kong.”²³⁸

A second potentially relevant explanatory scheme focuses on the style or standard operating procedure of key players in the policy formulation and implementation process.²³⁹ In some institutional milieus, such actors tend to proceed incrementally and endeavor to forge a consensus with external stakeholders or significant interest groups.²⁴⁰ Elsewhere, they may be inclined to move more decisively and impose rather than consult.²⁴¹ Hong Kong appears to fall into the former category, which may account for a degree of regulatory opaqueness and reticence with respect to departures from perfect competition.²⁴² Of course, this is not inconsistent with the assertion that the business sector, and certain segments thereof, may loom larger on the government's strategic horizon than other pivotal groups (e.g., the consumer).²⁴³

Thus, a number of pertinent observations are in order. First, Hong Kong's comparatively and productively unshackled economy is not entirely devoid of government intervention—at the micro as well as the macro level. Second, policy responses to 'excessive' concentration of market power—notably, but no longer exclusively, in the case of natural monopolies—are not necessarily a new and aberrant phenomenon. Third, prior to the recent introduction of a competition law, the approach to the subject had been characterized as ideational ambivalence, piecemeal engineering, and structural fragmentation. Fourth, the regulation of business competition cannot be conceptualized merely in terms of the degree of market failure, analytical grounds for government intervention, and efficiency consequences of the remedial measures contemplated or embraced.

The intellectual and practical agenda has a salient behavioral element, which falls within the ambit of law and economics (distinct from the economic analysis of law) and political

²³⁸ *See id.*

²³⁹ *See* POLICY STYLES IN WESTERN EUROPE (Jeremy Richardson ed., London: Allen and Unwin, 1982).

²⁴⁰ *See id.* at 10-14.

²⁴¹ *See id.*

²⁴² *See generally* Mushkat & Mushkat, *supra* note 110 (explaining that as a result of historical events, Hong Kong's ability to progress has been stymied by an abundance of caution and incrementalism).

²⁴³ *See* MOLE, *supra* note 55, at 4.

economy. Issues such as the effectiveness of the regulatory process—narrowly equated with imperfect knowledge and foresight, but possessing additional dimensions—cartelization, capture, economic mainlandization, overall government-business relationships, and policy style should arguably not be overlooked in assessing the quantum leap that Hong Kong has apparently taken in dealing with possible challenges to its competitive order.

V. From a Loose Patchwork to an Elaborate Control System

A. Historical Backdrop

The evidence presented suggests that, without disputing Hong Kong's status as a bastion of free enterprise, it is legitimate to selectively qualify this assessment, because the local government has not consistently and wholly refrained from macro and micro level intervention in the essentially untrammelled and widely open colonial-era and post-1997 market economy.²⁴⁴ Moreover, on the micro front, the questions of industry structure, strategy, and performance have long been featured, even if not on a large scale, in public policy discourse.²⁴⁵ Importantly, sector-specific regulation of competition, of the conventional variety, has steadily been practiced not merely in the traditional utilities space, but also in industries such as broadcasting and telecommunications.²⁴⁶

Indeed, the issue of the desirability and potential form of a comprehensive regime to address excessive market power has periodically surfaced.²⁴⁷ A key milestone in the evolution of relevant ideas and institutions was the establishment of the Hong Kong Consumer Council (HKCC) in 1974.²⁴⁸ While it was not granted the authority to carry out investigations and employ sanctions, its responsibilities included the right to collect, obtain, and provide information regarding goods, services, and irremovable property.²⁴⁹ In 1992, nearly two decades after the HKCC's founding, the government requested a detailed

²⁴⁴ See *supra* notes 109-243, and accompanying text.

²⁴⁵ See *supra* notes 109-243, and accompanying text.

²⁴⁶ See *supra* notes 230-236, and accompanying text.

²⁴⁷ See Tsang Shu-Ki, *Competition Regulation in Hong Kong*, SKTSANG, www.sktsang.com/ArchiveII/Tsang180901.pdf (last visited Aug. 20, 2014).

²⁴⁸ See *id.*

²⁴⁹ See *id.*

examination of competitive patterns across the entire industrial spectrum.²⁵⁰

The HKCC's study extended over a four-year period.²⁵¹ From a quantitative perspective, the principal output consisted of seven elaborate sector-specific reports, containing both descriptive and prescriptive elements.²⁵² However, from a qualitative viewpoint, the most notable product was in the shape of a 1996 summary report, emphatically identifying fair competition as a condition for enduring prosperity in Hong Kong's freewheeling economic setting.²⁵³ This summary report suggested a sharp departure from the prevailing status quo, unexpectedly recommending that a comprehensive competition law be adopted and an independent regulatory body be set up to administer it.²⁵⁴

Given its strategic predisposition to err on the side of nonintervention, and its penchant for incremental adjustments to the existing state of affairs, the government's lukewarm response to this ambitious blueprint was more than predictable.²⁵⁵ While acknowledging the need for an active competition policy to promote Hong Kong's economic efficiency and international competitiveness, the government expressed reservations about the broad scope of the framework envisioned by the HKCC and its legal underpinnings.²⁵⁶ The government emphasized the inherent flexibility provided by administrative guides, or sector-specific codes of conduct, sustained by Hong Kong's free trade and open market doctrines, as opposed to the inevitable rigidity of an all-

²⁵⁰ See *id.*

²⁵¹ See *id.*

²⁵² See *id.*

²⁵³ See Tsang, *supra* note 247; see also Hong Kong Consumer Council, *Competition Policy: The Key to Hong Kong's Future Economic Success*, CONSUMER COUNCIL, www.consumer.org.hk/website/ws_en/competition_issues/competition_studies/1996fairtrade.html (last visited Aug. 20, 2014) ("After seven sectoral reports, the Consumer Council produced a summary report: 'Fair Competition: the Key to HK's Prosperity' advocating the establishment of a competition law and competition Authority.").

²⁵⁴ See Hong Kong Consumer Council, *supra* note 253.

²⁵⁵ See Trade and Industry Bureau, Government of the Hong Kong Special Administrative Region, *Government Response to Consumer Council's Report Entitled "Competition Policy: The Key to Hong Kong's Future Economic Success,"* 1-2, COMPETITION POLICY ADVISORY GROUP (Nov. 1997), www.compag.gov.hk/reference/brochure.pdf.

