fine if factors, which had not been disclosed to the KFTC during the investigation, were later revealed. The Supreme Court subsequently held such power of modification to be invalid for the reason that administrative fines imposed by a government agency must be grounded only in factors confirmed prior to the determination, notwithstanding the subsequent revelation of new factors.[72)]

IV. Conclusion

During the early years of the MRFTA, Korean courts were relatively unfamiliar with the entire field of competition law. With the recent accumulation of cases, however, the courts have gradually enhanced their understanding of the statute.

A key problem is that Courts have usually restricted themselves to deciding the case at hand but have generally not shown a willingness to provide specific rules to be referenced in similar instances. Typically, courts have stated general rules, listed factors that should be considered, and then drawn conclusions with some decisive reasoning. Most such judgments have not been analytical. For example, although courts may list factors to be considered in the course of deciding a case, most judgments have not reviewed each factor in turn or explained what role the various factors had on the ultimate decision. Moreover, although it may be true that most cases handled by the courts have involved hard-core cartels in which the anticompetitive effects were readily apparent, the courts have generally avoided conducting proper economic analysis even in those cases where it would have been appropriate to do so.[73)]

Notwithstanding this overall pattern of reticence, a somewhat different tendency has appeared in some recent decisions under the MRFTA. In such decisions, the Supreme Court has endeavored to articulate specific rules to be applied in similar cases. If this trend continues, such rules may yield significant benefits in the form of more predictable application and enforcement of the MRFTA. Moreover, courts have recently attempted to utilize economic analysis more broadly in their review of cases under the MRFTA. Such efforts could herald an era of unprecedented growth and development of competition law in Korea.

72) *Id*.

73) For example, the music disc case discussed above in Section III.C.4.

Korean Competition Law: First Step towards Globalization

*Youngjin Jung**

Abstract

In April 4, 2002, Korea Fair Trade Commission ("KFTC") took the unprecedented step of extraterritorially applying the domestic antitrust law to six foreign manufacturers of graphite electrodes. And on August 26, 2003, the Seoul High Court affirmed KFTC's decision. This is highly significant since it is the first time that a Korean court has acknowledged the extraterritorial application of the domestic competition law. In particular, given the increasing economic interdependence among states in accordance with the globalization trend, the court appears to accept the reality that it can no longer adhere to the conventional bases for jurisdiction, i.e. territorial and nationality principles. Also the subsequent legislative changes that are to take effect on April 1, 2005 are expected to significantly bolster KFTC's capability in the international dimension. Korea has now ushered in the new era of globalization in the international competition arena.

* Partner with Woo Yun Kang Jeong & Han (Seoul, Korea); Member of Korean and NY Bar Associaions; LL.B and LL.M. Seoul National University College of Law; LL.M and J.S.D.Yale Law School

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I. Introduction

Since Judge Learned Hand first put forward the controversial "effects doctrine" in the 1945 *Alcoa* case,[1] the doctrine has gradually earned international recognition[2] by overcoming vocal oppositions against it.[3] Notably, the Court of First Instance ("CFI") in the European Union ("EU"), some members of which used to vehemently contest the extraterritorial application of American antitrust law,[4] explicitly adopted an effect doctrine in *Gencor* case.[5] It can be stated that the EU approach to extraterritoriality is converging to that of the United States away from the European Court of Justice ("ECJ")'s longstanding position-the implementation principle.[6] Likewise, Germany[7] and Canada[8] have expressly adopted the effects doctrine in their competition laws, while China is expected to incorporate it into the competition

1) United States v. Aluminum Co. of America, 148 F.2d 416, 443 (2d Cir. 1945)("it is settled law-as [the defendant] itself agrees-that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize.").

2) See generally Joseph P. Griffin, "Extraterritoriality in U.S. and EU Antitrust Enforcement", 67 Antitrust *L.J.* 159 (1999).

3) See generally Blechman, "Antitrust Jurisdiction, Discovery and Enforcement in the International Sphere: An Appraisal of American Developments and Foreign Reactions", 49 *Antitrust L. J.* 1197 (1980). See also, David E. Teitelbaum, "Strict Enforcement of Extraterritorial Discovery", 38 *Stan. L. Rev.* 841 (1986)

4) *Id.* A number of "blocking" statutes were instituted to prevent production of commercial documents pursuant to US discovery process. See Protection of Trading Interests Act of 1980 § 6(1)-(4)(Eng.).

5) Case T-102/96, Gencor Ltd. v. Commission, 1999 E.C.R. II-753, [1999] 4 C.M.L.R. 971 (1999)("[application of the Regulation(Council Regulation 4064/89)] is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community"). See Eleanor Fox, "The Merger Regulation and Territorial Reach - Gencor Ltd. v. Commission", *E.I.P.R.* 334 (1999).

6) Alexander Layton et al., "Extraterritorial Jurisdiction-European Responses", 26 *Hous. J. Int'l L.* 309, 322 (2004)("it is evident that, from a perspective of legal theory, the E.U. approach to extraterritoriality (at least in the antitrust field) appears to be converging with that of the United States").

7) Anti-Competition Prohibition Act(Gesetz gegen Wettbewerbsbeschranken, GWB) Article 98, section 2: Even if anti-competitive acts are committed outside the application range of the regulations, the law applies to all anti-competitive acts arising within the application range of laws similar to the effects of those acts.

8) Competition Law Article 46.

law that is currently being drafted.[9] Also, the fact that an increasing number of countries' competition laws set out merger filing rules on mergers and acquisitions ("M&A") taking place outside their respective jurisdictions indirectly illustrate that past criticisms hurled against the legitimacy of the extraterritorial application of antitrust law has withered considerably.

