

OUR COUNTRY, RIGHT OR WRONG: THE FTC ACT'S INFLUENCE ON NATIONAL SILOS IN ANTITRUST ENFORCEMENT

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ABSTRACT:

The Federal Trade Commission Act of 1914 (“FTC Act”), a model for many other countries that set up their own competition agencies, combines the control afforded by presidential appointment and removal powers over FTC commissioners with an exceedingly discretionary mandate. This Article contends that the FTC Act’s outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States’ original blueprint for unitary executive-stamped antitrust enforcement without sharing a long historical evolution of counterbalancing regulatory norms, e.g. the judicial check that was *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935).

Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee Myung-Bak’s term (2008-2013) serves as an apt recent case study, featuring *dirigiste* calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act (“MRFTA”) before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread

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erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

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We have created, in the Federal Trade Commission, a means of inquiry and of accommodation in the field of commerce which ought both to coordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law.

—President Woodrow Wilson, September 1916¹

[Our companies] are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let's take just a half step forward to move beyond the pace of change in the global economy.

—South Korean President Lee Myung-Bak, March 2008²

It is clear that, at the beginning of the 21st century, we cannot afford to operate, to enforce our competition laws, in national or regional silos. We must not remain isolated from what happens in other jurisdictions. Even if markets often remain regional or national in terms of competitive assessment, fostering global convergence in our legal and economic analysis is essential to ensuring effectiveness of our enforcement and creating a level

1. PRESIDENT WILSON'S STATE PAPERS AND ADDRESSES 315-316 (Albert Shaw, ed., The Review of Reviews Co.) (1918).

2. *Anti-trust trade commission unveils plan to ease regulations for conglomerates*, THE HANKYOREH (Mar. 29, 2008), http://english.hani.co.kr/arti/english_edition/e_business/278744.html [https://perma.cc/6AA3-EN4E].

playing field for businesses across our jurisdictions.

—Joaquín Almunia, Vice-President of the European Commission for Competition Policy, April 2010³

The [U.S.] Agencies do not discriminate in the enforcement of the antitrust laws on the basis of the nationality of the parties. Nor do the Agencies employ their statutory authority to further non-antitrust goals.

—The U.S. Department of Justice and the Federal Trade Commission, April 1995⁴

INTRODUCTION

The International Competition Network's founding in October 2001, with the aim of "formulat[ing] proposals for procedural and substantive convergence" among its stated goals,⁵ sought to usher in a future with more cosmopolitan and coherent global antitrust enforcement. Although U.S. regulatory leadership maintained that "consistently sound antitrust enforcement policy cannot be defined and decreed for others by the U.S., the EU, or anyone else," many countries looked to the U.S. as a role model while developing their competition regimes.⁶ It is ironic, then, that to this day a central obstacle to the aspired international "culture of competition" can be found in none other than the influence of the U.S.'s own FTC Act.⁷ American antitrust priorities around the time of the legislation's passage oscillated between tempering trusts and shepherding business to further national economic strength, all towards the domestic interest. They shaped a regulatory environment that would reemerge abroad in many later-

3. Cooperation and convergence: competition policy in the 21st century, speech at the International Competition Network Annual Conference (Apr. 27, 2010) *available at* http://europa.eu/rapid/press-release_SPEECH-10-183_en.htm [<https://perma.cc/PKL8-QT5D>].

4. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS (Apr. 1995), *available at* <https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations> [<https://perma.cc/6493-TTDN>] (last updated Aug. 8, 2016).

5. INTERNATIONAL COMPETITION NETWORK, <http://www.internationalcompetitionnetwork.org> [<https://perma.cc/NB5G-HLQQ>] (last visited Oct. 22, 2017).

6. William J. Kolasky, Deputy Assistant Att'y Gen. of the Dep't of Just., U.S. and EU Competition Policy: Cartels, Mergers, and Beyond, Address Before the Council for the United States and Italy Bi-Annual Conference (Jan. 25, 2002), *available at* <https://www.justice.gov/atr/speech/us-and-eu-competition-policy-cartels-mergers-and-beyond> [<https://perma.cc/H4RN-ZT2K>] (last visited on Oct. 22, 2017).

7. 15 U.S.C. §§ 41-58 (1914).

developing countries.

The deepening global retreat from internationalism and free market principles in the present day, with the specter of trade wars looming, is exacerbated by nationalist competition regimes that are derivative of a U.S. model predating the modern world economy. Domestic critics of open markets often overlook the U.S.'s own past vis-à-vis protectionist governments today. Illiberal or nominally liberal, they walk the kind of *dirigiste* path once treaded by the American School through the early twentieth century.⁸ In and of itself, pure economic liberalism does not create biased regulatory forces that imbalance “open door” trade policies; they are largely the product of politics. An antecedent of today’s national antitrust silo can be traced back to the U.S. political climate leading up to the FTC Act’s passage.

Beneath his trustbuster image long perpetuated in mainstream discourse,⁹ President Theodore Roosevelt harbored more nuanced beliefs regarding competition enforcement. They proved consistent with a nationalistic streak exhibited since the publication of his earliest book, a naval military history depicting the U.S. as a resourceful underdog.¹⁰ During his presidency, Roosevelt formed the first antitrust-focused office within the Department of Justice (“DOJ”),¹¹ and a Bureau of Corporations within the newly established Department of Commerce and Labor.¹² He used these two prototype enforcement agencies as his big sticks for holding accountable corporations which had better “show that they have a right to exist.”¹³ Yet Roosevelt also faulted the Sherman Act’s nascent application for preventing businesses from working to their potential under modern business

8. See generally MICHAEL LIND, *HAMILTON’S REPUBLIC: READINGS IN THE AMERICAN NATIONALIST TRADITION* (1997) (documenting the early manifestations of nationalism theory).

9. See, e.g., *Special Report: The Rise of the Superstars*, THE ECONOMIST, Sept. 17, 2016, at 3 (painting a picture of Theodor Roosevelt as determined to stop a handful of corporations from taking control of the American economy).

10. See LIBRARY OF CONGRESS, *RESPECTFULLY QUOTED: A DICTIONARY OF QUOTATIONS* 346 (2010) quoted in THEODORE ROOSEVELT, *THE NAVAL WAR OF 1812* (1882) (singling out the U.S. naval war hero Commodore Stephen Decatur for praise). This Article’s title partly derives from Decatur’s famed if controversial toast: “Our country—in her intercourse with foreign nations, may she always be in the right, and always successful, right or wrong.” *Id.*

11. DEP’T OF JUST., *HISTORY OF THE ANTITRUST DIVISION*, <https://www.justice.gov/atr/history-antitrust-division> [<https://perma.cc/6ST8-CZEE>] (last visited July 29, 2017).

12. FED. TRADE COMM’N, *OUR HISTORY*, <https://www.ftc.gov/about-ftc/our-history> [<https://perma.cc/JEY3-ZLSB>] (last visited July 29, 2017).