²⁵⁶ See *id.* at 22.

embracing regulatory scheme.²⁵⁷ It further argued that no clear rules or international standards were available to determine what constitutes ‘fair’ or ‘unfair’ trade practices, and proceeded to cast doubt on the assertion that the absence of a comprehensive competition law could undermine Hong Kong’s international standing in economic organizations.²⁵⁸

The government also found no convincing evidence of firms in the territory engaging on a significant scale in horizontal and vertical agreements or abusing their market dominance.²⁵⁹ To all appearances, an elaborate legislative approach would thus serve no useful purpose; indeed, such a blunt instrument might amount to regulatory “overkill.”²⁶⁰ In addition, because decisions regarding sanctions would have to be preceded by complex investigations, a cross-sector competition law and supporting infrastructure might substantially heighten business uncertainty in Hong Kong.²⁶¹ By the same token, there would unavoidably be adverse consequences stemming from the proliferation of costly and protracted court cases.²⁶²

Despite such numerous and strong misgivings, and the negative strategic posture and conservative operating mode underlying them, the government conveyed, whether for fundamental or tactical reasons, its intention to accept some of the HKCC’s less far-reaching recommendations.²⁶³ More importantly, it signaled its willingness to take parallel steps to broaden the range of measures relied upon to enhance Hong Kong’s overall competitive climate.²⁶⁴ The ideas put forward included: offering a roadmap to achieve greater policy consistency and transparency; orienting the entire bureaucratic apparatus toward increasing market power in all its manifestations; requesting the HKCC to continue monitoring and reviewing trade practices, as well as encouraging and helping autonomous trade associations to adopt

²⁵⁷ See *id.* at 15-17.

²⁵⁸ See *id.* at 4.

²⁵⁹ See *id.*

²⁶⁰ See *id.* at 17.

²⁶¹ See Trade and Industry Bureau, Government of the Hong Kong Special Administrative Region, *supra* note 255.

²⁶² See *id.* at 16.

²⁶³ See *id.* at 28-29.

²⁶⁴ See *id.*

relevant codes of conduct; and setting up a Competition Policy Advisory Group (COMPAG) as a broad-based and high-level institutional vehicle for assessing compliance, generating new initiatives, and reviewing progress.²⁶⁵

COMPAG has functioned in accordance with its terms of reference, evaluating in an ongoing fashion the competitive environment in Hong Kong and producing detailed annual reports.²⁶⁶ In 2005, the group reached a point where its members deemed it necessary to undertake a more thorough examination of the prevailing situation, thus forming a Competition Policy Review Committee (CPRC) to conduct the study and provide advice regarding appropriate actions.²⁶⁷ Contrary to the picture painted by the government in its 1997 response to the HKCC's recommendations,²⁶⁸ the CPRC found evidence that anti-competitive practices began to spread beyond their narrow traditional confines and reaffirmed, albeit not unanimously, the HKCC's view that the time was ripe for the introduction of a comprehensive competition law and a corresponding overhaul of the regulatory institutional facade.²⁶⁹

In November 2006, following the publication of the CPRC report, the government embarked on a three-month public consultation exercise to determine community-wide sentiment with respect to a cross-sector competition law.²⁷⁰ It subsequently published a detailed outline of such a potential legal instrument in November 2008.²⁷¹ The public response to the concept was highly favorable on both occasions.²⁷² In light of the broad support the proposal elicited, the government proceeded to introduce the

²⁶⁵ See *id.* at 14.

²⁶⁶ See *Annual Reports*, COMPETITION POLICY ADVISORY GROUP, www.compag.gov.hk/report/ (last visited Aug. 20, 2014).

²⁶⁷ See *Competition Policy Advisory Group Report 2011-2012*, COMPETITION POLICY ADVISORY GROUP, http://www.compag.gov.hk/report/Compag_Report_2011-12_Eng.pdf (last visited Aug. 20, 2014).

²⁶⁸ See Trade and Industry Bureau, Government of the Hong Kong Special Administrative Region, *supra* note 255.

²⁶⁹ See Competition Policy Review Committee, *Report on the Review of Hong Kong's Competition Policy*, COMMERCE AND ECONOMIC DEVELOPMENT BUREAU (June 2006), www.cedb.gov.hk/citb/doc/en/Policy_Responsibilities/cprc.pdf.

²⁷⁰ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 2.

²⁷¹ See *id.*

²⁷² See *id.*

Competition Bill into LegCo on July 14, 2010.²⁷³ LegCo, in turn, established a committee to study the bill.²⁷⁴ After lengthy scrutiny, the bill was passed by LegCo on June 14, 2012, becoming the Competition Ordinance.²⁷⁵

The academic literature on the dynamics of policy agendas is not entirely helpful in shedding light on the long journey of the selectively and weakly embraced notion that a broad-based approach to the problem of excessive market power is warranted to it gaining wide acceptance and becoming enshrined in law. It is not entirely clear what factors played a decisive role in propelling the issue from the informal (or systemic) to the formal (or institutional) agenda, with the government according it serious attention.²⁷⁶ The HKCC raised awareness of the cross-sector dimension of anti-competitive practices, which made it the “policy entrepreneur”²⁷⁷ that opened a “policy window” through a process of “outside initiation.”²⁷⁸

At the same time, the government’s contribution, deliberate or otherwise, cannot be overlooked. Its motives may have been tactical rather than strategic, but the government chose to keep the window open by creating and institutionalizing COMPAG, allowing for a significant element of “inside initiation”²⁷⁹ in the progressive reconceptualization of the problem. The government bought ample time by establishing COMPAG, during which the status quo was comfortably maintained, but it also co-opted outsiders into the monitoring apparatus and “routinized the policy window,”²⁸⁰ rendering the ultimate outcome almost inevitable. The lesson may well be that institutional routines, at least in a pluralistic or semi-pluralistic setting, may exert considerable influence over the evolution of policy agendas, materially diminishing the power of policy controllers to shape them at will.

²⁷³ *See id.*

²⁷⁴ *See id.*

²⁷⁵ *See id.* at 2.

²⁷⁶ *See* HOWLETT, RAMESH & PERL, *supra* note 235, at 104-05.

²⁷⁷ *See id.* at 104.

²⁷⁸ *See id.*

²⁷⁹ *See id.*

²⁸⁰ *See id.* at 105.

B. The Competition Ordinance

This new instrument, the product of incremental adaptation entailing a fundamental redesign of a strategically and structurally enduring regulatory regime, is an elaborate institutional mechanism whose purpose is to prohibit and deter undertakings throughout the whole economy from engaging in anti-competitive behavior which is aimed at or has the effect of preventing, restricting, or distorting competition in Hong Kong.²⁸¹ An “undertaking,” in this context, is defined as any entity, irrespective of its legal status or mode of finance, involved in economic activity, including a natural person taking part in such activity.²⁸²

Broadly speaking, the Competition Ordinance imposes binding constraints in three key areas of anti-competitive behavior—referred to as the “first conduct rule,” the “second conduct rule,” and the “merger rule” (known collectively as the “competition rules”).²⁸³ The first of these rules prohibits agreements, concerted practices, and decisions of an association of undertakings that aim at or have the effect of preventing, restricting, or distorting competition in Hong Kong.²⁸⁴ Four types of anti-competitive behavior—price-fixing, market allocation, output control, and bid rigging—are deemed to constitute serious departures from the prescribed norm under this rule.²⁸⁵ The second conduct rule addresses excessive market power and prohibits an undertaking from abusing its position by engaging in practices that aim at or have the effect of preventing, restricting, or distorting competition in Hong Kong.²⁸⁶ Finally, the merger rule applies to merger and acquisition activity that is likely to have the same impact on the territory’s competitive environment as the other two prohibitive

²⁸¹ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; see also LegCo, Competition Ordinance, www.legco.gov.hk/yr11-12/english/ord014-12-e.pdf (last visited Aug. 20, 2014).

