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I. INTRODUCTION

In March 2009, China's MOFCOM blocked Coca-Cola's proposed $2.4 billion acquisition of a leading Chinese juice producer, China Huiyuan Juice Group, without much explanation, prompting some commentators to cry foul and protectionism[2] and others to lament China's missed opportunity to lay a foundation for its merger analysis under the newly enacted Anti-Monopoly Law of 2008.[3] In 2010, BHP Billiton and Rio Tinto abandoned their production joint venture proposal in the face of antitrust hurdles from various antitrust agencies including the Korea Fair Trade Commission ("KFTC").[4]

Fast-forward to the end of 2013 when the United States and European Union rather unceremoniously cleared Microsoft's proposed $7 billion-plus acquisition of Nokia's handset business. Then, in February 2014, Taiwan's Fair Trade Commission ("TFTC") came down with a number of conditions for approving the deal. Shortly thereafter, in April 2014, MOFCOM finally approved the transaction with strings attached.[5] In the meantime, in neighboring Korea, faced with the KFTC's continuing concerns,[6] Microsoft and Nokia reportedly restructured the transaction in late April 2014 to make it a non-reportable transaction in Korea and promptly consummated it. Unfazed, the KFTC continues its merger investigation of the consummated transaction.[7] As of October 2014, the KFTC is still investigating the already consummated

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[2] *See, e.g.*, White & Case Alerts, http://www.whitecase.com/alert_032009_3/.

[3] *See, e.g.*, Mondaq, http://www.mondaq.com/x/78718/Antitrust+Competition/CocaColas+Acquisition+Of+Huiyuan+A+Lost+Opportunity+For+MOFCOM.

[4] *See, e.g.*, Sydney Morning Herald, http://www.smh.com.au/business/rio-bhp-scrap-117b-joint-venture-20101018-16pde.html.

[5] *See, e.g.,* Wall Street Journal, http://online.wsj.com/news/articles/SB10001424052702304819004579488773400060370. To receive MOFCOM's approval, Microsoft agreed to a number licensing commitments including for a period of eight years.

[6] *See, e.g.*, Business Korea, April 21, 2014, http://www.businesskorea.co.kr/article/4188/concern-over-patents-much-attention-drawn-korea%E2%80%99s-anti-trust-body-examination-microsoft.

[7] *See*, PaRR Special Report, May 21, 2014, http://www.parr-global.com/wp-content/uploads/2014/06/ABA-antitrust-in-asia-special-report.pdf.

Microsoft's acquisition of Nokia, and discussing potential post-consummation commitment remedies.[8]

In the meantime, in June 2014, China's MOFCOM sank the P3 Alliance proposal among three global shipping companies, Denmark's Moller-Maersk, France's CMA CGM, and Swiss' Mediterranean Shipping Company ("MSC").[9] In contrast, the U.S. Federal Maritime Commission cleared the deal in March and the EC cleared the proposed transaction on June 3, 2014, just two weeks before MOFCOM announced its decision. The parties to the transaction promptly called off the deal. This was the only the second time that MOFCOM had completely blocked a merger transaction since the adoption of China's antitrust statute in 2008.[10]

Reading the compilation of global deals gone busted or almost derailed above, one could see why some observers have voiced concern that antitrust merger enforcement in some parts of the world is showing signs of protectionism. Lately, China is often implied (but not necessarily named specifically by speakers) at conferences as the prime culprit in not just merger but other antitrust enforcement areas. Given the continuing investigation of the already consummated Microsoft-Nokia transaction, some commentators are already claiming, hinting, or will likely opine that Korea's merger enforcement also smells and looks like a protectionist merger review program at times.[11]

However, hard numbers—the KFTC's merger enforcement statistics—do not necessarily support the assertion, at least not yet. China's MOFCOM has been reviewing merger transactions since the country's enactment of its first antitrust statute, the Anti-Monopoly Law, in 2008. Korea has had a merger control provision, Article 7 of the Monopoly Regulation and Fair Trade Act ("MRFTA"), ever since the MRFTA was first enacted in 1980 and became effective in 1981.[12] However, only after its July 2003 adoption of the mandatory "foreign merger" notification program for transactions involving a foreign party with the requisite nexus to Korea did the KFTC really begin the modern era of notification-based merger review.[13] Perhaps it is just a matter of time before a fair number of controversial cases may be criticized as protectionist decisions.