Against this international backdrop and in response to the following legal precedents, Korea has introduced an amendment to the Monopoly Regulation and Fair Trade Act ("MRFTA"), which codifies the extraterritorial application of the Korean competition law and is to take effect on April 1, 2005. Prior to the amendment, there were a series of legal precedents vindicating the initiative of extraterritorially applying the Korean competition law. On April 4, 2002, Korea Fair Trade Commission ("KFTC") took the unprecedented step of extraterritorially applying Korean antitrust law to six foreign manufacturers of graphite electrodes, and imposed a fine of $9.2 million for price fixing.[10] On April 29, 2003, after carrying out a sweeping investigation into an alleged international cartel of six foreign vitamin manufacturers, the KFTC levied a fine of $3.3 million.[11] On July 1, 2003, KFTC introduced a system that requires certain M&A transactions involving a foreign company to be notified to the KFTC, even with respect to foreign-to-foreign M&A. On August 26, 2003, the Seoul High Court ("the Court"), which has exclusive first-stage jurisdiction over the challenges against KFTC's measures, affirmed KFTC's decision of April 4, 2002 to extraterritorially apply Korea's cartel regulations to graphite electrodes.[12]

That said, the extraterritorial application of competition law based on the effects doctrine would occasion a situation where multiple states would try to exercise jurisdiction concurrently over the same economic activity. The essence of the extraterritorial application of the domestic competition law based on the effects doctrine is to superimpose a state's competition law over the regulatory system of a

9) Youngjin Jung et al., "The New Economic Constitution in China: A Third Way for Competition Regime?", 24 *Northwestern J. Int'l L.* and B. Fall 2003.

10) KFTC Decision, April 4, 2002: Case 02-77.

11) KFTC Decision, April 29, 2003: Case 03-98.

12) Seoul High Court Decision, August 26, 2003 (2002 nu 14647). As of now the appeal to the Supreme Court is still pending.

target state. Given that sovereign states are in general quite protective and sensitive of outside intervention into their economic regulatory jurisdictions, an unlimited application of the effects doctrine is most likely to culminate in an increasing number of interstate disputes in the future. Consequently, a principle or system should be devised to preclude avoidable tensions from arising so as to preserve and promote a stable international economic system.

Until now KFTC's actions and the Court's decision to apply Korea's competition law extraterritorially have not created any friction with the countries in which Korea's jurisdiction was exercised mostly because Korea's actions were instigated primarily as a response to other countries' prior actions, and there was no real conflict of interests among the countries concerned. In fact, a preponderance of evidence utilized in KFTC's investigations into the international graphite electrodes and vitamin cartels was voluntarily provided by the relevant foreign governments. Nevertheless, KFTC's actions and the Court's decision have set important precedents for the extraterritorial application of Korea's competition law in the following manner. First, the administrative and judicial actions engineered the legislative change. Second, Korea is now more willing to exercise its jurisdiction beyond its domestic parameters when its economic interests are at stakes. Third, the international cooperation on enforcement of competition law is very effective in detecting and investigating anticompetitive behaviors around the world.

This essay analyzes the Court's unprecedented decision of August 26, 2003 ("Decision") to accept the extraterritorial application of the competition law and attempts to draw implications thereof.

II. "Unlimited" Effects Doctrine?

A. International Law's Admonition

The Court held that when the foreign enterprises entered into an agreement to restrain competition, and the subject of the agreement included the Korean market, regardless of whether the collusive behavior took place inside or outside the territory of Korea, the Court has the jurisdiction to apply Korea's competition law to the extent that the agreement directly affected the Korean market. The Court appears to

have accepted the typical effects doctrine as it recognized the jurisdiction based on such connectors as "intent," "direct effects." However, the Decision is problematic since there is no language in it suggesting that the application of the effects doctrine can be limited under certain circumstances. This is because the application of the effects doctrine implies that the domestic regulatory scheme is applied extraterritorially in lieu of the regulatory scheme of a foreign state.[13] In a case where a state attempts to regulate a certain act by virtue of its jurisdiction to prescribe, whereas a foreign state's policy is to promote such an act, enterprises doing business in both countries are likely to experience significant confusion with the legal systems, in turn undermining the stability and predictability of the international economic system. Such potential conflicts demonstrate the necessity for limiting the applicable scope of the effects doctrine in the international economic arena.

Courts generally address the question of jurisdictional reach or the validity of the effects doctrine through their subject matter jurisdiction. Arguments based on the concept of subject matter jurisdiction mostly revolve around the jurisdiction to prescribe rather than the jurisdiction to adjudicate or enforce. This is particularly the case in the United States since for a court to exercise its jurisdiction under antitrust laws, Congress should be perceived to have the power to legislate or prescribe the relevant laws even in the absence of express language allowing for the extraterritorial application of the subject law. Since jurisdiction to adjudicate and to enforce is based, in most cases, on the jurisdiction to prescribe, the courts' proper exercise of the latter is essential to prevent unnecessary conflicts from arising in the enforcement phase of the competition law.

Some argue that a uniform competition policy and unlimited extraterritorial enforcement around the world would bring about fewer disputes and confusion.[14] However, this argument appears to be oblivious to the practical reality that enforcement agencies and courts can potentially reach different conclusions and interpretations for the same legal language. For instance, price-fixing is generally considered to be the most egregious form of violation of the competition laws.

13) See generally Kenneth W. Dam, "Extraterritoriality in an Age of Globalization: The Hartford Fire Case" 1993 *Sup.ct.Rev*.289 (1993).

14) From this meaning, Professor Harry First emphasized the affirmative side that the expansion of the impact theory can bring. See Harry First, "The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law", 68 *Antitrust L.J*. 711 (2001).

Nearly every country that has a competition law prohibits price-fixing, at least as a matter of principle, although they may permit broad statutory exceptions to collusive behaviors. The Organization for Economic Cooperation and Development ("OECD") Recommendation against hard-core cartels also confirms that price-fixing falls into one of the categories of the four hard-core cartels.[15] Especially, price-fixing among competitors is generally subsumed under the *per se* illegality in the competition law jargon. However, a particular conduct cannot be conclusively characterized as price-fixing that is subject to the *per se* rule unless there is full awareness of the given industry's market practice.[16] Such awareness can be reached only by having had accumulated considerable experience in the given industry. Accordingly, despite the universal condemnation of price-fixing in competition law, a specific conduct can be actually categorized into varying classes, i.e., naked restraint or ancillary restraint, in individual countries. Therefore, if a country characterizes an activity as a naked restraint while other countries view it as an ancillary restraint, a dispute among the countries is inevitable, and, concomitantly, a significant amount of confusion will ensue.