13. Theodore Roosevelt, *Special Message* (Apr. 27, 1908), in 16 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS*, 7189, 7193 (James D. Richardson ed., 1927).

conditions.¹⁴ Even the leviathan trusts, after all, were American trusts. He stressed the importance of protecting the country's global competitiveness and voiced his opposition to a blanket prohibition on questionable combinations and concentration. Instead, he preferred oversight and control.¹⁵ According to the former Federal Trade Commission ("FTC") attorney and historian Marc Winerman, Roosevelt wanted to "use a commission to supplement (or supersede) antitrust," while the firm "that 'voluntarily' accepted its regulation and obeyed [government] orders in good faith would be shielded from antitrust prosecution."¹⁶ Consistent with Roosevelt's regulatory hedging and predilection for strong executive control, President Woodrow Wilson in 1914 signed into law the Federal Trade Commission Act ("FTC Act") that established the FTC. Wilson underscored

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The mechanism of modern business is so delicate that extreme care must be taken not to interfere with it in a spirit of rashness or ignorance. Many of those who have made it their vocation to denounce the great industrial combinations which are popularly, although with technical inaccuracy, known as "trusts," appeal especially to hatred and fear . . . In facing new industrial conditions, the whole history of the world shows that legislation will generally be both unwise and ineffective unless undertaken after calm inquiry and with sober self-restraint. Much of the legislation directed at the trusts would have been exceedingly mischievous had it not also been entirely ineffective . . . In dealing with business interests, for the Government to undertake by crude and ill-considered legislation to do what may turn out to be bad, would be to incur the risk of such far-reaching national disaster that it would be preferable to undertake nothing at all

Theodore Roosevelt, 1901 Annual Message to Congress, in 15 MESSAGES AND PAPERS OF THE PRESIDENTS, 6641, 6647 (James D. Richardson ed., 1917).

15.

There is a widespread conviction in the minds of the American people that the great corporations known as trusts are in certain of their features and tendencies hurtful to the general welfare. This springs from no spirit of envy or uncharitableness, nor lack of pride in the great industrial achievements that have placed this country at the head of the nations struggling for commercial supremacy. It does not rest upon a lack of intelligent appreciation of the necessity of meeting changing and changed conditions of trade with new methods, nor upon ignorance of the fact that combination of capital in the effort to accomplish great things is necessary when the world's progress demands that great things be done. It is based upon sincere conviction that combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled; and in my judgment this conviction is right.

Roosevelt, *supra* note 14, at 6647, 6648.

16. Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L.J. 1, 24 (2003). *See also id.* at 3 ("Roosevelt envisioned an expanded Bureau of Corporations that would rationalize the economy, tame rather than dissolve the trusts, and accommodate rather than challenge both concentration and interfirm cooperation. All this would take place under government auspices, and the government's ultimate backstop would be direct price regulation.").

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his desire for the agency to be transparent and accountable to him, with “powers of guidance and accommodation” meant to relieve “businessmen of unfounded fears and set them on the road of hopeful and confident enterprise.”¹⁷

There is little evidence to suggest that either presidents or their legislative allies in the early twentieth century could have foreseen the ramifications of their formative roles in shaping competition regimes worldwide. American competition laws, including the FTC Act, came to serve as a template for foreign governments that freely transplanted many elements while modifying others. A cognizant DOJ and FTC issued their Antitrust Enforcement Guidelines for International Operations in 1995, stating: “Throughout the world, the importance of antitrust law as a means to ensure open and free markets, protect consumers, and prevent conduct that impedes competition is becoming more apparent.”¹⁸ But these guidelines do not paint the full picture. Inspired foreign states modeled their regulatory regimes after foundations originally shaped under the auspices of Roosevelt and Wilson, both powerful executives with aforementioned hands-on preferences in matters of antitrust. At the FTC’s launch, “Wilson emphasized assistance to business rather than the investigative functions highlighted in the House or the prosecutorial functions highlighted in the Senate.”¹⁹ The language of the U.S. antitrust laws inevitably allowed leeway for presidential influence on industry-level economic direction.

All the same, the enforcers of old were watchmen for a U.S. economy which, then as now, operated within a market economy framework. Many countries that followed the United States’ regulatory lead have been less beholden. As the prominent international relations scholar Michael W. Doyle confirms:

The most striking rates of growth of the post-war period appear to have been achieved by the semi-planned capitalist economies of East Asia—Taiwan, South Korea, Singapore, Japan, and now China and India. Indicative planning, capital rationing by parastatal development banks and ministries of finance, managed trade, and incorporated unions—capitalist syndicalism, not capitalist libertarianism—seemed to describe the wave of the

17. THE PAPERS OF WOODROW WILSON 129 (Arthur S. Link ed., Princeton U. Press) (1982). See also ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 681 (1941) *quoted in* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 110 (2015) (“There is no doubt that Wilson . . . felt that he was entitled to impress his policies on the independent commissions and to expect their conformity to those policies.”).

18. DEP’T OF JUST. & FED. TRADE COMM’N, *supra* note 4.

19. Winerman, *supra* note 16, at 5.

capitalist future.²⁰

The close coordination between government and big business common to state-sponsored capitalist economies is also conducive to mercantilist thinking and dependent on the incumbent administration's economic worldview. Originating from a "historical association with the desire of nation-states for a trade surplus. . . whether it is labeled economic nationalism, protectionism,"²¹ or the like today, mercantilism is characterized by the subservience of economy to the state and its interests, and a willingness to give home-grown business enterprises an extra competitive advantage.²² Thus-inclined governments view international economic relations as conflicting, zero-sum, and better overseen through state-private sector coordination than left to wholly free markets.²³ Nor is the mercantilist phenomenon limited to illiberal states that feature state-owned enterprises and other such overtly hybrid forms of corporate governance. As political leaders continue to promote economic growth and highlight personal expertise to justify and fortify their democratic legitimacy, an expansion of governments' coordination with the private sector has followed.²⁴ When their major industries face dismal market conditions, countries inured to "capitalist syndicalism" per Doyle are not above protectionist adjustments at the expense of their neighbors. Together with the standard mercantilist strategies of prioritizing exports and frequent

20. Michael W. Doyle, *Liberalism and Foreign Policy*, in *FOREIGN POLICY: THEORIES, ACTORS, CASES* 54, 74 (Steve Smith et al. eds., 2012).

21. Robert Gilpin, *The Nature of Political Economy*, in *INTERNATIONAL POLITICS: ENDURING CONCEPTS AND CONTEMPORARY ISSUES* 273, 281 (Robert J. Art & Robert Jervis eds., 2000).

22. See, e.g., Spencer W. Walker, *The Ambivalence of United States Antitrust Policy Towards Single-Country Export Cartels*, 10 *NW. J. INT'L L. & BUS.* 98, 100 (1989) (highlighting the United States' often protectionist antitrust policy).

23. See, e.g., Ronald J. Gilson & Curtis J. Milhaupt, *Sovereign Wealth Funds and Corporate Governance: A Minimalist Response to the New Mercantilism*, 60 *STAN. L. REV.* 1345, 1346 (2008) ("In [new mercantilism], the country is the unit whose value is to be maximized, with a corresponding increase in the role of the national government as a direct participant in and coordinator of the effort. . . For the new mercantile capitalism, the government attempts to ensure that company-level behavior results in country-level maximization of economic, social, and political benefits.").

24. See generally Christopher May, *GLOBAL CORPORATIONS IN GLOBAL GOVERNANCE* (2015) (arguing that corporations significantly impact global governance institutions); see also, Michael A. Witt, *South Korea: Plutocratic State-Led Capitalism Reconfiguring*, in *THE OXFORD HANDBOOK OF ASIAN BUSINESS SYSTEMS* 216, 221 (Michael A. Witt & Gordon Redding eds., 2014) ("The genuine fear that full enforcement of corporate governance reforms may weaken the competitive power of the *chaebol* [mega-conglomerates]; given their importance to the economy—Samsung alone is said to account for about 20 percent of Korean exports—it seems plausible that prosecutors and politicians will try to avoid the risk of blame for weakening Korea's industrial powerhouses.").

use of various non-tariff barriers to thwart competitive imports,²⁵ selective antitrust enforcement offers another tool.

