

# EXTRATERRITORIAL APPLICATION OF KOREAN COMPETITION LAW

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## PART I – INTRODUCTION

On March 20, 2002, the Korea Fair Trade Commission (KFTC) issued corrective orders and imposed administrative fines against six foreign manufacturers of graphite electrodes for their cartel activities.<sup>1</sup> The cartel activities by the manufacturers included an agreement made outside of Korea on the prices of graphite electrodes.<sup>2</sup> This was the first time the KFTC applied Korean competition law extraterritorially.<sup>3</sup> Accordingly, this case has triggered heated debates and interest within the Korean antitrust community in regard to the extraterritorial application of Korean competition law.

Korean competition law applies extraterritorially when conduct outside of Korea has a competition restraining effect on the Korean market.<sup>4</sup> In the past, it was the practice of the KFTC not to apply Korean competition law extraterritorially. This was because the KFTC's initial focus was on domestic competition issues,<sup>5</sup> and also because the Monopoly Regulations and Fair Trade Act (MRFTA) did not contain

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<sup>1</sup> Press Release, Korea Fair Trade Comm'n, Korea Fair Trade Commission Imposes Surcharge of U.S. \$8.5 million on International Cartel of Graphite Electrodes Manufacturers from the U.S., Germany, and Japan (Mar. 21, 2002), <http://ftc.go.kr/eng/> (follow "news" hyperlink; then follow "press releases" hyperlink).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Judgment of Aug. 19, 2004, 2002 Nu 6110 (Seoul High Ct.) at 16 (S. Korea).

<sup>5</sup> See JOSEPH SEON HUR, COMPETITION LAW/POLICY AND KOREAN ECONOMIC DEVELOPMENT 268-69 (Publication Ziumm, Ltd. 2006).

express provisions as to the extraterritorial application of Korean competition law.<sup>6</sup>

This passive attitude of the KFTC has undergone a significant change as Korean consumers and companies have increasingly been injured by the anticompetitive acts of foreign companies conducted outside of Korea.<sup>7</sup> Such increase in damages caused by international cartels led the KFTC to start an investigation of the graphite electrodes international cartel<sup>8</sup> and the international vitamin cartel.<sup>9</sup> The KFTC ultimately issued corrective orders against the cartels.<sup>10</sup> On December 31, 2004, in order to actively facilitate the enforcement of the extraterritorial application of Korean competition law, the KFTC established express provisions under the MRFTA.<sup>11</sup> The KFTC hoped that the provisions would solve various procedural problems that may arise in the course of the extraterritorial application of Korean competition law. In this regard, it is likely that, due to the globalization and balkanization of the world economy, the extraterritorial application of Korean law will become a major project for the KFTC. This article introduces and explains the history and the current status of the extraterritorial application of Korean competition law.

## PART II – HISTORY AND ISSUES IN EXTRATERRITORIAL APPLICATION OF KOREAN COMPETITION LAW

### *A. Debates and Legislative Procedures Regarding the Extraterritorial Application of Korean Competition Law*

Prior to applying Korean competition law extraterritorially under the MRFTA, the KFTC used indirect methods in its extraterritorial application of the law. For example, Article 32 of the MRFTA indirectly achieved this purpose by granting the KFTC the power to review international contracts between foreign companies and Korean

<sup>6</sup> See DOGJEOMGYUJE MICH GONGJEONGGEOLAE-UI GWANHAN BEOBLYUL [MONOPOLY REGULATION AND FAIR TRADE ACT (MRFTA)] Law No. 7315 (2004) (S. Korea).

<sup>7</sup> Memorandum from the Korean Fair Trade Comm'n on Korea's Experience in Attacking the International Cartel and the Need for International Cooperation to the Org. for Econ. Co-operation & Dev. (May 2002) (on file with author).

<sup>8</sup> 2002 Nu 6110 at 8.

<sup>9</sup> Judgment of Nov. 24, 2004, 2003 Nu 9000 (Seoul High Ct.) at 10 (S. Korea).

<sup>10</sup> 2002 Nu 6110 at 8; 2003 Nu 9000 at 24.

<sup>11</sup> MRFTA arts. 2-2, 36-2, and 53-3.

enterprises.<sup>12</sup> Further examples can be found in the KFTC's investigation or issuance of preventive orders against Korean entities of foreign companies in cases where such foreign companies engage in competition restraining acts.<sup>13</sup> However, such indirect enforcement methods have only affected domestic subsidiaries of foreign companies headquartered abroad, rather than affecting the group as a whole.

Well aware of such limitations, since 1997, the KFTC has engaged in research on the extraterritorial application of Korean competition law.<sup>14</sup> As a result, in October 2000, the KFTC established Guidelines on Investigation and Treatment of Foreign Enterprise's Violation of Monopoly Regulation and Fair Trade Act (Guidelines).<sup>15</sup> The Guidelines provide that foreign companies will be examinees (or defendants) for the purposes of the Act, even in cases where they do not have places of business in Korea.<sup>16</sup> The Guidelines also cover the notice and review procedure of foreign companies.<sup>17</sup> Despite the Guidelines, however, the MRFTA did not have provisions concerning extraterritorial application;<sup>18</sup> and therefore, controversy as to the extraterritorial application by the KFTC continued since the Guidelines are merely administrative rules while the MRFTA is law. Where a law lacks a provision concerning extraterritorial application, such provision within an administrative rule cannot be effective. This distinction between laws and rules proved to be especially problematic in regard to the service of document<sup>19</sup> to foreign companies and the KFTC's investigation into acts of such companies. Thus, it comes as no surprise that absence of legal provisions regarding the extraterritorial application of Korean competition law was the source of much legal controversy.