²⁸² See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; see also LegCo, *supra* note 281.

²⁸³ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; see also LegCo, *supra* note 281.

²⁸⁴ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; see also LegCo, *supra* note 281.

²⁸⁵ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; see also LegCo, *supra* note 281.

²⁸⁶ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; see also LegCo, *supra* note 281.

measures (subject to the general qualification that the scope of this rule cannot be said to be wide, given that it is limited to carrier licenses granted under the Telecommunications Ordinance [Cap. 106]).²⁸⁷

This cross-sector, rule-based normative framework is underpinned by enforcement machinery that divides the powers of investigation, prosecution, and adjudication between the Competition Commission and the Competition Tribunal.²⁸⁸ The former is expected to enjoy the status of an independent statutory body, employ its powers to investigate relevant complaints, and bring public enforcement cases before the latter.²⁸⁹ The Competition Commission's membership is supposed to range from no less than five to no more than sixteen.²⁹⁰ The appointments will be made by the Hong Kong Chief Executive.²⁹¹

The Tribunal will constitute an integral part of the judiciary, functioning as a superior court of record, whose primary jurisdiction is to hear and adjudicate cases brought up by the Commission.²⁹² Its remit will include follow-on private actions, alleged contravention of a conduct rule as a defense raised in proceedings before the Court of First Instance (CFI), and review of certain determinations of the Commission.²⁹³ All CFI judges will be members of the Tribunal, which will be able to apply a full array of traditional remedies for contravention of a competition rule.²⁹⁴

The Commission will serve as the principal, but not sole

²⁸⁷ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; *see also* LegCo, *supra* note 281.

²⁸⁸ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 3; *see also* LegCo, *supra* note 281.

²⁸⁹ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; *see also* LegCo, *supra* note 281.

²⁹⁰ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; *see also* LegCo, *supra* note 281.

²⁹¹ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 4; *see also* LegCo, *supra* note 281.

²⁹² See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 5; *see also* LegCo, *supra* note 281.

²⁹³ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 5; *see also* LegCo, *supra* note 281.

²⁹⁴ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 5; *see also* LegCo, *supra* note 281.

institutional channel, for public enforcement.²⁹⁵ As indicated, the Competition Ordinance also provides a legal mechanism for follow-on private actions to be brought before the Tribunal by persons who have suffered damage or loss as a result of anti-competitive behavior that has been determined by the courts to be a contravention of a conduct rule.²⁹⁶

The application of the Competition Ordinance is not uniformly static in that exemptions and exclusions to the rules of conduct are envisioned and stipulated.²⁹⁷ The underlying logic is to enhance overall economic efficiency, ensure compliance with legal requirements, and honor government obligations stemming from a desire to promote the public interest in general and facilitate the performance of specific tasks in particular.²⁹⁸ This extends to the issuance of block exemptions.²⁹⁹ Thresholds are also employed in order to exclude instances of conduct of lesser significance from the ambit of the Ordinance.³⁰⁰

The new law does not bind the government, reflecting the assumption that public sector activities are predominantly non-economic in nature.³⁰¹ By the same token, key parts of the Ordinance (relating to the competition rules, as well as enforcement by the Commission and Tribunal), do not apply to statutory bodies, unless the Hong Kong Chief Executive in Council determines otherwise by way of regulations.³⁰² In a similar manner, the CE is empowered to refrain from applying these parts of the Ordinance to a person specified or a person who

²⁹⁵ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 5-6; see also LegCo, *supra* note 281.

²⁹⁶ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

²⁹⁷ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

²⁹⁸ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

²⁹⁹ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

³⁰⁰ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

³⁰¹ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

³⁰² See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

is engaged in an activity specified in the regulation.³⁰³

At face, this institutional blueprint, long in the making and thus for all appearances conceptually time-tested, seems to be consistent with the majority of preferences expressed by stakeholders who participated in the public consultation exercises. However, the notion of comprehensively regulating competitive behavior in Hong Kong remains shrouded in controversy. Moreover, the particular legal instrument that has been adopted for this purpose has not proved immune to criticism. Whether readily or reluctantly, the government has taken a quantum leap, but the debate regarding the desirability and form of its initiative continues, albeit inevitably with less intensity than before it had become a *fait accompli*.

C. Support and Reservations

The principal catalyst for radical change on that front has clearly been the influential 1996 HKCC summary report. While unenthusiastically received by the policy establishment, it has set in motion forces that the government has struggled to contain. Yet, the report has not been the sole source of pressure for shifting toward a more holistic governance configuration. The academic and professional communities have been sharply divided on this issue, but some scholars have taken a stance broadly consistent, although not in every respect, with that of the consumer protection agency and have provided their blessing, even if somewhat qualified, for the idea of cross-sector regulation of competition in Hong Kong.³⁰⁴

³⁰³ See *Competition Policy Advisory Group Report 2011-2012*, *supra* note 267, at 6; see also LegCo, *supra* note 281.

³⁰⁴ See CHENG & WU, *supra* note 200, at 225-33; see also Edward K.Y. Chen & Ping Lin, *Competition Policy Under Laissez-Faireism: Market Power and its Treatment in Hong Kong*, 21 REV. OF INDUS. ORG. 145, 145-66 (2002) (“This paper describes the current competition policy framework in Hong Kong: how [it] came into existence, what business practices are prohibited, and how the enforcement system works.”); see also Ping Lin & Edward K.Y. Chen, *Fair Competition under Laissez-Faireism: Policy Options for Hong Kong*, LINGNAN UNIVERSITY, <http://www.ln.edu.hk/econ/staff/plin/Fair%20Competition%20under%20Laissex%20Faireism.pdf> (last visited Aug. 20, 2014) (“[T]he CPRC recommends that the following seven types of business practices be regulated: price fixing, bid-rigging, market allocation, sales and production quotas, joint boycott, discriminatory standards, and abuse of dominant market position.”); Tsang Shu-Ki, *The Case for a Competition Institution in Hong Kong*, SKTSANG (Nov. 2, 2000), www.sktsang.com/ArchiveII/tsang021100.PDF (“[M]arket dynamics in more mature

Those favoring a fundamental departure from the time-honored hands-off approach have accepted the basic premise that, if looked at from a domestic perspective: (1) competition leads to lower prices, better output quality, and wider consumer choice; (2) downward pressure exerted on prices of intermediate inputs enhances competitiveness of downstream industries that rely on them in their production processes; (3) a soundly formulated comprehensive competition policy serves as a consistent and equitable strategic framework for guiding both local and foreign firms; and (4) an effective adoption of such a framework in fact diminishes the need for government micro-level intervention in the economy.³⁰⁵