This Article contends that the FTC Act's outmoded openness to strong presidential direction, where adapted abroad, has helped detract from antitrust regulator independence. Even advanced players in the liberal international economic order such as South Korea have made use of the United States' original blueprint for unitary executive-stamped antitrust enforcement without sharing its long historical evolution of counterbalancing regulatory norms. Strong executive direction in antitrust enforcement is particularly suited to capitalist economies helmed by administrations with mercantilist policies, given their belief that the state and big business must cooperate in the face of zero-sum international competition. South Korean President Lee Myung-Bak's term (2008-2013) serves as an apt recent case study, featuring *dirigiste* calibration of antitrust enforcement against a backdrop of global recession. This Article examines the parallels between the FTC Act and the South Korean Monopoly Regulation and Fair Trade Act ("MRFTA") before scrutinizing the enabled silo-like enforcement patterns of the Korean Fair Trade Commission under the Lee administration. Increasingly widespread erosion of public confidence in free and competitive trade demands a better understanding of the forces preventing global convergence in antitrust enforcement, and of their roots.

I. DEFERENCE IN THE FTC ACT AND ITS MODERN PROGENY

This Section reviews the FTC Act's language, specifically the delineated presidential appointment and removal powers with respect to FTC commissioners, along with the broad discretion and flexibility accorded to the Commission in its mandate. Also examined is a noteworthy case of these elements' transnational adaptation,²⁶ as seen in analogous provisions of the

25. See generally ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER (2001) (illustrating that national policies critically shape a country's economic affairs).

26. Many of the emergent antitrust laws worldwide in recent decades have been modeled after their predecessors in the U.S. and the EU. See, e.g., Kolasky:

Let me turn finally to the new International Competition Network (or ICN). The last decade has seen market principles, deregulation and respect for competitive forces broadly embraced around the world. Over 90 countries—accounting for nearly 80 percent of world production (19)—have enacted antitrust laws, and at least 60 have antitrust merger notification regimes. Many of these laws are modeled after the U.S. or EU antitrust laws. Now the real work begins. Having convinced much of the world to structure their national economies around competition and free markets, we must ensure that antitrust works effectively and

South Korean MRFTA. While far from carbon copies of the FTC Act, the MRFTA and numerous other U.S.-inspired foreign competition laws bear its substantive imprint without necessarily carrying over appurtenant time-honored safeguards—internal and external to the statutory language—against excessive presidential control over enforcement.

Enacted in 1914 to bolster and clarify the government’s authority to hold accountable business enterprises that harm or endanger market competition, the FTC Act is one of three core federal antitrust laws together with the Sherman and Clayton Acts. The “catch-all” legislation established the FTC and empowers commissioners to investigate a wide range of anticompetitive business practices and to penalize culpable companies.²⁷ Section 5 is central to the statute with its prohibition of “unfair methods of competition in or affecting commerce,” as well as “unfair or deceptive acts or practices in or affecting commerce.”²⁸ Any violation of U.S. antitrust laws—including, but not limited to, monopolization under Section 2 of the Sherman Act and mergers and acquisitions that trigger Section 7 of the Clayton Act—constitutes a violation of the FTC Act.

South Korea’s government enacted its MRFTA in late 1980 in response to a business climate wherein monopolists and dominant firms with 70 percent or more market share had come to produce 89 percent of all industrial goods by 1979.²⁹ In East Asia, the MRFTA was preceded by the Japanese Antimonopoly Law, which the American Occupation authorities themselves crafted largely in an attempt to stave off a future resurgence of the mega-conglomerate *zaibatsu* that had sustained the Japanese Empire.³⁰ Although

efficiently to deliver what it promises.

Supra note 6.

27. See, e.g., Eleanor M. Fox, *Chairman Miller, the Federal Trade Commission, Economics, and Rashomon*, 50 *LAW & CONTEMP. PROBS.* 33, 33 (1987).

A commissioner of the Federal Trade Commission serves the combined functions of executive (prosecutor), legislator (rule maker and policymaker), and jurist. The FTC decides what complaints should be brought, what appeals should be taken, and when writs of certiorari should be sought. As a judicial body it sits in judgment on appeals from decisions of the FTC’s administrative law judges. As an administrative body it promulgates rules by which, as a judicial body, it has the power to compel compliance.

28. Congress in 1938 amended the Act to also prohibit “unfair or deceptive acts or practices.” Wheeler-Lea Amendments of Act, ch. 49, § 3, 52 Stat. 111 (1938) (codified as amended at 15 U.S.C. § 45(a)(1) (2006)).

29. See MEONGCHO YANG, *COMPETITION LAWS OF THE PACIFIC RIM: REPUBLIC OF KOREA (SOUTH KOREA)*, 1-1, 1-5 (1991) (demonstrating that the increased business concentration in the latter half of the 1970s reduced the competitiveness of South Korea’s domestic enterprises in the international markets and an imbalance in the country’s own national economy).

30. See, e.g., Yi Sang-Seung and Jung Youngjin, *A New Kid on the Block: Korean Competition Law, Policy, and Economics*, 3 *COMPETITION POL’Y INT’L* 153, 158 (2007). Historically speaking, competition law began as an Anglo-American institution. In Japan, the U.S. occupation force, led by General MacArthur, introduced competition law after World

South Korea's legal competition framework also received heavy influence from the U.S., it also diverged in some details, not the least because many South Korean politicians wanted to expedite the continued advances of their own country's mega-conglomerates, the *chaebol*.³¹ Fairly unsubtle structural differences came to increase the clout of the Korean Fair Trade Commission ("KFTC") relative to that of its U.S. counterpart while limiting the private consumer's voice. Unlike in the U.S. where the FTC shares antitrust enforcement responsibilities with the DOJ, in South Korea the Prosecutor's Office involves itself only when the KFTC refers a matter to it; Korean law also does not permit antitrust class action lawsuits, nor are private parties allowed to file for injunctions against alleged MRFTA violations in court.³²

In sum, virtually all roads with respect to competition regulation in South Korea must run through the KFTC,³³ whereas the FTC is only one domestic driver of U.S. antitrust matters. Just as South Korea's antitrust enforcement paradigm differs from that of the U.S. despite the latter's imprint, so too do those of other countries; the structural impact of underlying constructivist disparities certainly must be considered when examining overseas instances of agenda-driven antitrust enforcement. All the same, widely diffused were the conventions of the FTC Act, which had been drafted in an era in which the competition agency was neither intended to be nor expected to become truly independent.

War II, but its main purpose was to dissolve and prevent the resurgence of the zaibatsu, the family-controlled large conglomerates that financed the Japanese war machine.

31. See, e.g., Danny Abir, *Monopoly and Merger Regulation in South Korea and Japan: A Comparative Analysis*, 13 INT'L TAX & BUS. L. 143, 175 (1996).

South Korea and Japan are concerned with the growth of their industries. Judging from the manner in which antitrust measures are enforced in those countries, lenient application of their antitrust laws are a means of achieving their objectives. Both countries initially modeled their antitrust laws after those of the United States. However, unlike in the United States, they have not placed a lot of weight on enforcing regulations which control monopolies and mergers. See also *infra* note 105 and accompanying text.