Finally in December 2004, by amending the MRFTA, the KFTC established legal grounds for extraterritorial application of domestic

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<sup>12</sup> HUR, *supra* note 5, at 269.

<sup>13</sup> *Id.* at 221-24.

<sup>14</sup> *Id.* at 270.

<sup>15</sup> *Id.*

<sup>16</sup> OEGUGSA-EOBJA-UI GONGJEONGGEOLAEBOEB WIBANHAENG-WI-E DAEHAN JOSA MICH CHEOLJICHIM [GUIDELINES ON INVESTIGATION AND TREATMENT OF FOREIGN ENTERPRISE'S VIOLATION OF MONOPOLY REGULATION AND FAIR TRADE ACT] art. 3 (2000) (S. Korea).

<sup>17</sup> *Id.* art. 4.

<sup>18</sup> See HUR, *supra* note 5, at 268-69.

<sup>19</sup> Service of document is equivalent to service of process. See, e.g., BLACK'S LAW DICTIONARY 1400 (8th ed. 2004).

law.<sup>20</sup> The KFTC, in this regard, also adopted provisions that provided for international cooperation<sup>21</sup> and service of document.<sup>22</sup>

### *B. MRFTA Provisions Relevant to Extraterritorial Application*

The main extraterritorial provisions under the MRFTA are as follows: (i) Article 2-2 (Application to Extra-Territorial Activities),<sup>23</sup> (ii) Article 36-2 (International Cooperation of the Fair Trade Commission),<sup>24</sup> and (iii) Article 53-3 (Service of Document).<sup>25</sup>

Article 2-2 of the MRFTA expressly provides that acts conducted abroad shall be subject to the extraterritorial application of the MRFTA if such acts have an effect on the Korean market.<sup>26</sup> This provision reflects the effects doctrine<sup>27</sup> currently adopted by many countries. Where the extraterritorial application is based on the effects doc-

<sup>20</sup> DOGJEOMGYUJE MICH GONGJEONGGEO LAE-UI GWANHAN BEOBYUL [MONOPOLY REGULATION AND FAIR TRADE ACT (MRFTA)] art. 2-2, Law No. 7315 (2004) (S. Korea).

<sup>21</sup> *Id.* art. 36-2.

<sup>22</sup> *Id.* art. 53-3.

<sup>23</sup> Article 2-2 states that: "Even though any activities are taken place in overseas, if they have any influence on domestic market, the Act shall be applied." MRFTA art. 2-2.

<sup>24</sup> Article 36-2 states that:

The government can sign the agreement for the enforcement of this Act with foreign governments within the scope not violating any laws and interests of the Republic of Korea: (1) Pursuant to the agreement signed under the provision of Paragraph 1, the Fair Trade Commission shall support the law enforcement by foreign government; (2) Even when the agreement under the provision of Paragraph 1 is not signed, the Fair Trade Commission shall support foreign government's law enforcement activity if there is any guarantee from the requesting country that it will also support the same or similar cases requested by the government in the future.

MRFTA art. 36-2.

<sup>25</sup> Article 53-3 states that:

(1) Service of document shall be applied mutates mutandis of Article 14 or 16 of the Administrative Procedural Act; (2) Despite the provision under Paragraph 1, business or business association having the address in overseas shall appoint domestic representative, servicing the document to the same representative. If business or business association concerned did not appoint any domestic representative, they shall disclose the content of document on the internet and on the page at least one of daily newspaper, official gazette, official bulletin and board.

MRFTA art. 53-3.

<sup>26</sup> MRFTA art. 2-2.

<sup>27</sup> See generally William S. Dodge, *An Economic Defense of Concurrent Antitrust Jurisdiction*, 38 TEX. INT'L L.J. 1, 5-6 (2002).

trine, it is very important to delineate the criteria for and the scope of extraterritorial application. Presumably, this will be established through future case law.

Even where extraterritorial application is possible, the procedural provisions such as service of document to foreign companies are also necessary.<sup>28</sup> Such provisions are intended to facilitate the procedural aspect of the extraterritorial application, e.g., procedures for commencing the KFTC investigation,<sup>29</sup> notice of hearing,<sup>30</sup> and delivery of final decision.<sup>31</sup> Accordingly, Article 53-3 of the MRFTA provides that, in principle, the Administrative Procedure Act<sup>32</sup> shall apply to service of document.<sup>33</sup> At the same time, enterprises having their addresses outside of Korea are required to appoint domestic representatives in order to effectuate service of document.<sup>34</sup> However, if such enterprises do not appoint domestic representatives, the KFTC is to announce “the content of document on the [I]nternet and on the page [of at least one] daily newspaper, official gazette, official bulletin and board.”<sup>35</sup>

On the other hand, since extraterritorial application of Korean competition law entails investigation into affairs of foreign companies, more than likely there will be friction between foreign companies and foreign competition authorities. This is especially true in regard to obtaining evidentiary documents in foreign countries and enforcing Korean competition law. In order to prevent such friction, cooperation from foreign competition authorities is imperative. For these purposes, the MRFTA has a provision regarding international cooperation.<sup>36</sup> Under Article 36-2 of the MRFTA, the Korean government is allowed to enter into agreements with foreign governments insofar as such agreements do not violate any Korean laws or interests.<sup>37</sup> Under such agreements, the KFTC may support the enforcement of laws by for-

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<sup>28</sup> MRFTA art. 53.