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[8] *See*, PaRR Asia-Pacific Weekly News Digest, October 13, 2014, http://app.parr-global.com/intelligence/view/1171078. Yulchon LLC represents a third-party intervenor in the KFTC proceedings.

[9] *See*, Hellenic Shipping News, June 28, 2014, http://www.hellenicshippingnews.com/china-china-blocks-global-shipping-alliance/.

[10] Prior to this decision, MOFCOM reportedly approved 23 transactions with conditions and banned only one merger, Coca-Cola's proposed acquisition of China Huiyuan Juice Group, outright out of over 800 merger transactions it reviewed.

[11] Of course, in recent years, the U.S. FTC and DOJ have stepped up their efforts to investigate and challenge consummated merger transactions, all to protect consumers.

[12] Since then, the MRFTA, including Article 7 on merger control, has been amended numerous times, with the most recent revision taking place in May 28, 2014 to become effective November 29, 2014. The KFTC's Merger Review Standard Decree pursuant to the MRFTA was first promulgated in 1998 and has been periodically revised, with the most recent revision of December 2013.

[13] *See,* KFTC Annual Report 2004 (official Korean version) for a review of major developments and enforcement activities in 2003. An unofficial abridged English version is *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301 under the name Annual Report 2003. The KFTC cautions that only the Korean text is authentic.

More fundamentally, however, it is not clear whether it is a simple matter to call a jurisdiction's particular decision a "protectionist decision" simply because the decision blocked a foreign company's acquisition of a domestic company or another foreign company. After all, each jurisdiction's antitrust agency's statutory mandate (if not the only mandate, then still the primary mandate) is to protect competition and consumers within its territorial boundaries. It may just be possible, but easy to forget, that consumers in China, Korea, Taiwan, or any other country are actually quite different from consumers in the United States, European Union (for that matter, consumers in each Member State may be quite unique), Latin America, or anywhere else.

And if it so happens that protecting domestic corporate customers of the foreign merging parties serves to protect the consumers in that particular jurisdiction, then it becomes even more difficult to discern whether the merger enforcement agency is being a protectionist agency. Perhaps, a clarification question should follow. If the term "protectionist" encompasses protecting consumers as opposed to simply protecting domestic industries, then perhaps every single merger enforcement agency may be labeled a protectionist agency. Of course, this is not how the term "protectionist" is supposed to be interpreted. Yet, it shows how the term itself is also susceptible to a self-serving "protectionist" interpretation and misuse.

In this paper, we will review the short but already interesting history of Korean merger control. We offer that what the KFTC does (actually what most jurisdictions do) may not really be any more protectionist than others. Indeed, perhaps it is inherent in merger control although not many people talk about it much. In so doing, we hope to offer an alternative way to explain why antitrust enforcement agencies (or some other or larger parts of the national government) review and decide mergers the way they do, sometimes appearing to be (or indeed they really are, at times) protectionist in the true sense of the word.

II. STATUTORY AND REGULATORY FRAMEWORK OF KOREAN MERGER CONTROL

The MRFTA in Korea provides the framework for merger control in Korea. Article 7 of the MRFTA prohibits anticompetitive mergers and acquisitions, and Article 12 provides pre-merger notification rules. There are only two exceptions to save otherwise anticompetitive mergers: the efficiency defense and the failing firm defense.[14]

The KFTC states the goal and importance of its merger control program this way:[15]

> Generally, the combination of enterprises has many merits, including, but not limited to the mitigation of investment risks due to diversification, strategically responding to technology innovation and market changes and reduction of costs based on the scale of economy attained from the combination. In some cases, however, competitors combine their businesses for the purpose of artificially dominating the market. In this light, as for combination of enterprises which results in limiting competition in the market, corrective measures are needed to effectively prevent any anticompetitive harm resulting from such combination through thorough review and analysis.