This conflict and confusion in international economy is exacerbated with respect to anticompetitive behaviors subject to "rule of reason", especially in the area of M&A review. As the *GE-Honeywell* case demonstrates, the extraterritorial application of the domestic M&A standard can bring about enormous tension among the countries concerned.[17] This case eloquently illustrates how different competition

15) Recommendation of the Council Concerning Effective Actions Against Hard Core Cartels (C(98)35/FINAL, March, 25, 1998).

16) Herbert Hovenkamp, *Federal Antitrust Policy*, 2nd edition, (1999), at 251-256.

17) On May 2, 2001, the Antitrust Division of the United States cleared the merger with a condition of spinning off overlapping helicopter businesses whereas on July 3, 2001, the European Commission banned the merger. Press Release, United States Department of Justice Requires Divestitures in Merger Between General Electric and Honeywell, at <http://www.usdoj.gov/art/public/press_releases/2001/8140.htm. See also Case COMP/M.2220>, General Electric/Honeywell v. Commission (2001), available at <http://europa.eu.int/competition/mergers/cases/decisions/m2220_en.pdf>. For reactions to the EU Commission's decision, See, e.g., Deborah P. Majoras, "Deputy Assistant Attorney General Antitrust Division, U.S. Department of Justice, GE-Honeywell: The U.S Decision"(Before the State Bar of Georgia Nov. 29, 2001); William J. Kolasky, "Deputy Assistant Attorney General, Conglomerate Mergers and Range Effects: It's a Long Way to Go from Chicago to Brussels"(Remarks Before the George Mason University Symposium, Nov. 9, 2001).

authorities interpreted the same standard in diametrically opposite ways.[18)]

Therefore, it is necessary to reconsider the validity of the "unlimited" extraterritorial application of the competition law and seriously cogitate upon incorporating a principle limiting such application, thereby averting preventable conflict of interests from taking place. With this in mind, the United States, for instance, has adopted the so-called jurisdictional rule of reason set forth in Article 403[19)]of the Restatement of Foreign Relations Law ("Restatement").[20)] The jurisdictional rule of reason, which is predicated on the notion of international comity,[21)] sets out that when exercising the jurisdiction to prescribe laws, the country should consider the interests of foreign countries as well as various other essential factors.[22)] It is notable that Judge Hand had also conceded the need for limitations to

18) Compare the following views. The first two articles are critical of the EU Commission's decision while the latter two articles vindicate its decision. Donna E. Patterson et al., "Transatlantic Divergence in GE/Honeywell: Causes and Lessons." *Antitrust* Fall 2001 vol. 16. no.1. at 18-26.; Eric Emch, "GECAS and the GE/Honeywell Merger: A Response to Reynolds and Ordorver", 72 *Antitrust L.J*. 233 (2004); John Deq. Briggs et al., "A Bundle of Trouble: The Aftermath of GE/Honeywell", *Antitrust* Fall 2001 vol.16 no.1, at 26-31; Robert J.Reynolds et. al., "Archimedean Leveraging and the GE/Honeywell Transaction", 70 *Antitrust L. J*. 171 (2002). The EU Commission reached the decision primarily based on its "portfolio effects theory."

19) Relating to a concrete application of the jurisdictional rule of reason regarding anti-monopoly laws, Article 415 has separate stipulations.

20) In the EU, the principle of proportionality would be a candidate for limiting over-exorbitant extraterritorial application of competition law (Alexander Layton, *supra* note 6, at 322). But in *Gencor*, the Court of First Instance dismissed the claim based on the principle of proportionality.

21) In the context of the OECD recommendations, the concept of comity describes a voluntary policy calling for a country to give full and sympathetic consideration of other countries' important interests while deciding the enforcement of its own competition law. See OECD Recommendation Concerning Cooperation Between Member countries on Anticompetitive Practices Affecting International Trade (1995)

22) The eight factors that are enumerated are as follows: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connection, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to the regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation with the traditions of the

domestic jurisdictional power customarily observed by states and also established by Conflicts of Laws.[23)]

Some would argue that the majority opinion in the U.S Supreme Court's *Hartford Fire* decision[24)] simply endorsed the effects doctrine while declining to apply the jurisdictional rule of reason.[25)] However, in subsequent cases some U.S. lower courts did consider the comity factor, as suggested by the Restatement, and restrained from aggressively expanding their jurisdictional power based on the effects doctrine.[26)] In fact, the majority opinion in *Hartford Fire* did not blindly preclude the possibility of applying the jurisdictional rule of reason, but rather declined to apply such a rule because it seemed to believe that there were no true conflicts of laws between the United States and Great Britain that would trigger the issue to be determined by the jurisdictional rule of reason. The Supreme Court held that there was nothing in the British laws that compelled the British reinsurers to violate U.S. antitrust law. Thus, one could argue with some force that the Supreme Court has left room for the interpretation that in cases of "true conflicts," a court's exercise of its jurisdiction may be restrained pursuant to the jurisdictional rule of reason.[27)] Indeed, the Supreme Court added that "[w]e have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of comity."[28)] Of course, by strictly interpreting

international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.

23) 148 F.2d 416 (2d Cir. 1945), at 443: "Nevertheless, it is quite true that we are not to read general words, such as those in this Act [Sherman Act], without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'".

24) Hartford Fire Insurance Co. v. California, 113 S.Ct. 2891 (1993).

25) For this argument, see Philip Trimble, " Supreme Court and International Law: The Demise of Restatement 403", 89 *Am.J.Int'l L*. 53 (1995).