<sup>29</sup> See HAENGJEONG JEOLCHABEOB [ADMINISTRATIVE PROCEDURE ACT] art. 33, Law. No. 8451 (2007) (S. Korea).

<sup>30</sup> *Id.* art. 21.

<sup>31</sup> *Id.* art. 26.

<sup>32</sup> Administrative Procedure Act is a law that governs the administrative procedure, intended to effectuate the fairness, transparency, and reliability of administration. ADMINISTRATIVE PROCEDURE ACT art. 1.

<sup>33</sup> MRFTA art. 53-3.

<sup>34</sup> *Id.* art. 53-3(2).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* art. 36-2.

<sup>37</sup> *Id.* art. 36-2(1).

eign governments.<sup>38</sup> Furthermore, even where no agreement has been made with a foreign country, the KFTC may nevertheless support a foreign government in its law enforcement efforts when there is a guarantee from the requesting country that it will also support the Korean government in same or similar circumstances.<sup>39</sup>

### C. KFTC Practices and Court Precedents

#### 1. KFTC Practices

Both the graphite electrodes international cartel of 2002 and the vitamin international cartel of 2003 were declared illegal by foreign competition agencies, and the agencies issued corrective orders against the two cartels.<sup>40</sup> The KFTC, however, found it difficult to obtain evidence of the agreement made among the cartel participants because the act of agreement was conducted overseas.<sup>41</sup> Therefore, in its investigation of the graphite electrodes international cartel, the KFTC requested information from the U.S. Department of Justice (U.S. DOJ) and other relevant authorities about where the cartel operated as well as the contents of the cartel's discussions, and its internal documents.<sup>42</sup> In response to the request, the U.S. DOJ replied by letter dated December 5, 2000<sup>43</sup> that it could not provide any documents relevant to the graphite electrodes international cartel until the Eastern District Court of Pennsylvania rendered its decision in *U.S. v. Mitsubishi Corp.*<sup>44</sup> True to its word, after the case was closed, the U.S. DOJ provided the KFTC with disclosed evidences such as records of the *Mitsubishi* court and affidavits of the cartel participants.<sup>45</sup>

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<sup>38</sup> *Id.* art. 36-2(2).

<sup>39</sup> *Id.* art. 36-2(3).

<sup>40</sup> Judgment of Aug. 19, 2004, 2002 Nu 6110 (Seoul High Ct.) at 8 (S. Korea); 2003 Nu 9000 at 11.

<sup>41</sup> See HUR, *supra* note 5, at 278.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 279 n.27.

<sup>44</sup> *U.S. v. Mitsubishi Corp.*, Crim. No. 00-033 (E.D. Pa) (2000). Mitsubishi Corporation was an export agent for Japanese graphite electrodes manufacturers. Memorandum in Support of Govt.'s Response in Opposition to Defendant's Motion to Strike, *U.S. v. Mitsubishi Corp.* Crim. No. 00-033 (E.D. Pa. 2000). It also provided Needle Coke, an ingredient for manufacturing graphite electrodes, to the manufacturers. *Id.* After acquiring 50% stock of UCAR International in 1991, Mitsubishi Corporation facilitated the creation of a cartel by instructing Robert Krass, CEO of UCAR, to meet with Japanese graphite electrodes. *Id.* Accordingly, U.S. DOJ filed suit against Mitsubishi Corporation. *Id.*

<sup>45</sup> HUR, *supra* note 5, at 279 n.27.

The evidentiary materials provided by the U.S. DOJ were of great help in the KFTC's handling of the graphite electrodes international cartel case. In a situation where it was difficult for the KFTC to obtain evidentiary materials through direct investigation, the *Mitsubishi* court decision and evidence provided by the U.S. DOJ acted as key evidence in proving the violations of the MRFTA. Notably, the Korean court admitted most of the recognized evidentiary materials used by the *Mitsubishi* court.<sup>46</sup>

On the other hand, there has been controversy surrounding the jurisdictional power to serve process because there was no express provision supporting extraterritorial service. The KFTC, in this regard, used two methods. First, based on the interpretation of the regulations under the Administrative Procedure Act, the KFTC has used public notification for its service of document.<sup>47</sup> Second, the KFTC *de facto* effectuated service of document by sending relevant documents by mail to foreign companies located overseas.<sup>48</sup>

The KFTC recognized its jurisdiction over the above two cases. In particular, the KFTC unanimously adopted both the effects doctrine and the implementation doctrine in connection with its recognition of jurisdiction.<sup>49</sup> In other words, even where an agreement between foreign companies incorporated under foreign laws was carried out overseas, if the agreement itself was implemented in Korea and affected the Korean market, the acts of such companies would fall under the MRFTA.<sup>50</sup> The reason why the KFTC mentioned the above two theories in its recognition of jurisdiction was most likely because the KFTC was conscious of the debates surrounding the extraterritorial application of the MRFTA without express provision allowing such application.<sup>51</sup>

## 2. Court Precedents

The Seoul High Court recognized the KFTC's jurisdiction based on the effects doctrine in the above two cases.<sup>52</sup> The Seoul High Court

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<sup>46</sup> See *id.* at 278.