32. Yi & Jung, *supra* note 30, at 159. Incidentally, "[d]eveloping countries are increasingly looking at the KFTC as a potential role model, on the assumption that they lack institutions needed for the kind of sophisticated antitrust enforcement seen in the United States or Europe." *Id.* at 155.

33. See *id.* at 160.

[I]t could be argued that the KFTC is currently the single, most important enforcer of Korean competition law. The KFTC's quasi-monopoly of enforcement of Korean competition law is distinct from the U.S. antitrust law, in which various stakeholders such as individuals and state governments may also initiate actions to enforce U.S. antitrust law.

A. *The President's Commissioner Appointment Power*

1. Power of Appointment in the FTC Act

The presidential power to appoint FTC commissioners is established in the opening section of the FTC Act and has remained unmodified since its inception in 1914. Section 1 provides that:

A commission is created and established, to be known as the Federal Trade Commission which shall be composed of five Commissioners, who shall be appointed by the President, by and with the advice and consent of the Senate. Not more than three of the Commissioners shall be members of the same political party. The first Commissioners appointed shall continue in office for terms of three, four, five, six, and seven years, respectively, from September 26, 1914, the term of each to be designated by the President, but their successors shall be appointed for terms of seven years, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall succeed. The President shall choose a chairman from the Commission's membership.³⁴

Although this bipartisan, staggered fixed-term appointment clause can be found duplicated in other United States statutes that established independent agencies, the FTC Act is one of the earliest instances of the template's use.³⁵ The statutory language purposefully aims for an ideological balance in the FTC's membership by ensuring that at least two of five commissioners cannot belong to the same political party as the President. Requirements of Senate consent and staggered terms are also meant to prevent excessive partisan influence on the activities of commissioners. In the case of the United States, the longer a party controls the presidency, the greater the prospects for sympathetic commissions aligned with presidential preferences in matters of policy. A two-term President through the course of eight years can personally appoint the entirety of a five-member Commission, albeit only over time.

The FTC Act also confers on the President the consequential power to select a Chairman of the FTC.³⁶ Although the chairperson does not possess

34. 15 U.S.C. § 41 (1914).

35. *See, e.g.*, Consumer Product Safety Act, 15 U.S.C. §§ 2051-84 (mandating staggered appointments). The Interstate Commerce Act of 1887 that created the first independent agency, the now-defunct Interstate Commerce Commission, preceded the FTC Act in its use of the commissioner appointment provision. Interstate Commerce Act of 1988 § 11, 2 U.S.C. 285(b) (1989).

36. This provision did not exist in the original version of the statute, but was introduced with Reorganization Plan No. 8 of 1950, formally designating the Chairman as the FTC's

any special formal authority to dominate policymaking, he or she has a strong say in selecting the issues to be covered by the Commission.³⁷ Thus, the power to appoint a chair in and of itself renders tenuous any notion of airtight FTC independence from presidential direction in competition policy matters. At least one noted administrative law scholar has described the President's primary avenue for control over independent agencies as the appointment of the chairperson.³⁸ The United States judiciary too, has acknowledged the power as a "lever[] of influence."³⁹ The FTC Act's entrustment of chair appointment to the executive branch eventually would become a norm among antitrust agencies worldwide.

Recent decades have seen the rise of ample literature questioning the true autonomy of the United States' independent agencies, as well as scholarship on pressure directed towards the FTC from different administrations and political parties.⁴⁰ For this Article's purposes, it is sufficient to acknowledge that the FTC Act, much of it philosophically Theodore Roosevelt's brainchild and further developed under Woodrow Wilson's purview,⁴¹ did not apportion elsewhere or contain effective dams against the presidential appointment power.

2. Power of Appointment in the MRFTA (South Korea)

The South Korean MRFTA's commissioner appointment clause resembles that of the FTC Act in two fundamental respects—it assigns to the President the appointment power, as well as the power to select a

executive and administrative head. Reorganization Plan No. 8 of 1950, 15 Fed. Reg. 50,4496 (May 25, 1950) (to be codified at 3 C.F.R. 3175).

37. See Fox, *supra* note 27, at 33-34.

38. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587-91 (1984).

39. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 680 (D.C. Cir. 2008), *cert. granted*, 129 S. Ct. 2378 (2009).

40. See, e.g., Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 842, 812 (2013) (rejecting the "binary distinction between independent and executive agencies," and positing that instead, all agencies should be regarded as executive and seen as falling on a "spectrum from more independent to less independent."); Neal Devins & David E. Lewis, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 461 (2008) (examining the "profound impact of party polarization on presidential control of independent agencies. . ."); Paul R. Verkuil, *Jawboning Administrative Agencies: Ex Parte Contacts by the White House*, 80 COLUM. L. REV. 943 (1980) (noting the various informal ways that presidents can apply pressure upon independent agencies, e.g. seeking new legislation from Congress, or removing support from an agency in budget negotiations with Congress).

41. See generally Winerman, *supra* note 16.

chairperson.⁴² Beyond this shared base, the predisposition to presidential direction is further consolidated in the MRFTA via a number of modifications and omissions. First, the legislative consent requirement found in the FTC Act is omitted. The chair and a vice chair are appointed by the President at the recommendation of the Prime Minister (a ceremonial figure selected by the President from within the same party), while the other commissioners are appointed by the President at the recommendation of the chairperson.⁴³ Second, the statute caps commissioner terms at three years and expressly allows for the possibility of a one term renewal per commissioner.⁴⁴ Given that South Korean presidents serve a single term of five years, the MRFTA permits each executive to appoint his or her preferred commissioners for at least the bulk of a presidential term, and to potentially switch out his or her own appointees by not renewing their terms. Third, the MRFTA does not contain a clause mandating a balance of political parties represented on the Commission.⁴⁵

Furthermore, the statute's provision for four non-standing commissioners — in addition to the chairman, vice-chairman, and three standing commissioners for a total of nine commissioners⁴⁶ — enables a hierarchy as well as promotion prospects, when coupled with presidential discretion over term renewal. At least one standing commissioner is required to be present for an official chamber meeting, and standing commissioners are considered next-in-line surrogates after the chairman and vice-chairman, in order of their seniority, in the event of contingencies.⁴⁷ This setup generally encourages conformity over maverick behavior on the part of commissioners who would prefer to exert a larger impact than would be possible with a single three-year term as a lower-tier commissioner.

In sum, the MRFTA's drafters incorporated the basic framework of the FTC Act's presidential appointment clause while further magnifying the KFTC's susceptibility to political influence and oversight from the executive

42. Monopoly Regulation and Fair Trade Act, Act No. 3320, Dec. 31, 1980, art. 37 (S. Kor.), translated by Korea Legislation Research Institute (2015), [hereinafter "MRFTA"].

43. *Id.*

44. *Id.* at art. 39. Commissioner reappointments to the United States FTC also have occurred, although they are not commonplace. One notable instance involved Republican President Calvin Coolidge's reappointment of Commissioner William Humphrey, a fellow Republican, to a second term that would extend to President Franklin D. Roosevelt's presidency. Roosevelt would later attempt to remove Humphrey from his post for political reasons. See *infra* note 56 and accompanying text.

45. *Id.* at art. 41. In this apparent effort to negate the prospect of partisan conflict within the KFTC, the MRFTA also effectively removes a potential source of pushback against presidential dictates.

46. *Id.* at art. 37.