26) See for e.g., In re Maxwell Communication Corp. plc. by Homan, 93 F.3d 1036 (2nd Cir.1996); Carpet Group Intern. V. Oriental Rug Imports Ass'n, Inc., 227 F.3d 62 (3rd Cir.2000); Den Norke Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 429 & n.13 (5th Cir. 2001).

27) Andereas F. Lowenfeld, "Conflict, Balancing of Interest, the Exercise of Jurisdiction to Prescribe: Reflections on the Insurance Antitrust Case", 89 *Am.J.Int'l L*. 42 (1995). For a similar position, see Benjamin B. Ferencz, "Extraterritorial Application of American Law after the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble", 89 *Am.J.Int'l L*. 750 (1995).

28) 509 U.S. 764, at 784.

the definition of the "cases of true conflicts" as to mean "legal compulsion," the Supreme Court has indeed significantly reduced the possibility of applying the jurisdictional rule of reason rather than simply resorting to the effects doctrine.

In addition, although the 1995 International Antitrust Guidelines ("Guidelines"), jointly announced by the U.S. Department of Justice and the U.S. Federal Trade Commission, recognizes the effects doctrine by citing *Hartford Fire*, they confirmed that the jurisdictional rule of reason is the valid international legal principle[29] by stating that consideration should be given to the various essential elements enumerated in *Timberlane*[30] when deciding on jurisdictional issues. Also, it is interesting to note that the United States, which arguably has an explicit stipulation on the exercise of jurisdiction regarding "foreign commerce" in the Sherman Act, also recognizes the leeway for a limitation of the effects doctrine.

From the viewpoint of international law, one could say that the effects doctrine is derived from a strictly "consent-based international law" that was rampant in the 19th century. The "consent-based international law" is well revealed in the Permanent Court of International Justice ("PCIJ") judgment of *Lotus* case that states that acts not prohibited by international law can be presumed to be permitted.[31] However, considering that minimizing interstate conflicts is in actuality the most important ideal of international law, the approval of "unlimited" concurrent jurisdiction is incontestably not a desirable outcome.[32] Accordingly, efforts to avoid frictions arising from conflicts in the course of exercising jurisdiction based on the effects doctrine are needed.

The principle of jurisdictional rule of reason should be more affirmatively examined regardless of the seemingly adverse decisions rendered by cases like *Hartford Fire*. The jurisdictional rule of reason involves two aspects - negative comity and positive comity. Restraining the exercise of jurisdiction constitutes negative comity whereas exercising jurisdiction in response to the request of other countries constitutes positive comity. Positive comity is the newer standard between

29) Timberlane Lumber Co. v. B ank of Am. Nat'l Trust & Sav. Ass'n, 749 F.2d 1378 (9th Cir. 1984).

30) Antitrust Enforcement Guidelines for International Operations (1995).

31) See The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9, at 25 (Sept. 7).

32) See W. Michael Reisman, *Jurisdiction in International Law* (1999).

the two types of comity,[33] and was introduced into bilateral agreements on the cooperation of competition law enforcement, such as the agreement concluded between the U.S. and EU.[34] Both negative and positive comities help to reduce the number of situations of extraterritorially applying a state's domestic competition law. The present debates on the convergence of international competition law in the OECD and World Trade Organization ("WTO")[35] can be viewed as an initiative to reduce unnecessary conflicts of jurisdiction by systemizing the principles of negative and positive comities. In short, although increased interstate interdependence may justify the necessity and appropriateness of the effects doctrine in theory, it is not a complete theory in and of itself, and can be endlessly limited in its extension by the "comity" notion.

Consequently, it can be argued that the value of the Court's Decision with respect to the graphite electrodes as a precedent is curtailed since it has acknowledged the justness of the effects doctrine without taking into consideration the essential limitation to the theory. This unlimited adoption of the effects doctrine may invite much criticism for the aforementioned reasons. Nevertheless, the graphite electrodes case did not create tension among the countries concerned since the defendants had already been sanctioned for infringement under the U.S. Sherman Act Article 1, EU competition law Article 81, EEA Agreement Article 53 and Canada Competition Law Articles 45 and 46. Therefore, there was little basis to resort to the jurisdictional rule of reason based on the comity principle in this particular case. Since the act was

33) Mitsuo Matsushita, "International Cooperation in the Enforcement of Competition Policy", 1 *Wash. U. Global Stud. L. Rev*. 463, 470 (2002) ("Positive comity means that a party to an agreement invokes, upon request of the other, its domestic competition law to remove anticompetitive practices that occur within its jurisdiction and that adversely affect the other part"). For more detail, refer to CLP Report on Positive Comity (DAFFE/CLP (99)19, OECD).

34) Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws, June 4, 1998, 37 I.L.M. 1070; Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, Oct. 7, 1999, available at <http://www.usdoj.gov/atr/public/international/docs/3740.pdf>.

35) See Youngjin Jung, "Modeling WTO Dispute Settlement System in An International Antitrust Agreement", *Journal of World Trade*, 2000 Feb. See also Eleanor M. Fox, "International Antitrust and the Doha Dome", 43 *Va. J. Int'l L.* 911 (2003).

already recognized as unlawful by the above-mentioned state laws, "true conflicts" between Korea and foreign countries' criterion schemes in the exercises of jurisdictional power of KFTC will most likely not arise. Hence it is not necessary for KFTC to restrain the exercise of jurisdiction out of respect for the criterion scheme of foreign states.