<sup>47</sup> HAENGJEONG JEOLCHABEOB [ADMINISTRATIVE PROCEDURAL ACT] art. 14, Law. No. 8451 (2007) (S. Korea).

<sup>48</sup> *Id.*

<sup>49</sup> See, e.g., Judgment of Aug. 19, 2004, 2002 Nu 6110 (Seoul High Ct.) at 16 (S. Korea).

<sup>50</sup> See *id.*

<sup>51</sup> See HUR, *supra* note 5, at 268-69.

<sup>52</sup> See, e.g., 2002 Nu 6110 at 16.

held that the MRFTA would apply if a foreign company agreed to restrict competition jointly with other enterprises and the implementation of such agreement directly affected the Korean market.<sup>53</sup> The Seoul High Court further held that whether the agreement between a foreign company and other enterprises was made in Korea or overseas did not affect its decision to exercise jurisdiction over the matter.<sup>54</sup> In addition, the Seoul High Court found that, based on the evidentiary materials submitted by the KFTC and the materials from the *Mitsubishi* court, the relevant agreements in the above two cases caused anti-competitive effects on the Korean market.<sup>55</sup>

The Korean Supreme Court affirmed the decision of the Seoul High Court in the graphite electrodes case.<sup>56</sup> Therefore, the decision became court precedent, establishing the extraterritorial application of the MRFTA based on the effects doctrine. However, the Korean Supreme Court found erroneous the Seoul High Court's finding that public notification to a foreign company having no address in Korea would be sufficient to effectuate service of process.<sup>57</sup> Nonetheless, the Korean Supreme Court held that, where documents are served by mail to a foreign company without a Korean address, there is lawful service under the Administrative Procedure Act.<sup>58</sup>

### PART III – EXTRATERRITORIAL APPLICATION OF REGULATIONS REGARDING COMBINATION OF ENTERPRISES

#### *A. Overview*

A “combination of enterprises”<sup>59</sup> must be notified to the KFTC under certain circumstances outlined in Article 12 of the MRFTA (Notification on Combination of Enterprises).<sup>60</sup> Failure to do so may result in an administrative fine of up to 100 million Korean won.<sup>61</sup> As will be shown in detail, since 2003, the Korean authorities are increasingly

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 17.

<sup>56</sup> Judgment of Mar. 24, 2006, 2004 Du 11275 (Sup. Ct.) at 6 (S. Korea).

<sup>57</sup> *Id.* at 4.

<sup>58</sup> *Id.*

<sup>59</sup> DOGJEOMGYUJE MICH GONGJEONGGEOLAE-UI GWANHAN BEOBYUL [MONOPOLY REGULATION AND FAIR TRADE ACT (MRFTA)] art. 7(2), Law No. 7315 (2004) (S. Korea) (defining combination of enterprises).

<sup>60</sup> *Id.* art. 12.

<sup>61</sup> *Id.* art. 69-2(1).

imposing this fine.<sup>62</sup> In this regard, extraterritorial application of the MRFTA regarding combination of enterprises is well established in Korea.

*B. Business Combination Notification Regulations between Foreign Companies and the Current Status of Such Regulations*

In 2005, the KFTC amended its M&A Notification Guidelines.<sup>63</sup> Accordingly, in a business combination between foreign companies, the foreign companies are required to file a business combination report with the KFTC if (a) the amount of total assets or sales turnover of either party is more than ten billion Korean won;<sup>64</sup> (b) the amount of total assets or sales turnover of the other party is more than three billion Korean won;<sup>65</sup> or (c) the amount of sales turnover of each party in the Korean market is more than three billion Korean won.<sup>66</sup> The KFTC is to impose a fine of up to 100 million Korean won if the reporting provisions are violated.<sup>67</sup>

In 2003, the KFTC for the first time imposed a fine pursuant to the M&A Notification Guidelines.<sup>68</sup> In 2006, the KFTC further imposed a total fine of 67.2 million Korean won against eleven business combinations between foreign companies for violation of the business combination reporting provisions.<sup>69</sup> In addition, as shown in the table below, the number of business combination reports filed by foreign companies has increased each year. In most cases, foreign companies have been found to have violated the business combination notifica-

<sup>62</sup> HUR, *supra* note 5, at 309-10.

<sup>63</sup> GI-EOBGYEOLSOG-UI SINGO YOGEON [M&A NOTIFICATION GUIDELINES] No. 2005-5 (2005) (S. Korea). In 1981, the KFTC Economic Planning Board enacted the M&A Notification Guidelines establishing the business combination reporting procedure. HUR, *supra* note 5, at 307 n.6. The Guidelines was amended in 2003 to include mergers between foreign companies or between foreign and domestic companies. *Id.*

<sup>64</sup> M&A NOTIFICATION GUIDELINES art. IV(1) .

<sup>65</sup> *Id.* art. II(2)(B).

<sup>66</sup> HUR, *supra* note 5, at 309.

<sup>67</sup> DOGJEOMGYUJE MICH GONGJEONGGEOLAE-UI GWANHAN BEOBYUL [MONOPOLY REGULATION AND FAIR TRADE ACT] art. 69-2(1), Law No. 7315 (2004) (S. Korea).

<sup>68</sup> See HUR, *supra* note 5, at 309.