47. *Id.* at art. 38.

branch.⁴⁸ The makeup of the appointment power is such that commissioner removal by the letter of the MRFTA becomes virtually unnecessary in practice. The brief three-year terms of commissioners, all of whom may hail from the same party as the President and eye new bureaucratic or political postings during a five-year presidential administration, render unlikely any protracted battles. Hence “voluntary” resignations are more practical for the parties involved.

B. *The President's Commissioner Removal Power*

1. Power of Removal in the FTC Act and Relevant Case Law

Section 1 of the FTC Act provides that “[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”⁴⁹ The removal power originates from the U.S. Constitution, which tasks the President with the duty to “take Care that the Laws be faithfully executed.”⁵⁰ The first United States Congress consequently endorsed plenary presidential power over officers appointed by the President, rejecting a legislative removal power in favor of the Senate’s advice and consent.⁵¹ Independent agencies including the FTC were later crafted in accordance with this position.⁵² The original language of the FTC Act did not clearly distinguish between at-will and for-cause commissioner removal by the President, nor did it expressly permit or prohibit the former.

Two decades after the FTC Act’s passage and in a blow to unfettered executive branch control over FTC commissioners, the Supreme Court issued the landmark decision of *Humphrey's Executor v. United States*.⁵³

48. In stark contrast to 20th century domestic U.S. politics, the South Korean center-right boasted a continuous grip on the presidency and legislature from the country’s post-WWII inception until 1998 and 2004, respectively. The drafting of the MRFTA in 1980 occurred within this imbalanced political environment.

49. 15 U.S.C. § 41 (1914).

50. U.S. CONST. art. II, § 3.

51. See *Bowsher v. Synar*, 478 U.S. 714, 722 (1986) (holding that Congress unconstitutionally aggrandized its own power by enacting a statute with for cause legislative removal power of an executive officer, which was a usurpation of executive power).

52. See Steven G. Calabresi & Christopher S. Yoo, *THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH* 258 (2012) (“The scant legislative history that does exist suggests that Congress probably did not have a clear idea of the relationship between the independent agencies and the president. If anything, the legislative history suggests that Congress regarded the removal provisions in the FTC Act as a check on the commission’s power, not the president’s, and that Congress thought about the FTC’s independence in terms of freedom from partisanship rather than freedom from presidential control.”).

53. 295 U.S. 602 (1935).

Humphrey's Executor clipped the presidential removal power by distinguishing between executive officers that could be removed at will by the President, and quasi-legislative and/or quasi-judicial officers in whose case Congress possesses the authority "to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime."⁵⁴ The Court asserted that FTC commissioners belong to the latter category.⁵⁵ After President Franklin D. Roosevelt had moved to fire Commissioner William Humphrey due to Humphrey's allegedly lukewarm support for his New Deal policies,⁵⁶ the Court ruled that FTC commissioners could not be removed from their posts solely for political reasons, by virtue of their quasi-legislative and quasi-judicial status.

Humphrey's Executor remains in force today, although successive Supreme Court decisions have stressed the fine line between the independent agency's autonomy and potential extra-constitutional infringement of the President's powers under Article II of the Constitution. In *Morrison v. Olson*, the Supreme Court upheld a for-cause removal provision for an independent counsel performing special investigatory and prosecutorial functions.⁵⁷ However, the *Morrison* court emphasized that this removal limitation was allowable only because the independent counsel acted in the narrow, unusual, and limited capacity of investigating the conduct of high-ranking executive branch officials.⁵⁸ Moreover, according to the Court, the limitation on the removal power did not unconstitutionally infringe on the President's Article II powers due to the independent counsel's direct line of accountability to the President through the Attorney General.⁵⁹ This carved-out exception came to coexist with the Court's *Bowsher v. Synar* decision⁶⁰ two years prior in 1986, where it had held that the Gramm-Rudman-Hollings Act was unconstitutional for empowering Congress rather than the President with the power to terminate the U.S. Comptroller General for inefficiency, neglect of duty, or malfeasance. *Bowsher* nonetheless noted that these terms, identical to those found in the FTC Act, "are very broad and . . . could sustain removal of a Comptroller General for any number of actual or perceived transgressions."⁶¹ Per the Ninth Circuit's interpretation of *Humphrey's*

54. *Id.* at 629.

55. *Id.* at 628.

56. MARIAN C. MCKENNA, FRANKLIN ROOSEVELT AND THE GREAT CONSTITUTIONAL WAR: THE COURT-PACKING CRISIS OF 1937 96–99 (2002).

57. 487 U.S. 654 (1988).

58. *Id.* at 655.

59. *See Id.* at 692 ("We do not think that this limitation as it presently stands sufficiently deprives the President of control over the independent counsel to interfere impermissibly with his constitutional obligation to ensure the faithful execution of the laws.")

60. 478 U.S. 714 (1986).

61. *Id.* at 714.

Executor, “[t]he power to remove is the power to control,”⁶² and it further extrapolated from *Bowsher* that “the removal power need not be exercised to exert effective control, [as] the mere existence of removal authority is likely to influence behavior”⁶³—a reality as applicable to the FTC as it has been to any independent agency. In the wake of the FDR administration, the U.S. for its part benefited from a gradual development of regulatory norms discouraging excessive presidential interference with the FTC, which has contributed to a lack of removal flashpoints since. Without the luxury of time to organically foster such conventions, foreign governments inspired by the FTC Act were left to transplant the legal ambiguity of its removal power, the likes of which had so bedeviled the American judiciary.

2. Power of Removal in the MRFTA (South Korea)

The KFTC refers to itself as a “quasi-judiciary body,”⁶⁴ seemingly in the vein of the U.S. Supreme Court’s recasting of the FTC. Apropos, the removal clause in the MRFTA appears to forbid at-will presidential removals of commissioners:

No commissioner shall be removed from office or decommissioned contrary to his/her intention except in any of the following cases:

1. Where he/she has been sentenced to imprisonment without prison labor or severer;
2. Where he/she becomes incapable of performing his/her duties due to prolonged physical or mental weakness.⁶⁵

Yet the MRFTA’s removal clause manages to retain the lack of clarity found in its FTC Act forerunner that had necessitated judicial intervention against Franklin D. Roosevelt. The statute does not adopt the FTC Act’s “inefficiency” or “neglect of duty” as causes for removal, substituting instead “prolonged physical or mental weakness,” yet in so doing, likewise opens the door to potentially subjective determinations. Additionally, the removal clause’s reference to “intention” can and has become problematic. A commissioner may encounter strong presidential pressure to relinquish the post for any number of reasons, legitimate or superficial—if the commissioner thereafter seeks a further role in the incumbent administration,

62. *Silver v. US Postal Service*, 951 F.2d 1033, 1039 (1991).

63. *Id.*

64. KOREA FAIR TRADE COMMISSION, <http://www.ftc.go.kr/eng/index.jsp> [<https://perma.cc/L6UJ-VTVB>] (last visited July 29, 2017).

65. MRFTA, Act No. 3320, Dec. 31, 1980, art. 40 (S. Kor.).

a voluntary resignation becomes the only realistic option.

When coupled with KFTC commissioners' brief terms limited to three years and the motivation of promotion and/or term renewal, statute-based removal proves nearly superfluous to inevitable presidential influence over the agency. The MRFTA's drafters ensured that even in the worst case scenario, the odd commissioner with maverick tendencies could be cycled out in relatively short order by the President. They hence chose to mirror the general ambiguity of the FTC Act's removal clause for the MRFTA, rather than balking from or further elaborating upon it.