B. ***Domestic Law's Admonition*** *- Principle of nulla poena sine lege*

The Court's Decision in the graphite electrodes case poses a unique problem when taking into account the question of whether the extraterritorial application of MRFTA based on the effects doctrine is legally permitted in the Korean legal system. The Court expounded the support for the effects doctrine primarily based on the statutory interpretations of Article 1, Article 2(1) & 2(8) and Article 19(1) of MRFTA. Article 1 states that "The purpose of [MRFTA] is to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers, and to strive for a balanced development of the national economy by preventing the abuse of market-dominating positions by enterprises and the excessive concentration of economic power, and by regulating undue collaborative acts and unfair trade practices." Article 2(1) states that "The term "enterpriser" means a person (corporation) who conducts a manufacturing business, service business, or any other business." The concept of enterpriser is important because MRFTA applies only to the enterpriser(s) within the meaning of Article 2(1). Article 2(8) defines "relevant market" in competition law jargon as "an area in which any competitive relation exists or may exist, by the subject, stage, or geographical area of such trade. And Article 19(1) prohibits unfair collaborative acts which are very similar to "contract, combination and conspiracy" banned by Article 1 of Sherman Act. The Court's logical flow is as follows. The Court first determined that Article 2(1), 2(8) and 19(1) of MRFTA specifically limit its respective applicable scope to neither the domestic enterpriser nor domestic market. Then the Court recognized the jurisdiction based on a broad reading of the purpose of MRFTA as codified in Article 1.

The Court explains that while all the said provisions of the current MRFTA contain no specific stipulation on whether or not to apply jurisdiction to a foreign entity's acts that takes place in a foreign country, the extraterritorial application of

MRFTA should be recognized since there is also no provision limiting its application to a domestic entity or to the acts occurring inside the country and taking into consideration the purposes enumerated in Article of MRFTA. Related to Article 1 of MRFTA, the Court specifically states that, in order to achieve the objective of the MRFTA, i.e., promoting national economic development in a balanced manner, it is necessary to promote fair and free competition not only in domestic transactions but also in international transactions.

However, one must first inquire whether the logic of extraterritorial application of MRFTA based on Article 1 and 2 is strong enough. From the perspective of Korea's legal system as a whole, it is possible to raise the argument that the extraterritorial application is unlawful. For the improper concerted act in the present case, criminal sanctions in the form of imprisonment up to the maximum of three years or a fine up to maximum of 200 million Korean won can be imposed under MRFTA. Article 8 of the Korean Criminal Law stipulates that "General Rules" provisions, especially the ambit of Criminal Law, should be applied in criminal acts in the case there are no specific provisions stating otherwise in other laws. Accordingly, since there are no other specifications regarding the range of application in MRFTA, it can be interpreted that the provisions governing the scope of application in the Criminal Law should be applied.

With respect to the scope of application of Korea's Criminal Law, the territorial principle and the nationality principle are adopted as basic principles. Under the premise that Criminal Law does not in principle apply to crimes committed by a foreigner in a foreign country, Criminal Law provides that its provisions will only be applied extraterritorially to certain crimes as an exception to the general principle. Namely, Article 5 of the Criminal Law states that "this law applies to the foreigners who commit the following stated crimes outside the Korean territory" and then enumerates "crimes concerning insurrection," "crimes concerning foreign aggression," "crimes concerning currency" and other serious felonies. Furthermore, Article 6 of Criminal Law stipulates that it has jurisdiction over foreigners who commit crimes other than those stated in Article 5 against Korea or Koreans outside the territory of Korea, and thus recognizes as an exception its right to exercise jurisdiction on certain crimes carried out by foreigners in foreign countries.

Accordingly, the territorial principle and the nationality principle form the basis of Korea's Criminal Law, and in exceptional cases Korea's criminal jurisdiction may

cover crimes committed by a foreigner in a foreign country. Because MRFTA does not provide for its extraterritorial application, the jurisdictional principles set forth in the Criminal Law should apply. Since Article 5 does not list the criminal acts laid down under MRFTA, the territorial principle and the nationality principle jurisdiction govern the application scope of MRFTA.

Of course, although arguments can be made as to whether this kind of interpretation of the substantive Korean law is sufficient to deny extraterritorial application, it seems unreasonable for the Court in the Decision to randomly draw out its right to exercise extraterritorial application solely by statutory interpretation of Article 2(1), 2(8) and 19(1) of the MRFTA and the purpose of the MRFTA embodied in Article 1.

Therefore, in order to resolve this kind of issue of the principle of *nulla poena sine lege*, it was necessary to revise the MRFTA and consider a way to stipulate that an act of violation of the MRFTA was also applicable to acts in a foreign country.

III. Quasi-Judicial Agency's Adjudicative Jurisdiction

In the case a quasi-judicial administrative agency like the KFTC exercises jurisdictional power over a foreigner, a question may arise as to whether the existence of the jurisdiction to prescribe is sufficient or the existence of adjudicative jurisdiction is also necessary. Jurisdiction in international law can be classified into a variety of standards, but the classification method that has been adopted by the Restatement, i.e., the jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce, is the most common.

Given that the issue of adjudicative jurisdiction involves whether the judicial agency can submit foreign parties to its own domestic legal proceedings, it is important to determine whether the court has such jurisdiction. Here adjudicative jurisdiction does not only refer to the court's judicial jurisdiction. Attention should be directed to the expression "adjudicative" jurisdiction, as the term "judicial" jurisdiction is not used in the Restatement.[36] In the Restatement, jurisdiction of an

36) Restatement sec. 401(b): jurisdiction to adjudicate, i.e., to subject persons or things to the process of its courts or *administrative tribunals*, whether in civil or in criminal proceeding, whether or not the state is a party to the proceedings (emphasis added).

administrative agency performing quasi-judicial functions, like the KFTC, is included in the jurisdiction to adjudicate. Although KFTC is a subsidiary institution under the Office of the Prime Minister, it is recognized to possess the characteristics of an independent, quasi-judicial judgment agency, and these legal principles should apply.