They have also expressed support for the argument that the implementation of a cross-sector competition policy would constitute a sensible tactical initiative from an international viewpoint.³⁰⁶ This claim stems from the assumption that promoting competitive practices in the global arena may be regarded as a viable alternative, or at least an antidote, to protectionist measures employed by developed countries in an effort to defend their markets against supposedly predatory strategies pursued by Asian exporters and domestic enterprises.³⁰⁷ If this contention is valid, it follows that Hong Kong is in a vulnerable position as a strong free-trade advocate and a vociferous critic of protectionism, because it has long and tenaciously resisted the idea of promulgating a meaningful competition law.³⁰⁸

A number of analytical and normative assertions have been put forward emphatically in this context, particularly regarding the efficiency-boosting consequences of promoting a competitive business environment through legal means and the distinct nature of this strategy. Economists have thus noted that a pro-competition policy is not a "zero-sum game" designed to benefit

economies has been such that dominant players with increasing power are rapidly emerging, some through mergers and acquisitions, in formerly un-regulated sectors or across sectors, regulated or otherwise.").

³⁰⁵ See CHENG & WU, *supra* note 200, at 225.

³⁰⁶ See *id.* at 226.

³⁰⁷ See *id.*

³⁰⁸ See *id.*

consumers at the expense of ‘mighty’ corporations.³⁰⁹ Rather, it may increase overall efficiency or social welfare by raising both consumer and producer surplus via the elimination or minimization of market distortions stemming from imperfect competition.³¹⁰

Utilizing the law to curtail such distortions is the ultimate objective, rather than a reflection of an ideological agenda whose purpose is to shift power from large to small and medium-size enterprises.³¹¹ The formal regulatory approach is essentially dimension and sector neutral.³¹² The legal edifice is constructed with the aim of curbing the abuse of market power, not denying its possession, and certainly not handicapping efficient businesses by punishing corporate success.³¹³ Importantly, the law is not an interventionist vehicle because it merely establishes the rules of the game and provides refereeing mechanisms.³¹⁴

A possible concern is that Hong Kong’s image as a lightly regulated and open economy, functioning in an efficient and transparent fashion, may undergo palpable erosion.³¹⁵ A potential counterargument is that, formally speaking, the existence of legal machinery to control anti-competitive practices is not a factor that enters into the equation when assessing the degree of economic freedom prevailing in a country or a broadly equivalent semi-autonomous political system.³¹⁶ Indeed, it is not unreasonable to suggest that policies aimed at enhancing efficiency by establishing a level playing field through a competition law may favorably impact Hong Kong’s image and standing as a bastion of free enterprise.³¹⁷

Another critical claim that has been addressed is that the small size of the Hong Kong economy obviates the need for legal measures to ensure that businesses adhere to acceptable

³⁰⁹ See Lin & Chen, *Fair Competition under Laissez-Faireism: Policy Options for Hong Kong*, *supra* note 304, at 11.

³¹⁰ See *id.* at 11, 19, 40.

³¹¹ See *id.* at 31-35.

³¹² See *id.* at 40.

³¹³ See *id.* at 11.

³¹⁴ See *id.* at 11-13.

³¹⁵ See Lin & Chen, *supra* note 304, at 12.

³¹⁶ See *id.* at 12-13.

³¹⁷ See *id.* at 13.

competitive standards.³¹⁸ This contention merits attention because it is commonly posited that in such a limited economic space, threats to competition are relatively rare and steps to increase the number of competitors are not likely to serve a useful purpose.³¹⁹ This view may be disputed on the grounds that the number of competitors should not be equated with the level of competition:³²⁰ “[h]aving a given number of competitors in a market, no matter how small the market is, does not mean that these competitors choose to compete.”³²¹

In fact, the proposition that large economies are the arena where challenges to competition are most expected to emerge is not entirely valid.³²² The opposite may well be true.³²³ Empirical evidence and theoretical support may be adduced to demonstrate that small size is often associated with elevated industrial concentration ratios,³²⁴ high barriers to entry,³²⁵ and a substantial degree of aggregate economic concentration.³²⁶ Moreover, while Hong Kong’s population is rather modest, its economy, as reflected in widely relied-upon indicators such as the gross domestic product (GDP), is by no means small.³²⁷ The size factor may thus not be greatly pertinent in this context.

Proponents of a broad-based, enshrined-in-law strategy to combat anti-competitive practices have also found merit in most, albeit not all, of the specific HKCC recommendations. Suggestions to impose restrictions on horizontal business agreements (e.g., bid rigging and cartel-inspired price-fixing),³²⁸ abuse of dominant position (e.g., monopoly pricing and tie-in-sales

³¹⁸ *See id.*

³¹⁹ *See id.*

³²⁰ *See id.*

³²¹ Lin & Chen, *supra* note 304, at 9.

³²² *See id.*

³²³ *See id.*

³²⁴ *See id.* at 10.

³²⁵ *See id.* at 10-11.

³²⁶ *See id.* at 11.

³²⁷ *See* Hong Kong Trade Development Council (HKTDC), *Economic and Trade Information on Hong Kong*, HKDTC RESEARCH, <http://hong-kong-economy-research.hktdc.com/business-news/article/Market-Environment/Economic-and-Trade-Information-on-Hong-Kong/etihk/en/1/1X000000/1X09OVUL.htm> (last visited Sept. 9, 2014).

³²⁸ *See* CHENG & WU, *supra* note 200, at 228-29.

enforced through market dominance),³²⁹ complex monopoly (e.g., tacit collusion),³³⁰ and mergers and acquisitions³³¹ have thus been either wholly embraced or subject to certain qualifications. The sole proposal to elicit an unfavorable response has been that directed at vertical agreements (e.g., exclusive dealerships, long-term supply contracts, retail price maintenance, and tie-in-sales).³³²

However, such analytically and empirically underpinned elaborate logic has failed to sway skeptics, whose misgivings have typically been articulated in libertarian terms, both general and precise.³³³ In addition, technical reservations have been expressed about the provisions of the Competition Ordinance.³³⁴ The general philosophically grounded line of reasoning remains that, even without such a regulatory mechanism, Hong Kong has consistently been “rated the freest and most competitive economy on the planet.”³³⁵ This by no means should be construed as a paradox, because the territory’s “current ‘competition regulator’ is its economic freedom and open market.”³³⁶

The precise argument is couched more dispassionately. It is predicated on the assumption that anticompetitive business practices have two distinct origins: first, in competition sapping, privately derived power constellations and second, distortions stemming from interventionist public policies—and it is the latter that are the more costly and persistent.³³⁷ In this context, concerns emanating from the opposite intellectual camp regarding

³²⁹ See *id.* at 230-31.

³³⁰ See *id.* at 231.