<sup>69</sup> Press Release, Korea Fair Trade Comm'n, 2006nyeong gi-eobgyeolhab donghyang mich teugjing [2006 Business Combination Trends and Characteristic Combination] at 9 (Mar. 28, 2007), [http://ftc.go.kr/data/hwp/20070328\\_102047.hwp](http://ftc.go.kr/data/hwp/20070328_102047.hwp).

tion provisions because they either failed to file the report or they filed after the filing deadlines.

Table 1: Total Number of Merger Notifications and Number of Business Combination Reports by Foreign Companies

Year	Total Number of Business Combination Notifications <sup>70</sup>	Number of Business Combination Reports by Foreign Companies <sup>71</sup>
2003	589	13
2004	749	58
2005	658	72
2006	744	113

\* KRW is the abbreviation for Korean won, the currency of the Republic of Korea.

### *C. Further Issues of Extraterritorial Application of Regulations Regarding Combination of Enterprises*

A major issue regarding extraterritorial application of domestic laws arises when various competition authorities (both domestic and foreign) decide the same case differently. In other words, where parties intend to merge, such parties must obtain approvals from competition authorities in various countries irrespective of their nationalities or the location of their assets.

As yet there has not been a case where this has happened in Korea. However, it is anticipated that the number of business combinations between foreign companies authorized by other foreign competition authorities that affect the Korean market will increase. In this regard, the time is ripe to pursue some measures to deal with this emerging problem.

## PART IV – EXTRATERRITORIAL APPLICATION OF CARTEL REGULATIONS

### *A. Overview*

The issue of extraterritorial application of domestic laws arises most often in international cartel cases. Especially in the United States,

<sup>70</sup> Int'l Cooperation Team, *Gongjeonggeolaebaegseo* [White Paper on Fair Competition] at 158 (KFTC 2007) (S. Korea), available at [http://ftc.go.kr/data/hwp/20070913\\_102896.pdf](http://ftc.go.kr/data/hwp/20070913_102896.pdf) [hereinafter *White Paper 2007*].

<sup>71</sup> 2006 Business Combination Trends and Characteristics, *supra* note 69, at 2.

the European Union (EU), and other international organizations such as the Organization for Economic Co-operation and Development, and the International Competition Network, the need for effective measures and extraterritorial application has been a subject of much debate.

In Korea, the KFTC issued corrective orders and administrative fines against the international graphite electrodes cartel in 2002<sup>72</sup> and the international vitamin cartel in 2003.<sup>73</sup> Subsequently, the Seoul High Court<sup>74</sup> and the Korean Supreme Court<sup>75</sup> affirmed the KFTC's decision against graphite electrodes cartel. The KFTC also investigated the marine transportation cartel in 2005.<sup>76</sup> The KFTC, jointly with the United States and the EU, investigated the international aircargo cartel and the international LCD cartel, among others.<sup>77</sup>

On the other hand, Korean companies have been increasingly subjected to administrative fines under foreign competition laws.<sup>78</sup> Such extraterritorial application has been mostly due to the companies' involvement with international cartels.

Table 2: Status of Imposition of Administrative Fines on Korean Companies by U.S. Competition Authorities<sup>79</sup>

Date	Company Name	Amount of Administrative Fines	Reasons for Imposition of Administrative Fines
August 1996	Cheil Jedang	USD 12.5 million	Lysine cartel
	Sewon America	USD 0.328 million	

<sup>72</sup> Judgment of Aug. 19, 2004, 2002 Nu 6110 (Seoul High Ct.) at 8 (S. Korea).

<sup>73</sup> Judgment of Nov. 24, 2004, 2003 Nu 9000 (Seoul High Ct.) at 11 (S. Korea).

<sup>74</sup> 2002 Nu 6110 at 1.

<sup>75</sup> Judgment of Mar. 24, 2006, 2004 Du 11275 (Sup. Ct.) at 6 (S. Korea).

<sup>76</sup> In September 2003, the KFTC began an investigation into Stolt-Nielsen Ltd. to determine whether the company formed an international chemical transportation cartel. Gyeongha Jeon, *Oegughae-unsae unsonglyodamhab jeogbal* [*Foreign Maritime Transportation Company Caught Price Fixing*], SEOUL SINMUN, Apr. 26, 2005, at 16 (S. Korea) available at <http://news.media.daum.net/economic/others/200504/26/seoul/v8930798.html>. After two years of investigation, in December 2005, the KFTC terminated its investigation. Int'l Cooperation Team, *Gongjeonggeolae-baegseo* [*White Paper on Fair Competition*] at 553 (KFTC 2006) (S. Korea) [hereinafter *White Paper 2006*].

<sup>77</sup> *White Paper 2007*, *supra* note 70, at 196 n.16.

<sup>78</sup> HUR, *supra* note 5, at 271.

<sup>79</sup> *Id.* at 272.

August 2001	Cheil Jedang	USD 3 million	Nucleio cartel
	Daesang Japan	USD 0.09 million	
May 2004	Hynix	USD 18.5 billion	DRAM cartel
October 2005	Samsung Electronics	USD 30 billion	
Total Amount		USD 48.515 billion (Approximately KRW 50.6 trillion)*	

\* Applied standard exchange rate on December 31, 2004 (1 USD = 1,043.80 KRW).