Accordingly, in order for KFTC to exercise jurisdiction regarding anti-competitive acts by a foreigner in a foreign country, it should have both adjudicative jurisdiction and prescriptive jurisdiction. The personal jurisdiction is a more preferred term in judicial practice, although they are not identical. The above-mentioned debate regarding the effects doctrine's application possibility is more about whether Korea can legislate to regulate an unjust cooperative act of a foreign entity in a foreign country. Moving away from the orthodox territorial principle existence principle presented in the *Pennoyer v. Neff* decision,[37] the current U.S. standard regarding the exercise of adjudicative jurisdiction is established in the substantial standard of "minimum contacts"[38] presented in the 1945 *International Shoe Co. v. Washington* case.[39] In the United States, the theory of adjudicative jurisdiction has developed with efforts to restrain the individual states' excessive exercise of jurisdiction by relying on the constitutional legal principle of due process.[40] In Europe, the Brussels Agreement[41] took effect on March 1, 2002 to deal

37) 95 U.S. 714 (1877).

38) The theory has developed into a two-pronged test. Namely, (i) there must be some "minimum contact" with the forum state (or district) resulting from an affirmative act of the defendant by which he "purposefully avails" himself of the privilege of conducting activities there and invoke the benefits and protection of the forum's laws (e.g. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985). (ii) it be fair and reasonable to require the defendant to come into the forum state (or district) and defend the action (e.g., Congoleum Corp. v. A.G., 729 F.2d 1240, 1243 (9th Cir. 1984).

39) 326 U.S. 310 (1945): "due process 'requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he has certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice..."'

40) For a critical opinion on the application of the constitutional law's due process principle, see Russell, J. Weintraub, A Map out of the Personal Jurisdiction Labyrinth, 28 U.C.Davis L. Rev. 531 (1995).

41) Council Regulation EC/44/2001 (published in O.J. Eur. Comm. (No L 12)).

with the adjudicative jurisdiction and adjudicative enforcement in the form of Council Regulation. Since the Agreement was originally prepared as an agreement centered on the continental legal systems, and a European "Constitution" explicating basic human rights does not yet exist, there can be no constitutional legal limitation unlike in the United States. Henceforth, the scope of adjudicative jurisdiction recognized in Europe is generally considered to be wider than in the United States However, it is not disputable that the Brussels Agreement recognizes that substantial relationships must be acknowledged for an adjudicative jurisdiction to be exercised.

A new provision was introduced into the wholly amended Korean "Private International Act" of 2001, reflecting the established jurisprudence on international jurisdiction. Article 2 of the Act provides that "in case the concerned party or case in dispute has a substantial relationship with Korea," the court has international adjudicative jurisdiction. In principle, there is no distinction between public and private law in the United States, and henceforth the above theory of adjudicative jurisdiction extends to administrative cases. On the other hand, the Brussels Agreement and Korea's international private law apply only to civil and commercial affairs. Therefore, the standard for exercising adjudicative jurisdiction by a quasi-judicial agency like KFTC can only be determined by taking into consideration the court decisions that are yet to be accumulated.

The Court held that it has the "jurisdiction to adjudicate,"[42] over the foreign defendants by applying the MRFTA, suggesting that the Court might have taken into consideration issues with respect to KFTC's "adjudicative jurisdiction." The Court merely touched upon the propriety of the effects doctrine, while refraining from separately expounding on the adjudicative jurisdiction of KFTC. Yet, it is notable that the Court has consistently used the term "jurisdiction to adjudicate." As such, it is possible to interpret that the Court might have indirectly revealed its opinion regarding the standard of exercise of adjudicative jurisdiction of the quasi-judicial body.

Accordingly, the above holding can be interpreted to mean that the Court recognizes the adjudicative jurisdiction, namely the exercise of personal jurisdiction, if there are connectors as "intent" or "direct effects" as set forth in the previous

42) Seoul High Court Decision, August 26, 2003 (2002 nu 14647), at 17-19.

discussion of the effects doctrine. In this regard, the principle of adjudicative jurisdiction that is applied to civilian and commercial affairs can be analogized to apply to the issue of adjudicative jurisdiction of a quasi-judicial body. This particular attitude the Court is similar to that of the Restatement Article 421, section 2, subsection j, affirming the existence of the adjudicative jurisdiction if the person carries on an activity having a substantial, direct and foreseeable effect within the forum state.[43] Since such connectors are actually the same as those identified in the above-mentioned effects doctrine, an argument could be made that if the jurisdiction to prescribe is recognized based on the effects doctrine,[44] the adjudicative jurisdiction can automatically be acknowledged. The minimum contact theory in the U.S. adjudicative jurisdiction theory affords some weight to the fact that a certain activity is "purposeful." The connectors identified in the effects doctrine pertain to the typical instances of intentional acts.[45]

It is regrettable that the Court does not clearly explicate its reasoning on whether KFTC has jurisdiction to adjudicate over the foreign defendants.

IV. Service of Process

The premise of the exercise of adjudicative jurisdiction mentioned above is a service on the defendants.[46] The MRFTA does not provide provisions regarding

43) In general, a state's exercise of jurisdiction to adjudicate with respect to a person or thing is reasonable if, at the time jurisdiction is asserted; (j) the person, whether natural or juridical, had carried on outside the state an activity having a substantial, direct, and foreseeable effect within the state, but only in respect of such activity.

44) Restatement, 402(1)(c).

45) Consolidated Gold Fields, PLC v. Anglo American Corp. of South Africa, 698 F. Supp. 487 (S.D.N.Y.1988), aff'd in part and rev'd in part sub nom. Consolidated Gold Fields PLC v. Minorco, S.A., 871 F.2d 252 (2d Cir.), cert. dismissed, 492 U.S. 939 (1989). The district court held that "where [defendant's] "intentional and allegedly...[unlawful], actions were expressly aimed at" the United States... and the company knew and intended that its actions would have a direct impact on [the acquired entity] with whatever consequences that impact might have for competition in the United States, [the defendant] "must 'reasonably anticipate being haled into court there' to answer for" its actions (id. At 496 quoting Calder, 465 U.S. at 789, and World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