³³¹ See *id.* at 232.

³³² See *id.* at 229-30.

³³³ See Dan Ryan, *How to Make Hong Kong Uncompetitive*, WALL STREET JOURNAL (Apr. 2, 2008, 12:01 AM), online.wsj.com/news/articles/SB120708273137381351; Richard Y.C. Wong, *Understanding Competition in Hong Kong*, HONG KONG CENTRE FOR ECON. RES., <http://www.hkcer.hku.hk/Letters/v20/rwong.htm> (last visited Aug. 20, 2014); Richard Y.C. Wong, *What Is the Purpose of a Competition Policy?*, WANGYUJIAN.COM (Jan. 9, 2013), <http://www.wangyujian.com/?p=1988&lang=en>.

³³⁴ See Christoph Kober, *Hong Kong Competition Law Riddled with Uncertainty, Legal Experts Say*, THE ASSET (Oct. 24, 2012), mobile.theasset.com/inside.php?tid=22967.

³³⁵ Ryan, *supra* note 333.

³³⁶ *Id.*

³³⁷ See Wong, *Understanding Competition in Hong Kong*, *supra* note 333; Wong, *What Is the Purpose of Competition Policy?*, *supra* note 333.

endogenously induced departures from perfect competition are discarded because they fail to draw a distinction between market statics and dynamics.³³⁸ At any particular juncture, concentration of corporate power and its adverse consequences may be observed (market statics), even in freewheeling Hong Kong, but if a longer time horizon is adopted (market dynamics), it becomes evident that that such patterns are inherently unstable and do not present a lasting challenge, particularly in an environment of unfettered capitalism (where monopolies and cartels unravel in the face of intense internal and external pressures).³³⁹

Business dominance that is the product of government regulation (interventionist monopoly and oligopoly) is viewed as more damaging and entrenched.³⁴⁰ Two examples are invoked to buttress this claim.³⁴¹ One involves the monopolistic arrangement for the distribution of mainland China beef in Hong Kong, and the other refers to the duopolistic configuration (due to time-honored and rigid licensing policies) prevailing in the broadcasting industry.³⁴² In such circumstances, the effective removal of harmful and unnecessary barriers to entry imposed and maintained by the government could reshape the competitive landscape and enhance efficiency to a greater extent than a legally based wide-ranging regulatory regime.³⁴³

Deficiencies of the Competition Ordinance that critics have chosen to highlight have been of a largely technical nature.³⁴⁴ Above all, the new law has been portrayed as rather limited in scope and vague in certain respects.³⁴⁵ For instance, the potential difficulties posed by mergers and acquisitions have not been adequately addressed.³⁴⁶ By the same token, a number of key concepts have not been unambiguously defined.³⁴⁷ This includes 'market power' and 'undertaking,' where conflicting

³³⁸ See Wong, *What Is the Purpose of Competition Policy?*, *supra* note 333.

³³⁹ *See id.*

³⁴⁰ *See id.*

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *See id.*

³⁴⁴ See Kober, *supra* note 334.

³⁴⁵ *See id.*

³⁴⁶ *See id.*

³⁴⁷ *See id.*

interpretations may prove highly problematic.³⁴⁸ However, the more fundamental issues discussed earlier, pertaining to the system's overall architecture, deserve closer academic and policy attention.

VI. Macroscopic Assessment and Concluding Observations

The literature on the normative facets of business regulation in its various forms, its merits and demerits, is considerable and is expanding at a fast pace.³⁴⁹ This reflects the increasing role of the activity, its multidimensional character, the serious questions to which it gives rise, and the weighty challenges it confronts.³⁵⁰ In a recent survey, taking into consideration the latest trends in the field, the authors contend and demonstrate that research on the subject is likely to dramatically accelerate due to the emergence of a “world risk society,” which features the proliferation of threats to humankind, other biological species, and the physical environment—such as defiant rogue states, escalating climate change, heightened financial fragility, and large-scale terrorism.³⁵¹

The normative thrust manifests itself most palpably in the methodological and related domains where substantial intellectual resources are invested in a quest for acceptable and workable instruments to gauge the impact of regulatory endeavors targeting business, both in the domestic and global arenas.³⁵² This is a quest

³⁴⁸ See *id.*

³⁴⁹ See generally JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (Cambridge: Cambridge University Press, 2000) (presenting several case studies of the interactions between regulation and normative issues, including property, corporations, labor standards, nuclear power, drugs, food, and others); ANDRE NIJSEN ET AL. (eds.), *BUSINESS REGULATION AND PUBLIC POLICY* (New York: Springer, 2009) (presenting various essays which attempt to explain how to tailor regulations most effectively so that businesses are able to comply.); ALBERTO ALEMANNI ET AL. (eds.), *BETTER BUSINESS REGULATION IN A RISK SOCIETY* (2013) (discussing how to address social risks by implementing regulations).

³⁵⁰ See NIJSEN ET AL. (eds.), *supra* note 349; ALEMANNI ET AL. (eds.), *supra* note 349. See generally BRAITHWAITE & DRAHOS, *supra* note 349 (discussing marked increases across various sectors in a multitude of states).

³⁵¹ See generally ALEMANNI ET AL. (eds.), *supra* note 349 (discussing how the world has changed to be a “world risk society”).

³⁵² See generally *id.*; BRAITHWAITE & DRAHOS, *supra* note 349; NIJSEN ET AL. (eds.), *supra* note 349; CASS R. SUNSTEIN, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* (2002) (discussing a cost-benefit analysis applied to governmental regulations).

that has yielded a wide array of insights, ranging from the philosophical to the practical, but ultimately the focus has tended to gravitate toward the practical end of the continuum. This focus places a particularly heavy emphasis on identifying sound principles and techniques for determining whether specific strategies relied upon to regulate business competition are worth implementing.³⁵³

The principal tool resorted to for this purpose remains cost-benefit analysis, as traditionally construed and employed.³⁵⁴ It is a clearly delineated, but not inelastic, assessment procedure, or more broadly speaking, a vehicle applied in a variety of regulatory contexts, rather than merely in relation to departures from competitive market norms.³⁵⁵ A well-established variant of this method is cost-effectiveness analysis.³⁵⁶ Additional complementary techniques include actuarial estimates, engineering approaches, econometric studies, expenditure appraisals, expert opinion investigations, general equilibrium models, monitoring of consumer behavior, prescriptive decision theories, productivity measures, risk assessment methods, valuation metrics, and willingness-to-pay surveys.³⁵⁷

The narrow ambit of such research strategies should not be overstated. A case in point is the commendable effort to incorporate psychological consequences, both positive and

³⁵³ See BRAITHWAITE AND DRAHOS, *supra* note 349; SUNSTEIN, *supra* note 352; ALEMANNI ET AL. (eds.), *supra* note 349.; EINAR HOPE (ed.), *COMPETITION POLICY ANALYSIS* (2000) (discussing methodological and analytical issues in competition policy); see MANFRED NEUMANN, *COMPETITION POLICY: HISTORY, THEORY, AND PRACTICE* (2001); JOSEF DREXL, WOLFGANG KERBER, & RUPPRECHT PODSZUN (eds.), *COMPETITION POLICY AND THE ECONOMIC APPROACH: FOUNDATIONS AND LIMITATIONS* (2011); ROBERT BALDWIN, MARTIN CAVE, & MARTIN LODGE, *UNDERSTANDING REGULATION: THEORY, STRATEGY, AND PRACTICE* (2011). *see generally* NIJSEN ET AL. (eds.), *supra* note 331 (discussing the Standard Cost Model as a method of measuring compliances costs).