Table 3: Status of Imposition of Administrative Fines by EU Competition Authorities<sup>80</sup>

Date	Company Name	Initial Administrative Fines	Final Administrative Fines	Reasons for Imposition of Administrative Fines
Feb. 1998	Samsung Electronics	ECU 0.03* million	ECU 0.03* million	Delayed application for pre-merger filing
Sept. 1998	Hanjin Shipping	ECU 20.63 million	0	Freight cartel
	Hyundai Merchant Marine	ECU 18.56 million	0	
	Joyang Merchant Marine	ECU 13.75 million	0	

May 2000	Hanjin Shipping	EUR 0.6 million	0	Freight discount cartel
	Joyang Merchant Marine	EUR 1.34 million	0	
June 2000	Cheil Jedang	EUR 12.2 million	EUR 10.08 million	Nucleio cartel
	Daesang (formerly known as Sewon)	EUR 8.9 million	EUR 8.9 million	
Dec. 2002	Cheil Jedang	EUR 2.74 million	EUR 2.74 million	
	Daesang	EUR 2.28 Million	EUR 2.28 million	
Total Amount		EUR 79.847 million (approx- imately KRW 113.6 billion)**	EUR 24.033 mil- lion (approx- imately KRW 34.2 billion)**	

\* ECU (European Currency Unit) has changed to Euro from January 1, 1999 (1:1 ratio).

\*\* Applied standard exchange rate on December 31, 2004 (1 EUR = 1,422.96 KRW).

Table 4: Status of Imposition of Administrative Fines by Canadian Competition Authorities<sup>81</sup>

Date	Company Name	Administrative Fines	Reasons for Administrative Fines
August 2005	Cheil Jedang	CAD 175,000	Price fixing by nucleic acid cartel
Total amount		CAD 175,000 (KRW 150 million)*	

\* Applied standard exchange rate on December 31, 2004 (1 CAD = 866.87 KRW).

### B. Graphite Electrodes International Cartel Case

#### 1. Factual Background

The graphite electrodes international cartel involved the main manufacturers of graphite electrodes from the United States, Germany, and Japan.<sup>82</sup> The manufacturers agreed on sales prices and implemented such agreement in London, Tokyo, and other places.<sup>83</sup> On May 21, 1992, they solidified the agreement at the Skyline Hotel located in London.<sup>84</sup> The cartel activity continued until February 1998.<sup>85</sup>

Specifically, the manufacturers agreed that, where one manufacturer should increase its price in its home market, other manufacturers were to follow it.<sup>86</sup> Also, with respect to markets outside their home market, they agreed on a set price.<sup>87</sup> They discussed market allocation based on sales volume in Asia.<sup>88</sup> Furthermore, in order to bar new en-

<sup>81</sup> Jihong Na, 'Kaleutel'-ui baesin mi bandogjeombeob geollimyeon 'heos-jangsa' [Cartel's Betrayal: Futile if Caught Violating the U.S. Antitrust Act], CHOSUN ILBO, Nov. 11, 2006, at B3 (S. Korea) available at [http://news.chosun.com/site/data/html\\_dir/2006/11/10/2006111060420.html](http://news.chosun.com/site/data/html_dir/2006/11/10/2006111060420.html).

<sup>82</sup> HUR, *supra* note 5, at 273.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> Judgment of Aug. 19, 2004, 2002 Nu 6110 (Seoul High Ct.) at 4 (S. Korea).

<sup>87</sup> *Id.* at 5.

<sup>88</sup> *Id.*

trants from the market, they agreed to restrict the sharing of the graphite electrodes manufacturing technology with non-cartel participants.<sup>89</sup>

The cartel was operated by the manufacturers with approximately 80% or more of the global market share.<sup>90</sup> Consequently, due to its activities, the price of graphite electrodes increased by approximately 48.9% in the global market.<sup>91</sup> The damage proved to be extensive especially in Korea where there were no manufacturing companies of graphite electrodes and the steel manufacturers were entirely dependent on imports.<sup>92</sup>

## 2. KFTC Investigation and Deliberation Procedures

By the time the KFTC commenced its investigation of the cartel, the U.S., EU, and Canadian competition authorities had already issued corrective orders.<sup>93</sup> Therefore, the KFTC investigation focused on proving the effects on the Korean market by collecting evidentiary materials published by the foreign competition authorities.<sup>94</sup> Accordingly, the KFTC twice requested relevant documents by sending written investigation forms concerning the six companies, including UCAR International (United States), SGL Carbon (Germany), Showa Denko (Japan), Nippon Carbon (Japan), Tocai Carbon (Japan), and SEC (Japan).<sup>95</sup> At the same time, the KFTC conducted an investigation into the shift in the import price of graphite electrodes in regard to Korean electric furnace companies.<sup>96</sup>

After the KFTC completed its investigation, the KFTC twice requested the manufacturers to designate local representatives.<sup>97</sup> However, they either waived their rights to designate local representatives or did not designate local representatives until the case was presented to the full Commission.<sup>98</sup> Accordingly, the KFTC sent the notices directly to the manufacturers' headquarters overseas.<sup>99</sup> At the same time, the KFTC made a public notice through its Internet homepage and

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 3.

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.* at 3, 6.

<sup>93</sup> *Id.* at 7.

<sup>94</sup> *Id.* at 16-17.

<sup>95</sup> *Id.* at 2, 8.

<sup>96</sup> HUR, *supra* note 5, at 278.

<sup>97</sup> 2002 Nu 6110 at 8.

<sup>98</sup> *Id.* at 18.