46) Combs v. Nick Garin Trucking, 825 F.2d 437, 442 (D.C.Cir.1987)

service of process. However, Article 3(2) of the Regulations on the Administration and Procedure of KFTC's Proceedings (Regulation), which was promulgated in accordance with Article 55 section 2 of MRFTA, stipulates that service of process in KFTC's investigation and proceedings should refer to the regulations of Administrative Procedure Act ("APA") on document delivery. According to the regulations of APA, in contrast to that in Civil Procedure Act, delivery by mail is not an exception to the service method but enjoys the same status as hand delivery.[47] The APA Article 3, section 2, no. 9 and its Enforcement Decree Article 2, section 6 stipulate that APA does not apply to competition law cases subject to MRFTA. However, the Court held that these provisions do not preclude application of the provision of APA on service of process when the Regulation provides that it should follow the method of service of process set forth in APA. On this reasoning, the Court ruled that KFTC complied with APA and the interior guideline of "investigation and management of a foreign entity's act of violation of MRFTA" by delivering the requests for opinion in response to the investigation report, a written notice for the plenary meeting of Commissioners, and the authentic text of the decision to the address of the defendants by registered mail

Nevertheless, the Court ruled that this kind of service method by registered mail is validly limited to cases enforced within the territory governed by Korea and that it is generally not permitted in the case of a foreigner residing in a foreign country. So the Court has found it difficult to accept each mail delivered to the defendants by registered mail. The Court states that since KFTC is working in the capacity as a quasi-judicial organ and its decision has the characteristics of a quasi-judicial judgment, one cannot view service of process done by KFTC simply as a matter of administrative disposal, and the "strict" delivery principle applied in civil judgment process must be employed.

The strict position regarding delivery by mail reflects[48] the position of the

47) According to APA Article 14, section 1, delivery is stipulated to be made by mail, hand delivery or by info-communications use and other methods, to the recipient's address, residence, place of business, office or email address so that between delivery by mail and by hand, there is no difference in the order of priority of delivery. The Civil Procedure Act has delivery by service as the reigning principle (Art. 178), and delivery by mail in exceptional cases stands in contrast to APA (Art. 187).

48) Civil litigation law Art. 174. See 4A C. Wright & Miller, *Federal Practice and Procedure sec. 1135*, 2d ed. (1987).

continental law's civil procedure that has chosen the principle of delivery by the court as an act of the exercise of jurisdictional competence.[49] According to Article 10, section (a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters ("Convention"), to which Korea is a party, if the country of destination does not oppose, this Convention does not interfere with the right to send judicial documents by mail directly to those residing in a foreign country. Yet regarding this matter, Korea has attached a reservation to the Convention and henceforth such an article does not apply. Likewise, Korea's International Civil Cooperation law does not recognize direct delivery method by mail. The Korean Supreme Court also maintains a strict position regarding consular delivery. According to the Vienna Convention on Consular Relations, the consul residing in a foreign country can deliver a judicial document or an extrajudicial document on behalf of the accrediting country's court but only to its citizens, and in case that the person to be serviced is not its own citizen, it is international comity not to enforce service of process directly by the consul. The Court has taken a strict position regarding delivery by holding that even if the countries are parties to the above Convention, they cannot adopt the above method if they clearly had made reservations concerning it.[50] Such a strict position differs from the position of the Anglo-American legal system which recognizes delivery by registered mail by the parties concerned.[51]

However, the Court has ruled that because KFTC does not have a method of delivery of the decision and others through the Korean consul or foreign country's competition authorities or courts, delivery can be made through the method of delivery by public announcement, since this situation falls under "in case of impossibility of service" set forth in the delivery stipulation of APA. Based on this

49) Lee, Shi-Yoon, *civil litigation law* (1997) 6654, at 518.

50) Supreme Court Decision, July 14, 1992 (92 da 2585)

51) For instance, U.S. Federal Rules of Civil Procedure Rule 4(f)(2)(C)(ii) F.R.Civ. P.: Rule 4(f)(2)(C) provides that this method of service may be used unless prohibited by the law of the foreign country. American courts have held that formal objections to service by mail made by countries party to a multilateral treaty or convention on service of process at the time of accession or subsequently in accordance with the treaty are honored as a treaty obligation, and litigants should refrain from using such a method of service. See DeJames v. Magnificence Carriers, In., 654 F.2d 280 (3d Cir. 1981).

reasoning, the Court has endorsed KFTC's delivery by public announcement. Since delivery by public announcement does not signify that delivery has actually been executed and it is a legal fiction of delivery,[52] it must be interpreted very strictly. Accordingly, the requirement "in case of impossibility of service" under APA must also be strictly interpreted.

In the Decision, the Court in interpreting "in case of impossibility of service," which is the condition under APA's delivery by public announcement, seems to have greatly referred to the conditions of delivery by public announcement under the Civil Procedure Act. Article 194 of the Civil Procedure Act dealing with conditions of delivery by public announcement stipulates that delivery by public announcement is possible when Article 191 cannot be followed or when following it would have no legal effect. And Article 191 stipulates that delivery that must be made in a foreign country can be entrusted by the judge to the Korean ambassador, diplomat or consul residing in that land or to that country's public institution, so that the Court in the "decision" seemingly had in mind Articles 191 and 194 for "in case of impossibility of delivery."

Particularly, in light of the holding that that as KFTC acts in the capacity as a quasi-judicial body it should apply the standard of service of process similar to that of civil court procedure, it should be interpreted for the purpose of maintaining a logical consistency that the requirement "in case of impossibility of service" which is a condition of delivery by public announcement in APA is only satisfied only when it meets the requirement of delivery by public announcement laid down in the Civil Procedure Act. Hence when KFTC provided the notice in this case, it seems desirable that KFTC should have adopted a delivery via Korea's ambassador, diplomat, consul or that country's ministry of Foreign Affairs, at least relying on the Civil Procedure Act, related stipulations and others

The Decision appears to lack logical coherence. First, the Court has adjudicated the legitimacy of delivery by registered mail by referring to the provisions on service of process set forth in the Civil Procedure Act by considering KFTC's status as a quasi-judiciary organization and on the legitimacy of delivery by public announcement based on the delivery stipulation of Civil Procedure Act.