C. *Elastic Statutory Language and Purpose*

1. Interpretive Latitude in the FTC Act

A dearth of clarity on standards and criteria has been part and parcel of the FTC Act's considerable normative influence abroad,⁶⁶ especially with respect to areas of regulator discretion in enforcement. Within two years of the statute's enactment, President Wilson would confess candidly of the new FTC: "It is hard to describe the functions of [the] [C]ommission. All I can say is that it has transformed the Government of the United States from being an antagonist of business into being a friend of business."⁶⁷ While Wilson may have been referring to the FTC as a shield for business owners against monopolies and dominant competitors, his inability to easily condense the mandate of the Commission spoke to its versatility and breadth. The FTC Act's purview over any "unfair methods of competition"⁶⁸ per its Section 5 granted the agency wide berth in pursuing both ongoing and incipient antitrust violations beyond the Sherman Act's reach, instead of limiting the FTC to codified standards and prescriptions for a generally defined set of antitrust violations. According to Winerman, "then, as now, the agency combined formal powers to investigate [and] formal powers to prosecute," while permitting dialogues "with business to facilitate compliance with the

66. See, e.g., Abir, *supra* note 31, at 143 ("The success of antitrust regulation in the United States is a compelling reason why industrial countries adopted legislation dealing with monopolies and restrictive business agreements.").

67. Wilson, *supra* note 17, at 265. Wilson envisioned the FTC as fulfilling a finesse role that the DOJ could not. See *id.* at 340-341 ("[A]n attempt was very properly made. . . to provide tribunals which would distinctly determine what was fair and what was unfair competition; and to supply the business community, not merely with lawyers in the Department of Justice who could cry, 'Stop!', but with men in such tribunals as the Federal Trade Commission, who could say, 'Go on,' who could warn where things were going wrong and assist instead of check.").

68. Winerman, *supra* note 16, at 68. Before the FTC Act's passage, Section 5 was opposed by congressional critics for "the broad discretion they understood the statute to convey."

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law (those emphasized by Wilson).”⁶⁹ As discussed, there existed a strong predilection in the FTC Act’s originators towards favoring cooperation with big business over heavy-handed policing and resultant debilitation of the national economy. The inferred use of discretion prevalent throughout the statute proved conducive to this aim.

Section 5 proceeds to state that a person, partnership, or corporation believed culpable of antitrust violations by the FTC will be issued a complaint and a notice of a hearing if “it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.”⁷⁰ This invocation of the public interest without further elaboration has left open a sizable margin for interpretive license,⁷¹ not the least a presumption that the public referenced is the *domestic* public. Certainly the public interest varies from country to country and is not a fixed concept. Even within a single domestic polity, different interest groups may be at odds regarding its intuitive definition. Former FTC Chairman William Kovacic noted that “in the 1950s and the 1970s, Commission efforts to use Section 5 litigation elicited strong political backlash from the Congress. The very breadth of Section 5 creates political risks in its application.”⁷² Whether manifestations of checks and balances or politicized affairs, such historical developments contributed to extralegal U.S. regulatory norms in antitrust enforcement that foreign competition regimes could not transplant and adapt in the same manner that they did American competition laws.

Section 5 also states “in determining whether an act or practice is unfair, the Commission may consider established public policies as evidence,” with the qualifier that “[s]uch public policy considerations may not serve as a primary basis for such determination.”⁷³ Befitting the FTC Act’s elastic mandate, no specific examples of any such public policies are offered. Furthermore, the FTC may find unlawful only the unfair method of competition that “causes or is likely to cause substantial injury to consumers not outweighed by countervailing benefits to consumers or to competition.”⁷⁴ Without further elaboration on countervailing benefits, the statute cedes to the Commission the leeway to finesse its responses to complex antitrust

69. *Id.* at 97.

70. 15 U.S.C. § 45(b) (1914).

71. Especially during periods of economic upheaval, interpretations of the “interest of the public” can evolve. *See, e.g.,* Winerman, *supra* note 16, at 5 (“The Commission’s early history would soon play out against a new backdrop, as wartime mobilization would encourage, and to some extent legitimate, unprecedented coordination under government auspices.”).

72. William E. Kovacic & Marc Winerman, *Competition Policy and the Application of Section 5 of the Federal Trade Commission Act*, 76 ANTITRUST L.J. 929, 943 (2010).

73. 15 U.S.C. § 45(n) (2006).

74. *Id.*

violations. While guidance to fill these descriptive gaps has been supplied domestically by over a century of successive judicial decisions, alongside evolving conventions accounting for legislative as well as private sector interests, most foreign competition regimes lack a comparable array of participant actors beyond the executive branch.⁷⁵ When acting in a relative vacuum of precedent and checks, protectionist administrations abroad encounter less resistance to their justifications for selective antitrust enforcement in the name of public policy and/or countervailing national economic benefits.

Section 5 is not explicit regarding openness to presidential control, but Section 6 includes direct mention of presidential prerogative: “The Commission shall also have power. . . [u]pon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.”⁷⁶ Wilson was quick to rely on Section 6,⁷⁷ and even as the notion of FTC autonomy later became entrenched in the U.S., this portion of the FTC Act was left unamended. Today, the language easily could be construed overseas as an affirmation of the FTC’s subservience to the executive branch. In the event that foreign readers of the Act fail or do not choose to connect the historical dots, they would be unable to find any undergirding support for agency independence in Section 5 or 6. Indeed, novel expansions of FTC autonomy in Section 5 cases still risk political crossfire for “going beyond established principles of antitrust doctrine—principles set in the resolution of Clayton or Sherman Act disputes creat[ing] immediate opportunities to scold the Commission for taking ‘unprecedented’ measures or entering ‘uncharted’ territory,” per Kovacic.⁷⁸ The originators of the legislation would not have had it any other way.

75. Divergence in culture also cannot be discounted. In 2015, President Barack Obama was purported to be the first sitting U.S. president to visit the FTC’s offices since Franklin D. Roosevelt in 1937. President Barack Obama, Remarks by the President at the Federal Trade Commission (Jan. 12, 2015) (transcript available at <https://www.whitehouse.gov/the-press-office/2015/01/12/remarks-president-federal-trade-commission> [<https://perma.cc/2CLG-7M4Q>]).

76. 15 U.S.C. § 46(d) (2006).

77. See Calabresi & Yoo, *supra* note 52, at 259 (“Wilson did not hesitate to use his power to direct FTC investigations, launching many of the FTC’s major initiatives.”).

78. Kovacic & Winerman, *supra* note 72, at 943. Kovacic is blunt in his assessment that “Section 5 is important to the FTC in theory, but efforts to implement it have seen only limited success in practice. Future efforts to develop Section 5 jurisprudence must account for these past problems, if the Commission is to attain better results the next time. The Commission needs to articulate, perhaps through a policy statement prior to litigation, the basis on which it intends to proceed.” *Id.* at 950.