<sup>99</sup> *Id.* at 8.

bulletin board.<sup>100</sup> Consequently, UCAR International, SGL Carbon, Tocai Carbon, and SEC attended the full Commission and presented their opinions.<sup>101</sup> However, Showa Denko and Nippon Carbon did not attend the full Commission, objecting on grounds of lack of proper service and jurisdiction.<sup>102</sup>

### 3. Result of the Full Commission Deliberation

On March 2, 2002, the full Commission found that the cartel participants agreed on price fixing in the global market including Korea.<sup>103</sup> The full Commission further decided that such acts directly affected the Korean market and hence constituted a violation of the MRFTA.<sup>104</sup> Therefore, the KFTC issued corrective orders against the cartel and imposed a total fine of 11.2 billion Korean won on the cartel participants.<sup>105</sup> On the other hand, the KFTC substantially reduced the amount of administrative fines imposed on UCAR International as it fully cooperated with the KFTC investigation.<sup>106</sup>

### 4. Main Issues and Decisions of the Seoul High Court

In August 2003, the Seoul High Court dismissed lawsuits filed against the KFTC by SGL Carbon, Showa Denko, Tocai Carbon, and SEC.<sup>107</sup> The Seoul High Court did find, however, that the KFTC abused its discretion when it imposed excessive administrative fines against Showa Denko due to its uncooperativeness with the KFTC's investigation.<sup>108</sup>

After reviewing the *Mitsubishi* court decision and evidentiary materials, the Seoul High Court found that the manufacturers held various meetings outside of Korea and agreed on the price of graphite electrodes.<sup>109</sup> The Seoul High Court also found, based on the documents submitted by the KFTC, that the KFTC exercised proper jurisdiction

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<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 16.

<sup>105</sup> HUR, *supra* note 5, at 280.

<sup>106</sup> 2002 Nu 6110 at 22.

<sup>107</sup> *See, e.g.*, 2002 Nu 6110 at 8.

<sup>108</sup> *Id.* at 22-23.

<sup>109</sup> *Id.* at 5-6.

over the manufacturers as the cartel agreement resulted in anticompetitive effects on the Korean market.<sup>110</sup>

In addition, the Seoul High Court found the public notification to foreign companies to be lawful.<sup>111</sup> In other words, the Court found that when a foreign company does not have a domestic address, “delivery is impossible” under the Administrative Procedure Act,<sup>112</sup> and therefore, public notification is sufficient for purposes of notification.<sup>113</sup> At the same time, the Seoul High Court found that, whereas, in principle, service to a foreign company should be made through delivery to a local representative, in circumstances where judicial cooperation for delivery to a local representative is not established, public notification is sufficient.<sup>114</sup> The Seoul High Court decided that delivery by registered mail to a foreign company is not effective, but that public notification can cure the defect.<sup>115</sup>

### 5. Korean Supreme Court Decisions

In March 2006, the Korean Supreme Court dismissed the appeals made by SGL Carbon, Showa Denko, Tocai Carbon, and SEC and confirmed the Seoul High Court’s decisions.<sup>116</sup> The Korean Supreme Court also affirmed the Seoul High Court’s finding that the KFTC abused its discretion when it imposed an excessive fine on Showa Denko.<sup>117</sup>

With respect to jurisdiction, the Korean Supreme Court found that the MRFTA would apply to the extent the price fixing agreement affected the Korean market.<sup>118</sup> The Korean Supreme Court also agreed with the Seoul High Court’s decision that there was a cartel agreement among the cartel participants and that the agreement had anticompetitive effects on the Korean market.<sup>119</sup>

With respect to the lawfulness of service, although the Korean Supreme Court disagreed with the Seoul High Court in its legal interpre-

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<sup>110</sup> *Id.* at 17.

<sup>111</sup> *Id.* at 18.

<sup>112</sup> HAENGJEONG JEOLCHABEOB [ADMINISTRATIVE PROCEDURE ACT] art. 14(4), Law. No. 8451 (2007) (S. Korea).

<sup>113</sup> 2002 Nu 6110 at 18.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *See, e.g.*, Judgment of Mar. 24, 2006, 2004 Du 11275 (Sup. Ct.) at 6 (S. Korea).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 4.

<sup>119</sup> *Id.*

tation, it nonetheless found that the KFTC's delivery was lawful.<sup>120</sup> In other words, the Korean Supreme Court found erroneous the Seoul High Court's ruling that the public notification to foreign companies was lawful. Nevertheless, the Korean Supreme Court found that the KFTC may use mail delivery of documents to a foreign company having no address, residence, operating office, or office in Korea.<sup>121</sup> In sum, the Korean Supreme Court decided that the mail delivery by the KFTC in this case was lawful.<sup>122</sup>

### C. *Vitamin International Cartel Case*

#### 1. Factual Background

The vitamin international cartel involved six companies that, after forming a cartel, engaged in manufacture and sale of vitamins between September 1989 and February 1998.<sup>123</sup> The companies agreed on prices and allocated market share or sales volume in the global market.

#### 2. Result of the Full Commission Deliberation

On April 29, 2003, the full Commission decided that the six vitamin manufacturers violated the MRFTA by participating in allocation of sales volume and price fixing.<sup>124</sup> The full Commission issued corrective orders against the six companies and imposed a total amount of 1.9 billion Korean won as an administrative fine.<sup>125</sup>

The full Commission decided that the KFTC had jurisdiction over the companies based on the same reason put forth in the graphite electrodes international cartel case.<sup>126</sup> In other words, although the agreement was made overseas, because either the implementation of the agreement was effectuated in Korea or the agreement had an effect on the Korean market, the MRFTA would apply.<sup>127</sup>

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> Judgment of Nov. 24, 2004, 2003 Nu 9000 (Seoul High Ct.) at 5-8 (S. Korea).