[14] Article 7(2) of the MRFTA, as amended; English version is *available at* http://eng.ftc.go.kr/bbs.do.

[15] *See* http://eng.ftc.go.kr/policyarea/competitionpolicy_review.jsp?pageId=0201.

> Reviewing the combination of enterprises is one of the main tasks carried out by competition authorities in most of the world's developed countries, and in Korea the review procedure for combination of enterprises has been in operation since it was first introduced in 1981 along with the implementation of the Fair Trade Act.

As such, there are no explicit statutory or regulatory requirements, or references, requiring factors that are not related to competition (such as assurance of local employment or protection of sensitive or critical industry sectors) to be considered. In addition, there are no separate statutes that require simultaneous reviews of national security interests (a la the Exon-Florio or CFIUS review) or foreign investment concerns (a la the Investment Canada Act and various laws of some Member States of the European Union). Therefore, unlike many Western countries, in Korea there is no statutory or regulatory built-in mechanism to consider those factors unrelated to competition in approving or rejecting merger proposals.

III. MODERN KOREAN MERGER REVIEW STATISTICS

To understand if Korea's merger control regime has shown a protectionist tendency, or is more likely to show it in the future, a close look at its recent enforcement statistics may be in order.[16]

Perhaps because Korea has not been a driving force or deal-making location for global merger transactions, there have been relatively few global merger transactions that have required merger notifications or substantive merger reviews in Korea where the acquiring party to the transaction was a foreign entity. For example, in calendar year 2013, the KFTC reviewed a total of 585 transactions, 151 of which involved foreign acquirers (roughly 26 percent of the total). In 2012, there were a total of 651 transactions, 108 of which involved foreign acquirers (roughly 17 percent). In 2011, the KFTC reviewed 543 transactions, 112 of which involved foreign acquiring parties (about 21 percent). In 2010, there were 499 transactions and a foreign company was the acquiring person in 78 matters. In 2009, there were a total of 413 mergers and of these 53 involved foreign acquiring parties. All in all, in the past full five years (from 2009 through 2013), the KFTC imposed conditions on proposed transactions in only 4 out of over 500 deals where the acquiring person was a foreign company.

[16] The following statistical information is drawn from the KFTC's Annual Reports (unofficial English versions *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=53&pageId=0301) and Statistical Yearbooks (unofficial English versions *available at* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=51&pageId=0303). Interestingly, the English website contains the Annual Reports from 1997 to 2013 while the official Korean website has only from 2002 through 2013. On the other hand, the English website contains the Statistical Yearbooks from 2009 to 2013 while the Korean version has from 2003 to 2013. The number of transactions reviewed here includes not just mergers, acquisitions, and joint ventures in various forms and shapes, but it also includes interlocking directorates.

Calendar Year	No. of Total Transactions	Acquiring Party was a Foreign Party	Total No. of Conditional Clearance	Foreign-Acquirer Deals with Conditional Clearance
2013	585	151	5	2
2012	651	108	3	0
2011	543	112	3	1
2010	499	78	3	1
2009	413	53	3	0

While full figures are not yet available for 2014 and therefore not included in the chart above, in March 2014 the KFTC blocked Essilor Amera Investment PTE LTD's proposed acquisition of Korean prescription lens maker Daemyung Optical. Under the MRFTA, the KFTC presumed that the transaction would be anticompetitive given a combined post-merger market share of 66.3 percent in the Korean market for short focus lenses and a market share of 46.2 percent in the Korean market for progressive lenses. Determining that no behavioral remedy would cure the problem, the KFTC blocked the transaction in its entirety—the first such decision since its October 2009 decision to block a domestic transaction involving a duty-free retail business. As of October 2014, among other cross-border merger transactions, the KFTC is reportedly reviewing Microsoft's consummated acquisition of Nokia's hand-set business and the proposed transaction between Applied Materials and Tokyo Electron.