2. Interpretive Latitude in the MRFTA (South Korea)

The South Korean MRFTA also contains provisions regarding consideration of the public interest and public policies in determining an antitrust response. Although they appear to go into more granular detail than their U.S. precursors, the analogous MRFTA provisions similarly are left open to broad interpretation and enable extensive discretion in accordance with the executive branch's economic goals. Significantly, the MRFTA exempts certain "unfair collaborative acts" from punishment:

The provisions of paragraph (1) shall not apply, where unfair collaborative practices are authorized by the Fair Trade Commission as satisfying the requirements prescribed by Presidential Decree, and they are conducted for any of the following purposes:

1. Industry rationalization;
2. Research and technology development;
3. Overcoming of economic depression;
4. Industrial restructuring;
5. Rationalization of trade terms and conditions;
6. Improvement of competitiveness of small and medium enterprises.⁷⁹

The referenced Presidential Decree (one of many integrated into the MRFTA's supplementary Enforcement Decree) outlines the criteria to qualify for exemption and exhibits a heavy dependence on KFTC construal. For instance, with respect to "industry rationalization," the agency must first find that "the effect of technical advancement, quality improvement, cost curtailment, efficiency promotion, etc. by the collaborative act is obvious,"⁸⁰ in which case it will tolerate the anti-competitive conduct deemed beneficial to industry, presumably with the public (national) interest in mind. The KFTC also must deem that "it is difficult to attain the industrial rationalization through any way, other than the collaborative act," and that "the effect of industrial rationalization is greater than that of the restriction on competition"⁸¹—both markedly subjective determinations. The final criterion echoed the FTC Act's exemption for unfair methods of competition where the harms are outweighed by "countervailing benefits to consumers

79. MRFTA, Act No. 3320, Dec. 31, 1980, art. 19 (S. Kor.).

80. Enforcement Decree of the MRFTA, Presidential Decree No. 12979, Apr. 14, 1990, art. 24-2 (S. Kor.), *translated* by Korea Legislation Research Institute (2015).

81. *Id.*

or to competition,”⁸² the assessment of which is left to the FTC.

The MRFTA’s requirements for the “overcom[ing of] economic depression” exemption are even more nebulous. Unfair collaborative acts can be permitted upon satisfaction of the following conditions:

1. Where the demand for specified goods or services continues to be reduced for a considerable period, and the supply exceeds considerably the demand, and where such state is obviously going to continue in the future;
2. Where the market price of the goods or services remains below the average production costs for a considerable period;
3. Where a considerable number of enterprises in the business field might find it difficult to continue business activities due to economic depression;
4. Where matters as referred to in subparagraphs 1 through 3 are unable to be overcome through the rationalization of enterprises.⁸³

The criteria’s qualitative thresholds—over “a considerable period,” wherein “supply exceeds considerably the demand, and where such state is obviously going to continue,” and endangerment of a “considerable number of enterprises”—welcomes discretionary judgment calls on the part of the KFTC.⁸⁴ When anticompetitive collaboration is carried out by a group of domestic companies, not only are foreign competitors harmed in both domestic and foreign markets, but also gains can come at the expense of all consumers paying higher prices wherever the advantaged products reach.⁸⁵ Allowing such behavior for the “overcoming of economic depression” shelters cartels and advances a selective interpretation of the public interest, one subsumed under protectionist and potentially mercantilist policy.

The MRFTA also carries over the direct presidential prerogative preserved by the FTC Act’s Section 6⁸⁶ and replicates it across numerous sections. The statute is replete with amendments referencing Presidential Decrees for the terms of general rules, and such is the extent of this delegating act that Article 3-2 (Prohibition of Abuse of Market-Dominating Position) expressly states, “[c]ategories or standards for abusive acts shall be determined by Presidential Decree.”⁸⁷ Thus, timely executive preferences may outright dictate novel substantive definitions for illegal anticompetitive

82. 15 U.S.C. § 45(n); *see supra* note 73 and accompanying text.

83. Enforcement Decree of the MRFTA, art. 25. (S. Kor.).

84. *Id.*

85. Eleanor M. Fox & Janusz A. Ordover, *The Harmonization of Competition and Trade Law: the Case for Modest Linkages of Law and Limits to Parochial State Action*, 19 *WORLD COMPETITION* 5, 14-15 (1995).

86. 15 U.S.C. § 46(d); *see supra* note 76 and accompanying text.

87. MRFTA, Act No. 3320, Dec. 31, 1980, art. 3-2(2) (S. Kor.).

conduct or modify pre-existing categories and benchmarks. The other subsections of Article 3-2 hinge on “unreasonably” and “unfairly” abusing a position of market dominance,⁸⁸ undefined standards echoing the FTC Act’s relative flexibility shown towards dominant firms—comprising an approach that contrasts with those of other major jurisdictions such as the EU to this day.⁸⁹ We will next analyze how, under South Korea’s recent Lee Myung-Bak administration, already amenable competition laws influenced by their U.S. antecedents⁹⁰ were distended further to accommodate a strong executive’s overarching mercantilist policy and a national antitrust silo.

II. AN ANTITRUST SILO BY EXECUTIVE DESIGN IN SOUTH KOREA

Three developments foreshadowed the direction of Seoul’s competition regime during Lee Myung-Bak’s presidency from 2008 to 2013. First, a global financial contagion precipitated by U.S. subprime mortgages spread to Asian markets beginning in late 2007.⁹¹ According to Lee, “[w]hen the 2008 global economic crisis struck, many said that it was the worst crisis to hit the global economy since the Great Depression of the 1930s . . . It was a chilling reminder of how fragile our world is . . .”⁹² Second, in March 2008 within a month of his February inauguration, Lee (a former chief executive

88. *Id.*

89. *See, e.g.*, Claire Cain Miller & Mark Scott, *Google Settles Its European Antitrust Case; Critics Remain*, N.Y. TIMES, Feb. 6, 2014, at B1 (“The European Commission has gone further than the F.T.C. in extracting concessions from Google in large part because European antitrust law gives more priority to protecting competing companies. United States antitrust doctrine gives dominant companies more freedom if they can prove they are creating a better product for consumers, which was a central factor in the F.T.C.’s decision to close its case without charges.”).

90. Washington for its part has argued that single-country export cartels could potentially bring innovation and lower prices, arguing against their outright prohibition or treatment as a *per se* violation. *See* Marek Martyniszyn, *Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law*, 15 J. INT. ECON. L. 181, 189-190 (2012) (“The USA, who expressly allows export cartels, defended them recognizing an enabling and efficiency arguments. It pointed to the OECD Recommendation permitting members to exclude export cartels from cartel enforcement in a transparent manner and suggested exclusion from a definition of hardcore cartels for agreements having ‘a significant potential to enhance efficiency.’ They underlined that export cartels may have procompetitive effects, allowing firms that hitherto did not engage in export activities to do so. Moreover, the USA claimed that export cartels may bring innovation and lower prices, underlining that their prohibition or *per se* treatment would be inappropriate.”).

91. *See* ANDREW GORDON, A MODERN HISTORY OF JAPAN 336 (2014) (“[T]he American economy began to crumble under the massive weight of an unsustainable binge of home loans aggressively and deceptively marketed to millions . . .”); C. H. Park, *A Whirlpool of Historical Controversies in Widening Waters of Cooperation*, in CHANGING POWER RELATIONS IN NORTHEAST ASIA 39, 45 (Marie Soderberg ed., 2011).