<sup>124</sup> *Id.* at 14.

<sup>125</sup> *Id.* at 24.

<sup>126</sup> See 2003 Nu 9000; see also Judgment of Aug. 19, 2004, 2002 Nu 6110 (Seoul High Ct.) (S. Korea).

<sup>127</sup> 2003 Nu 9000 at 14.

### 3. Main Issues and Decision of the Seoul High Court

F. Hoffmann-La Roche AG filed a lawsuit against the KFTC, objecting to the decision by the full Commission.<sup>128</sup> In November 2004, the Seoul High Court dismissed the claim.<sup>129</sup> F. Hoffmann-La Roche AG decided not to appeal, and accordingly, the Seoul High Court decision became final.

As noted above, the Seoul High Court decided that the KFTC had jurisdiction in this case based on the same reasons as the graphite electrodes cartel case.<sup>130</sup> This shows that the ground for such decision was based on the effects doctrine. The Seoul High Court further decided that the agreement caused anticompetitive effects on the Korean market.<sup>131</sup>

#### PART V – EXTRATERRITORIAL APPLICATION OF REGULATIONS REGARDING ABUSE OF MARKET-DOMINANT POSITION

Until recently, the KFTC did not regulate a foreign company's abuse of its market-dominant position by applying the MRFTA extraterritorially. In order to find that a foreign company is in a market-dominant position under the MRFTA, a foreign company must not only have market power within Korea, but also actually perform acts in violation of the MRFTA.<sup>132</sup> In this regard, in most cases involving abuse of a market-dominant position, acts in violation of the MRFTA exist within Korea, and therefore, it is not controversial that the MRFTA applies to such acts.

In a recent abuse of dominance case involving Microsoft,<sup>133</sup> the KFTC applied the MRFTA extraterritorially.<sup>134</sup> In that case, the U.S.-based Microsoft Corporation argued that it did not conduct a tie-in sale act within Korea and that, therefore, the KFTC did not have jurisdiction over the company.<sup>135</sup> However, the full Commission disagreed and decided that the U.S.-based Microsoft Corporation was actually

<sup>128</sup> *Id.* at 1.

<sup>129</sup> *Id.*

<sup>130</sup> See 2003 Nu 9000; see also 2002 Nu 6110.

<sup>131</sup> 2003 Nu 9000 at 14.

<sup>132</sup> See DOGJEOMGYUJE MICH GONGJEONGGEOLAE-UI GWANHAN BEOBLYUL [MONOPOLY REGULATION AND FAIR TRADE ACT (MRFTA)] arts. 3-6, Law No. 7315 (2004) (S. Korea).

<sup>133</sup> Judgment of Feb. 24, 2006, 2006-042 (Fair Trade Comm'n) at 13 (S. Korea).

<sup>134</sup> *Id.*

<sup>135</sup> See *Id.*

engaging in tie-in sales either by being involved directly or indirectly through its contracts with Korean personal computer manufacturers.<sup>136</sup>

#### PART VI – CONCLUSION

This article explains how the KFTC successfully applied the MRFTA extraterritorially and how it enacted the regulations related to the MRFTA. Until around 2000, the extraterritorial application of competition laws was not common except in developed countries such as the United States, EU, or Canada.<sup>137</sup> However, the success of the KFTC's extraterritorial application of Korean competition law, in efforts to protect the Korean consumers and to promote fair competition in Korean market, is significant for developing countries that have not been successful in applying their laws extraterritorially.

As for the current work and future plans of the KFTC, the KFTC implemented a Cartel Leniency Program to encourage companies or individuals to voluntarily report cartel activities.<sup>138</sup> Many foreign companies have since applied to the program.<sup>139</sup> For business combinations of the foreign companies, the KFTC is planning on reducing the foreign companies' burden to report to the KFTC when they merge by greatly increasing the notification threshold from three billion won to twenty billion won.<sup>140</sup>

It is necessary for each country to pursue the project of establishing its own standard for the extraterritorial application of its laws by reviewing how other countries have applied their laws extraterritorially. As the International Bar Association is currently engaged in such projects by organizing an extraterritorial taskforce,<sup>141</sup> more rigorous discussions and positive results are expected.

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<sup>136</sup> *Id.*

<sup>137</sup> See HUR, *supra* note 5, at 265-68.

<sup>138</sup> See generally HUR, *supra* note 5, at 229-59.

<sup>139</sup> See *id.* at 242-43.

<sup>140</sup> E-mail from J. William Rowley, Chairman, McMillan Binch Mendelsohn LLP, to Joseph Seon Hur, Senior Consultant, Yoon, Yang, Kim, Shin, & Yu (Oct. 5, 2007, 14:51 GMT+9).

<sup>141</sup> See LEGAL PRACTICE DIV., INT'L BAR ASS'N, INTERNATIONAL BAR ASSOCIATION CONFERENCE SINGAPORE 2007 PROGRAMME (2007), available at <http://www.ibanet.org/conferences/singapore2007/binary/Programme-no-ads.pdf>.