52) Lee Shi-Yoon, *Civil Litigation Law* (1997), at 528.

Nevertheless, the Court appears to have committed a logical discrepancy by suddenly not following Civil Procedure Act's principle of delivery by public announcement and simply accepted the legitimacy of delivery by public announcement by KFTC.

In this case, the dispute regarding the legality of service processed by KFTC results from a fundamental deficiency of the service stipulations under MRFTA regarding a foreign entity residing in a foreign country. In Japan, there was also much discussion regarding the question of the possibility of extraterritorial application of its competition law, but due to the imperfection of delivery stipulations, there were many opinions[53] interpreting that there were procedural hindrances[54] in the extraterritorial application of its competition law. In an effort to remedy this deficiency, in 2003 the Japanese government introduced detailed provisions for service of process into the Japanese Antimonopoly Act. In addition to the current Article 69-2, Articles 69-3 and 69-4 of were codified into the Act. Article 69-3 of the Act stipulates application of Article 108 of the Civil Procedure Act, which provides for delivery to foreign country, and the Article 69-4 of the Act provides that delivery by public announcement may be employed in certain cases. In the United States, where Article 12 of the Clayton Act governs delivery,[55] the courts held that the provision is also applicable to a foreign entity that has its head office in a foreign country.[56]

In sum, it was necessary to introduce provisions that are similar to the delivery provisions of Japan's competition law in order to overhaul the procedural equipments that are necessary to apply the MRFTA extraterritorially.

53) ABA, *Competition Laws Outside the United States* (2001) Chapter 9 (Japan) at 72. See also, Mitsuo Matsushita, "Application of the Japanese Antimonopoly Law to International Transactions 568", in Marco Bronckers et al. eds., *New Directions in International Economic Law* (2000).

54) The former Japanese Antimonopoly Act Article 69, section 2 stipulates to apply Civil Procedure Act's delivery stipulations, but Civil Procedure Act Article 108's delivery stipulation from a foreign country is excluded from the application.

55) Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found [15 U.S.C. sec 22].

56) See e.g., Hoffman Motors Corp. v. Alfa Romeo SpA (244 F.Supp. 70 (S.D.N.Y. 1965)).

V. Going International

The Court's Decision is highly significant in light of the fact that this is the first time in history that a Korean court extraterritorially applied the MRFTA. This Decision should be lauded because the Court recognized explicitly the increasing international economic interdependence due to the ongoing globalization trend, while concomitantly appreciated the changed circumstances in which the Court could no longer strictly maintain territorial and nationality principles that constitute the classical foundation of the exercise of jurisdiction.

However, the Court has yet to develop a more tempered appreciation of the effects doctrine since an "unlimited" effects doctrine is likely to cause serious tension with close trading partners. In the United States, despite the seemingly "sweeping" adoption of the effects doctrine in *Hartford Fire*, the Department of Justice and Federal Trade Commission, the competition law watchdogs in the United States, have adopted a jurisdictional rule of reason. Although it would be more difficult to apply jurisdictional rule of reason in private antitrust suits as in *Hartford Fire*, administrative agencies should take into consideration comity factors before exercising their jurisdiction extraterritorially. In this regard, something more is to be desired in the Decision.

The Court's Decision could also be criticized for a couple of rather technical reasons. First, the Decision ignored the fact that according to Korea's constitutional law, the KFTC cannot exercise jurisdiction that would ensue criminal sanctions in violation of the principle of *nulla poena sine lege*. Second, the Decision could be faulted for its unreasonable interpretation of the law regarding the set of delivery provisions laid down in the administrative procedural law. In other words, it is very problematic that the Court recognized for a highly dubious reasoning the legality of delivery through public announcement aiming at the alleged violators residing in a foreign country.

To rectify such issues, the Korean government has introduced three provisions that are to take effect on April 1, 2005 and bolster KFTC's capability in the international dimension. As noted earlier, Article 2-2 has been newly added to MRFTA that codifies the extraterritorial application of the Korean competition law. Also Article 53-3 has been newly inserted into MRFTA that provides for service of process by which the documents can be delivered through listing on one or more of

the following means: Official Gazette, a public bulletin, a bulletin board, and a daily newspaper. This is despite the regulations set forth in APA in the event that the foreign enterprisers residing in a foreign country refuses to designate a domestic agent. It is expected that these amendments would prevent the situation where KFTC exercised jurisdiction arguably in a manner that would be unlawful in the absence of these amendments.

Apart from these amendments, Article 36-2 has been added to empower KFTC to enter into an agreement with foreign governments with a view to enforcing MRFTA. Notably, this Article has adopted "positive comity" by stating that "KFTC may assist in law enforcement of the foreign government in accordance with the bilateral agreement on competition law enforcement or under the guarantee of the foreign country on a reciprocal basis."[57] As the concept of positive comity is codified into MRFTA, an argument can be made that there is even a stronger need for moderation of exercising jurisdiction extraterritorially by virtue of negative comity.

Korean competition law has recorded unprecedented development for its relative short history. Through the Court's Decision and the subsequent legislative changes, Korea has jumped onto to the bandwagon of globalization in the international competition arena.

Topics: MRFTA, extraterritorial application, prescriptive jurisdiction, adjudicative jurisdiction, service of process

57) In the United States Congress enacted the International Antitrust Enforcement Assistance Act ("IAEAA") in 1994, which envisions agreements permitting either signatory's antitrust authority, upon other's request, to share the confidential information it possesses or to employ compulsory processes to gather the information on the requesting authority's behalf 15 U.S.C § 6204, §§ 6201-6203, §§ 6205-6212. However, although the US has entered into bilateral antitrust enforcement assistance agreements with a number of countries including the EU and Japan, no major trading partners except Australia have met the original purpose of IAEAA. See Agreement on Mutual Antitrust Enforcement Assistance, April 27, 1999, U.S.-Austl., 39 I.L.M. 1501.