In 2013, the KFTC granted conditional clearance to ASML's (photolithography systems) vertical acquisition of Cymer (light sources). It also conditionally cleared MediaTek's acquisition of MStar Semiconductor regarding SoC (system-on-chips) chips for digital TVs. Neither of these transactions and approval conditions were controversial.

In 2012, the KFTC approved Google's acquisition of Motorola Mobility without imposing any remedial conditions.

In 2011, working closely with antitrust agencies in other jurisdictions, the KFTC granted conditional clearance to Western Digital's acquisition of Viviti Technology (formerly Hitachi GST) involving the hard disk drive business. This was the first time the KFTC imposed conditions on a foreign-to-foreign merger since the Owens-Corning/Saint Gobain Vetrotex merger in 2007. On the other hand, relying on factual differences, the KFTC granted unconditional clearance to another global hard disk drive acquisition of Samsung Electronics by Seagate in 2011.

In 2010, working closely with the EC, Germany, Australia, and Japan, the KFTC issued a Statement of Objections to a proposed joint venture between BHP Billiton and Rio Tinto involving the worldwide marine-transported iron ore market. The KFTC staff alleged that the transaction would substantially lessen competition in the lump ore and powdered ore markets. This was the first time the KFTC staff had relied on extraterritorial jurisdiction to reach a foreign merger and had officially expressed its objections. Plus it was the first time it had geared up to

present a case to the KFTC's full Commission at a plenary hearing to block a foreign-to-foreign merger transaction for its anticompetitive effects in Korea. However, the parties abandoned the transaction, with the KFTC staff's objection further adding to other difficulties they were facing around the globe.

In sum, since 2009 to date, the KFTC blocked a merger or imposed conditions in only a handful of merger transactions where a foreign company was the acquiring party. At least so far, these decisions have been based on established antitrust merger analysis principles. They can hardly be called protectionist decisions.

IV. CONCLUSIONS

A closer look at Korea's statutory merger control regime and the KFTC's enforcement history reveals that the KFTC has not been a protectionist merger review agency. The few merger transactions with foreign acquirers on which the KFTC imposed conditions have not been particularly controversial. In fact, the KFTC made sure to point out and take credit that it had worked closely with other jurisdictions in those cases. Of course, a merger review agency could work closely with other jurisdictions and still come out with a protectionist decision. However, at least to date, this has not been the case and there is no particular reason that the KFTC will embrace a more protectionist stance in the future.

Somewhat ironically, the recent comments about how some emerging antitrust agencies are using antitrust as a thinly (or thickly, depending on one's view) veiled industrial policy tool—not just in the merger control area but also in other antitrust topic areas—may have made all these emerging (or non-Western) agencies more aware of other jurisdictions' protectionist-flavored merger control regimes or built-in mechanisms to inject non-antitrust factors in their merger approval procedures. In fact, the KFTC or other parts of the Korean government, not previously familiar with the CFIUS procedures in the United States, the Investment Canada Act requirements in Canada, or various EU Member States' public interest or national security factors, may now have become more aware of these mechanisms and justifications for such measures, and may even consider formally adopting some of the measures themselves.

So in the end, perhaps all this renewed talk about protectionist merger control might actually tempt some countries to embrace, or at least get closer to, a protectionist merger control regime, but under the fancier or more neutral-sounding labels of "critical infrastructure security" or "national security factors." In a sense, that could even qualify as securing and maintaining a level playing field among antitrust merger enforcement agencies around the globe. Or some might call it another much flaunted phrase "harmonization of global merger control" of sort; however, not for better or worse, but rather simply for worse.