³⁵⁴ See BALDWIN, CAVE, & LODGE, *supra* note 353, at 315-37; Francis Chittenden, Stefano Iancich, & Brian Sloan, *Techniques Available for Estimating the Impact of Regulations*, in NIJSEN ET AL. (eds.), pp. 43-58. *See generally* SUNSTEIN, *supra* note 352 (discussing risk-adverse strategies as compared to those that only evaluate what is to be gained [the benefits]).

³⁵⁵ See Chittenden, Iancich, & Sloan, *supra* note 354.; BALDWIN, CAVE, & LODGE, *supra* note 353. *See generally* SUNSTEIN, *supra* note 352 (discussing risk-adverse strategies as compared to those that only evaluate what is to be gained [the benefits]).

³⁵⁶ See Chittenden, Iancich, & Sloan, *supra* note 354, at 47.

³⁵⁷ *See id.* at 45-47, 55-58.

negative, for consumers into cost-benefit analysis and broadly equivalent methods.³⁵⁸ Nevertheless, it is legitimate to argue that, almost without exception, the techniques relied upon in this context are rooted entirely or largely in utilitarian calculus. The merits and demerits of actual or potential forms of business regulation hinge on their efficiency, which in the final analysis reflect the balance between the utilities and disutilities, typically expressed in monetary terms that they are capable of generating or in fact yield.³⁵⁹

While controversial, utilitarian logic is not without appeal and relevance. It is just a matter of contribution versus dominance, or whether it should be one of a number of factors in the equation or the sole yardstick consulted. The regulatory arena is heterogeneous rather than homogenous.³⁶⁰ It is characterized by conflicting pressures, which manifest themselves at various levels.³⁶¹ For instance, with reference to the global regulation of business, it has been noted that there is considerable tension between an array of differently positioned actors³⁶² and principles that often cannot be readily reconciled.³⁶³ Efficiency, or net utility, may thus have to be viewed in conjunction with other pertinent criteria.³⁶⁴

Indeed, in the ongoing debate about the Competition Ordinance in Hong Kong, efficiency shares the limelight with freedom. Both supporters and critics tend to see the relationship as symbiotic, albeit with either positive or negative effects, in terms of the influences exerted by this not uniformly embraced policy initiative. The issue of equity, or fairness, is also addressed, although cursorily so. However, additional potentially relevant yardsticks are mostly overlooked. A possible example is

³⁵⁸ See *id.* at 51, 56.

³⁵⁹ See generally SUNSTEIN, *supra* note 352 (discussing risk-adverse strategies as compared to those that only evaluate what is to be gained [the benefits]).

³⁶⁰ See BRAITHWAITE & DRAHOS, *supra* note 349, at 475-531 (discussing the effectiveness of a number of state regulators in a variety of fields).

³⁶¹ See *id.*

³⁶² See *id.* at 475-506.

³⁶³ See *id.* at 506-31.

³⁶⁴ See generally Randall G. Holcombe, *The Foundations of Normative Public Finance*, in FRED THOMPSON AND MARK T. GREEN (eds.), *HANDBOOK OF PUBLIC FINANCE* 1-42 (1998) (discussing the Pareto criteria and other conceptual policy frameworks).

institutional legitimacy³⁶⁵ in an environment where the government is believed to be increasingly detached from the grassroots community and facing a crisis of legitimacy.³⁶⁶ The Hong Kong experience may, hence, be regarded as a useful reminder that regulatory schemes designed to curtail anticompetitive business practices should be dissected from a multidimensional perspective, rather than exclusively within the framework of traditional cost-benefit analysis.

This is not merely an issue of expanding the list of applicable criteria, but of how broadly to conceptualize the problem or define the task. The point is that the introduction of a legal instrument akin to the Competition Ordinance amounts to a reconfiguration of a significant component of the whole Hong Kong policy façade, if faithfully implemented and enhanced. The corollary inevitably is that examining this development through narrow-angled lenses—which may be appropriate in other circumstances, with less far-reaching ramifications—may not be an optimal strategy. Given the historical backdrop and prevailing socioeconomic order, a cross-sector targeting of anticompetitive business conduct amounts to a fundamental change in the governance regime and should be treated as such.

There is fast growing and increasingly sophisticated literature on the evaluation of the impact, actual and potential, of such extensively constructed institutional mechanisms, albeit with a distinct bias toward those focused on the environment, perhaps because of the serious challenges humankind faces both collectively and in specific geographic realms in that particular domain.³⁶⁷ The starting point in this substantial body of academic work is normally the assumption that the merits or demerits of any far-reaching regulatory blueprint should be judged in terms of its ability to bring about tangible progress toward clearly defined

³⁶⁵ See *id.* at 35-36.

³⁶⁶ See IAN SCOTT, POLITICAL CHANGE AND THE CRISIS OF LEGITIMACY IN HONG KONG (1989). See generally LO, GOVERNING HONG KONG: LEGITIMACY, COMMUNICATION, AND POLITICAL DECAY, *supra* note 109 (discussing the various means by which the government attempts reform depending solely upon its own bureaucratic machinery).

³⁶⁷ See generally Miron Mushkat & Roda Mushkat, *Assessing the Effectiveness of Environmental Governance Regimes: Remaining Gaps*, 12 INTERDISC. ENVTL. REV. 166, 166-89 (2011) (discussing how regulatory schemes interact with their socioinstitutional settings).

governance regime goals.³⁶⁸

However, this tends to merely serve as an initial proposition, a necessary yet insufficient condition, because complex policy settings are characterized by a close interdependence of system components.³⁶⁹ Given this pattern, “cross-regime linkages are widespread and need to be fully accounted for.”³⁷⁰ That is not just a theoretical observation but one with practical connotations due to its significance as a guiding principle for those engaged in the assessment of comprehensive regulatory strategies.³⁷¹ Indeed, such researchers now commonly differentiate between the simple effectiveness and broad consequences of meaningful adjustments to the governance regime architecture.³⁷²

The latter are not completely overlooked in scholarly explorations of the intricacies and virtues of legally underpinned efforts to curtail threats to healthy business competition.³⁷³ Notable examples include the tentative examination of the relationship between such endeavors and income disparities³⁷⁴ (even inequality in general),³⁷⁵ economic development,³⁷⁶ property rights,³⁷⁷ international trade,³⁷⁸ financial stability,³⁷⁹ and social conflict.³⁸⁰ The researchers who venture that far afield partially

³⁶⁸ See *id.* at 169.

³⁶⁹ See *id.*

³⁷⁰ *Id.*

³⁷¹ See *id.*

³⁷² See Mushkat & Mushkat, *supra* note 367, at 169.

³⁷³ See e.g., Agnar Sandmo, *Toward a Competitive Society? The Promotion of Competition as a Goal of Economic Policy*, in HOPE (ed.), *supra* note 353, at 6, 17 (arguing that broader societal efficiency is not always benefited by individual reforms); see Frederic Jenny, *Competition Law and Policy: Achievements and Failures from an Economic Perspective*, in HOPE (ed.), *supra* note 353, at 20, 22 (asking whether competition laws benefit the broader goal of economic efficiency); NEUMANN, *supra* note 353, at 166-91 (discussing the dichotomy between competition policy and property rights, international trade policy, and financial stability); Josef Drexl, *On the (A)political Character of the Economic Approach to Competition Law*, in DREXL, KERBER, & PODSZUN (eds.), *supra* note 353, at 312-36.

³⁷⁴ See Sandmo, *supra* note 353, at 14-16.

³⁷⁵ See Drexl, *supra* note 353, at 326-28.

³⁷⁶ See Jenny, *supra* note 353, at 24-26.

³⁷⁷ See NEUMANN, *supra* note 353, at 166-75.

³⁷⁸ See *id.* at 175-79.

³⁷⁹ See *id.* at 179-83.

³⁸⁰ See Drexl, *supra* note 353, at 319-20.

adopt an interdisciplinary perspective and selectively employ conceptual vehicles grounded in disciplines (political science and sociology) where economic efficiency is not necessarily deemed to be the overarching value.³⁸¹

That said, a persistent gap in the academic writings on the design and redesign of governance regimes, particularly those entailing elaborate curbs on anti-competitive business conduct, remains in the form of a missing link between a grasp of the policy consequences and the appropriate strategic response. This inevitably, although not exclusively, involves a careful consideration of the “fit” between the governance regime, or its key elements, and the sociopolitical milieu in which it is embedded.³⁸² In ecologically oriented studies, where this factor looms large on the intellectual agenda and in problem solving contexts, the degree of correspondence between substantial regulatory schemes and the biophysical environment is widely recognized as a pertinent assessment criterion.³⁸³ However, even there, the next logical step of ascertaining the fit with the sociopolitical setting, and then drawing inferences regarding preventive or corrective action, is seldom taken.³⁸⁴ Possible exceptions to this generalization in the administrative and legal space are certain governance regimes for controlling corporate and individual crime.³⁸⁵

A prominent theme in this paper is that the Hong Kong global metropolis—notwithstanding the reversion to Chinese sovereignty, which is fraught with unavoidable difficulties due to underlying institutional incompatibilities and strains—continues to successfully encapsulate the spirit of dynamic and resilient free-market capitalism but, at the same time, is socio-politically handicapped and incapable of attaining a salutary equilibrium. Five salient features of this complex picture stand out: (1)

³⁸¹ See NEUMANN, *supra* note 353, at 187-88. See generally Drexl, *supra* note 353, at 312-336 (discussing how various different of disciplines can be applied to understand the current governmental crisis and attempts at reform).

³⁸² See generally Miron Mushkat and Roda Mushkat, *The Institutional Foundations of Environmental Governance Regimes*, 9 INT'L J. OF REG. AND GOVERNANCE 99, 99-120 (2009) (discussing how closely related various regulatory mechanisms are with respect to the socio-institutional settings they are supposed to regulate).

³⁸³ See *id.* at 105.

³⁸⁴ See *id.*

³⁸⁵ See *id.* at 106-08.

overwhelming power potentially exercised (and misused) by a domestically unconstrained chief executive who is strongly attuned to preferences expressed by the upper echelons of the CCP apparatus in Beijing, but is incapable of mobilizing adequate strategic support at home; (2) progressive (even if incomplete) mainlandization of the local institutional façade and its cultural underpinnings; (3) a disarticulation/segmentation of the entire policy machinery; (4) slight erosion of the rule of law; and (5) the widening chasm between the minimally muddling-through government and the disaffected grassroots community. These features combine to materially diminish state capacity and its effectiveness as a refereeing instrument.

The theoretical argument from a dynamic perspective is that, unless sustained by inherently restrictive and thus misguided policy action, market dominance and practices stemming therefrom contain the seeds of their own destruction, particularly in the bottom-up driven and untrammelled Hong Kong economic setting, and may consequently be regarded as not broad enough in this context. The prevailing (as distinct from an idealistically determined configuration) structural characteristics and modus operandi of the territory's quasi-representative institutions (the executive and legislative branches of government) cannot be overlooked. It is unrealistic to expect players in that space to be single-mindedly motivated by a desire to maximize efficiency, subject to modest constraints implemented in a transparent fashion, and refrain from distorting the functioning of supposedly fundamentally healthy and self-correcting private markets. These players are unlikely to consistently pursue strategies geared toward significantly curtailing anti-competitive business conduct in Hong Kong, which is evidently increasing.

One possible antidote to underperforming representative institutions is a category comprising their non-majoritarian counterparts.³⁸⁶ These are organizational entities which are an integral part of the democratic landscape, but which are indirectly accountable to the electorate. Indeed, if carefully designed and

³⁸⁶ See Giandomenico Majone, *Non-Majoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach*, 157 J. OF INSTITUTIONAL ECON. 57, 57-78 (2001). See generally Giandomenico Majone, *Europe's "Democratic Deficit": The Question of Standards*, 4 EUR. L. J. 5, 5-28 (1998) (discussing the features of non-majoritarianism and the legitimacy of non-majoritarian institutions).

nurtured, they may substantially be insulated from the vagaries of the political process.³⁸⁷ Relevant examples are available in many jurisdictions, with the most notable and visible in this specific case probably being the still largely independent judiciary, ICAC, HKMA, SFC, Office of the Commissioner of Insurance,³⁸⁸ and Communications Authority (CA).³⁸⁹ It is legitimate to assert that these bodies impart a degree of stability and certain vigor to an otherwise amorphous and directionless institutional system.

If this diagnosis is valid, the Competition Ordinance does in fact embody a vision that “fits with” Hong Kong’s current socio-political realities. Of course, this is subject to the qualification that mechanisms must be established to minimize the dangers of regulatory cartelization and capture. The Ordinance does provide some safeguards in this respect (e.g., the judicial component), although it is a moot point whether they are sufficient and whether this issue has received adequate attention. The question of the overall fit does not merely concern the underlying vision, or the architecture, but also the fine detail, or the engineering, particularly in relation to enforcement. Unfortunately, the intense and wide-ranging debate has not been couched, explicitly or implicitly, in these precise terms at either vision level or at the fine detail level. The assessment offered thus contains gaps and is not properly balanced. It follows that the evaluative framework that has been erected does not just lack one vital element, but a truly solid foundation.

The general inference to be drawn is that establishing such a foundation, whose shape may vary across geographic space and over time, is a prerequisite for a satisfactory appraisal of meaningful adjustments to governance regimes in domains such as business competition, where multiple stakeholders and values follow conflicting paths in a fluid and intricate environment. A strategic reconfiguration in this crucial realm and similarly

³⁸⁷ See Majone, *Non-Majoritarian Institutions and the Limits of Democratic Governance: A Political Transaction-Cost Approach*, *supra* note 386. See generally Majone, *Europe’s “Democratic Deficit”: The Question of Standards*, *supra* note 386, at 10 (discussing how economic integration without political integration can be a reality only if the two are adequately separated from one another).

³⁸⁸ See *Welcome Message*, OFFICE OF THE COMM’R OF INSURANCE, www.oci.gov.hk/about/index.html (last visited Aug. 20, 2014).

³⁸⁹ See COMM’N AUTHORITY, www.coms-auth.hk/en/home/index.html (last visited Aug. 20, 2014).

complex spheres of regulatory activity cannot be undertaken without due reference to the cultural and institutional impacts of any measures to be implemented. The sociopolitical ramifications must be fully explored—ideally as early as practically possible in order not to lose sight of the broad context in which all other analytical endeavors need to be placed. The degree of cultural and institutional, or sociopolitical fit is an essential component of the decision calculus in such circumstances, too often overshadowed by narrowly focused considerations reflecting traditional-style utilitarian logic.

If this reading of the intricacies of governance regime design and redesign is appropriate, there may be no universally applicable optimal model for regulating business competition and other roughly similar private sector activities, notwithstanding the powerful trend toward cross-border convergence and integration in pivotal domains of human activity. Jurisdictions such as Hong Kong do not have to reinvent the proverbial wheel, but should fruitfully seek inspiration from lessons obtained elsewhere. Indeed, this continues to remain a useful starting point for both theoretically oriented and practically-inclined researchers in their ongoing quest for policy enlightenment. However, any conclusions acquired in the process may not productively be implemented without fine-tuning, aimed at securing a good fit with local conditions, in the broadest sense of the term. Even Singapore, a city-state and a global metropolis rivaling Hong Kong, yet overlapping with it in several respects, cannot provide Hong Kong with an exhaustive set of ideas for successfully combating anti-competitive business conduct.³⁹⁰ From this perspective, the creation and enhancement of governance regimes must be viewed as a strategically driven art as much as a rigorous economic science.

Comparative law is a conceptually and empirically (from a factual standpoint) mature realm of scientific inquiry. However, it lacks a robust methodological framework for systematically juxtaposing legal instruments adopted in one jurisdiction with

³⁹⁰ Singapore's decade-old competition law and policy are outlined and reviewed in CAVINDER BULL, LIM CHONG KIN, & RICHARD WHISH, *COMPETITION LAW AND POLICY IN SINGAPORE* (2009). Australia's comparatively rich and elaborately analyzed experience is also selectively relevant. See RUSSELL V MILLER, *MILLER'S AUSTRALIAN COMPETITION LAW AND POLICY*, 2d (2012).

those embraced in another, where both display some crucial similarities and some important differences (e.g., Hong Kong versus Singapore). However, such frameworks, ranging from qualitative to quantitative, have been developed by social scientists and are widely applicable, including within various branches of law.³⁹¹ The emphasis on the cultural and institutional uniqueness of country-specific regulatory mechanisms should thus not be construed as an endorsement of a position that cross-border learning is not a practical and valuable pursuit in this context. Quite the contrary, if undertaken in accordance with well-established methodological principles, conducive to seeking relevance in the face of multiple sociopolitical convergences and divergences, such broad-based learning may greatly facilitate the challenging task of configuring, and reconfiguring, governance regimes.

A possible analytical tool to employ in systematically addressing the cultural and institutional dimension of substantial regulatory initiatives, focused on business competition or related issues, is counterfactual scenario construction.³⁹² Originally relied upon in the field of economic history to answer “what-if” questions known as counterfactuals, or to determine historical patterns which would have potentially materialized in the absence of key events (an exercise that involves engagement in counterfactual or hypothetical history),³⁹³ counterfactual scenario construction is now commonly resorted to by social scientists.³⁹⁴ If properly used, taking into account Hong Kong’s cultural and institutional realities, it could have probably yielded insights

³⁹¹ See Roda Mushkat, *Killing the Proverbial Two Birds with One Stone: New Ways to Expand the Comparative Law Methodological Repertoire and Enhance the Effectiveness of Inter-Jurisdictional Environmental Governance Regimes*, 6 TRADE, LAW, AND DEVELOPMENT (forthcoming 2014).

³⁹² See generally Jianhua He, *A Counterfactual Scenario Simulation Approach for Assessing the Impact of Farmland Policies on Urban Sprawl and Food Security in a Major Grain-Producing Area of China*, 37 APPLIED GEOGRAPHY 127, 127-38 (2013) (discussing how purely statistical models are inadequate to assess policy impact and should instead be supplemented by spatially explicit modeling).

³⁹³ See generally ROBERT W. FOGEL, *RAILROADS AND AMERICAN ECONOMIC GROWTH: ESSAYS IN ECONOMETRIC HISTORY* (Baltimore) (discussing various hypothetical situations in order to prove economic points).

³⁹⁴ See generally He, *supra* note 392 (discussing how purely statistical models are inadequate to assess policy impact and should instead be supplemented by spatially explicit modeling).

insufficiently generated during the debate preceding and following the decision to confront anti-competitive business practices in the territory in an authoritative and comprehensive fashion (e.g., what would be the consequences, given the sociopolitical backdrop, of adhering to the status quo and not implementing situation-compatible interventionist blueprints?).

The quest for governance regime constellations that satisfy the “fit” criterion highlighted in this paper must inevitably be supported by qualitative or “soft” research methods such as counterfactual scenario construction, because alone, widely relied upon efficiency-centered counterparts (e.g., cost-benefit analysis) cannot provide a solidly underpinned roadmap. The understanding of the descriptive, explanatory, prescriptive, and technical dimensions of strategically oriented public regulation of private sector activity has greatly increased in recent years, but it is not devoid of crucial gaps, reflecting an overly narrow problem definition and methodological thrust. The intellectual controversy and tension surrounding Hong Kong’s belatedly born Competition Ordinance serves as a useful reminder that this continues to be the case and that the knowledge-building process needs to be significantly broadened.³⁹⁵

³⁹⁵ See Thomas Cheng, *Convergence and its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 CHI. J. INT’L L. 433, 433-90 (2012).