92. LEE MYUNG-BAK, THE UNCHARTED PATH 271 (2011).

of Hyundai Engineering and Construction) explained his vision for competition regulation under his administration whereby “the [KFTC] commission should introduce a totally new system. It should support businesses by easing regulations as much as possible so that all enterprises can conduct their business well.”⁹³ The KFTC, following lockstep as had the FTC during the Wilson years, announced that the equity investment limit on large companies would be eased along with other investment restrictions through MRFTA and Enforcement Decree revisions at the National Assembly,⁹⁴ effectively backtracking from reform of corporate governance; Lee’s governing Grand National Party held a majority of seats and could ensure their passage.⁹⁵ Third, also in March 2008, the KFTC established the International Cartel Division within its Cartel Bureau to exclusively investigate international cartels.⁹⁶

In a paradox of sorts, after Lee took office, he criticized the KFTC for having adhered to “backward rules” he perceived as unsuitable for the ever-advancing global economy.⁹⁷ Yet his own brand of agency micromanagement was more suggestive of planned government oversight over developing economies than liberal economic policy for established powerhouses such as South Korea.⁹⁸ Lee’s commissioner appointment and

93. Kim Yon-se, *New Legislature to Act on Pro-Chaebol Bills*, KOREA TIMES (May 19, 2008, 9:10 PM), http://www.koreatimes.co.kr/www/news/special/2009/10/180_24412.html [<https://perma.cc/T4Q3-7F55>]. See also Witt, *supra* note 24, at 221 (describing “the generally pro-chaebol stance of the current president, Lee Myung-Bak, himself a former *chaebol* executive”); Dani Rodrik, *The New Mercantilist Challenge*, PROJECT SYNDICATE (Jan. 9, 2013), <https://www.project-syndicate.org/commentary/the-return-of-mercantilism-by-dani-rodrik> [<https://perma.cc/68HJ-PJA5>] (“The mercantilist model can be derided as state capitalism or cronyism. But when it works, as it has so often in Asia, the model’s ‘government-business collaboration’ or ‘pro-business state’ quickly garners heavy praise. Lagging economies have not failed to notice that mercantilism can be their friend.”).

94. Kim, *supra* note 93 (“Designed to make corporate governance structures more transparent and prevent the concentration of economic power, the investment limit guideline has been a symbol of regulations on chaebol for the past two decades. But the commission, which backed the rules during the Kim Dae-jung and Roh Moo-hyun administrations, made a policy shift after the election. Lee has promised a ‘business-friendly’ administration. . . . Currently, subsidiaries of companies with assets of 2 trillion won or more are prohibited from making equity investments or offering loan guarantees to each other. . . . The regulator also said it plans to ease the process for firms to switch into holding companies if they meet the current requirement of a debt ratio below 200 percent. The agency plans to lift the corporate debt-ratio requirement, as well as the rule that limits an investor to hold a maximum stake of 5 percent in a non-affiliate firm.”).

95. *Id.*

96. *FTC to take on global cartels*, KOREA JOONGANG DAILY (Mar. 4, 2008), <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=2886934> [<https://perma.cc/C9W9-XLE5>].

97. Kim, *supra* note 93.

98. South Korea under Lee Myung-Bak certainly was not the first, nor will it be the last,

removal powers, coupled with a mostly complaisant KFTC's broad and flexible discretion in interpreting the MRFTA clauses relating to public interest and public policy, lent Lee the kind of regulatory authority wielded by U.S. presidents a century prior. What followed during his administration were appointments of acquiescent KFTC chairs, greater tolerance for anticompetitive conduct by the *chaebol*, and arbitrary targeting of competitive foreign companies by the KFTC.

A. *De Facto Shuffling of KFTC Chairs at Will*

A tumult in global markets with the onset of World War I drove Woodrow Wilson to largely abandon antitrust regulation for a government-led marshaling of business, depriving the FTC of any meaningful independence.⁹⁹ In turn, it was a worldwide financial meltdown that emboldened Lee Myung-Bak to issue direct orders on KFTC policy. According to Lee, “[f]or many Koreans who had vivid memories of the 1997-98 Asian financial crisis, the 2008 global crisis seemed ominous.”¹⁰⁰ He aimed to galvanize South Korea's largest companies in response, hearkening back to previous presidents who had pushed for a rising tide of *chaebol* “national champions” that could supposedly lift all boats of the domestic economy through their success.¹⁰¹ Seeking to preside over a second act, Lee stated during a KFTC policy briefing in March 2008:

The FTC has so far made a dent in the market economy and corporate activities, but I want it to have a new role in this new era. With all regulations lifted, supervision should be conducted. If companies are tied one by one, they won't be able to compete with [their rivals overseas]. . . . They are fighting with unfavorable conditions amid competition in the global economy. To do so, they must be allowed to escape various regulations. Let's take just a

East Asian state that pursued mercantilist policies. *See, e.g.*, Dani Rodrik, *supra* note 93 (“[A] succession of Asian countries managed to grow by leaps and bounds by applying different variants of mercantilism. Governments in rich countries for the most part looked the other way while Japan, South Korea, Taiwan, and China protected their home markets, appropriated ‘intellectual property,’ subsidized their producers, and managed their currencies.”).

99. *See* W.H.S. Stevens, *What Has the Federal Trade Commission Accomplished?*, 15 THE AM. ECON. REV. 625, 636-37 (1925) (discussing the President's control over the FTC, which he required to provide numerous government agencies with cost reports on scores of commodities).

100. LEE, *supra* note 92, at 271.

101. *See* Witt, *supra* note 24, at 217-219 (“While the Korean [developmental] model was Japanese inspired, . . . [t]he Korean developmental state was much more top-down, especially in its early days. Business was not a partner, as in Japan, but a subservient tool Despite democratization from the 1980s onward, decision-making has remained top down and centred [sic] on the president.”).

half step forward to move beyond the pace of change in the global economy.¹⁰²

Reminiscent of the FTC Act's amenability to direct top-down Wilsonian regulatory policy, the MRFTA accommodated Lee's steering of the KFTC, starting with his power to appoint new commissioners when three-year term expirations gave way to openings at the commencement of his presidency. He would duly bestow upon his two picks the top posts of Chairman and Vice-Chairman.¹⁰³

Lee tapped Baek Yong-Ho, a former university professor and head of a public policy think tank, as his first Chairman of the KFTC.¹⁰⁴ Chairman Baek initially followed the President's vision for defanging previously existing MRFTA provisions¹⁰⁵ and in so doing drew an extraordinary rebuke from former Chairman Kang Cheol-Gyu, who asserted, "The [K]FTC should focus on market-friendly policies that can curb dominance and monopolies, but ironically, it unveiled plans for a *chaebol*-friendly policy."¹⁰⁶ Baek's approach typified Seoul's acutely nationalist economic strategy of the period. He believed that the global financial crisis had "exposed the limitations of neoliberalism. . . Korea strictly follows its market economy principles, although its regulations tend to be more excessive than those of other advanced nations."¹⁰⁷ Baek in effect argued that residual regulation unreached by neoliberalist policies—rather than runaway deregulation—had

102. *Anti-trust Trade Commission Unveils Plan to Ease Regulations for Conglomerates*, *supra* note 2.

103. See Kim, *supra* note 93. ("The [Korean] Fair Trade Commission . . . is likely to see its status shaken as the nation's top corporate regulator, as its top posts are filled with figures who oppose various regulations against enterprises Baek Yong-ho and Seo Dong-won, chairman and vice chairman of the commission, respectively, took part in the presidential transition committee to lay the groundwork for the Lee administration's fair trade policies. Under Lee's guidelines . . . Baek and Seo played a leading role in setting the keynote of fair trade policies, typified by the abolition of various regulations on chaebol, or family-controlled conglomerates. Baek, an ardent advocate for abolition of the equity investment ceiling system, expressed negative views about introducing alternative measures to the regulation. 'Regulations only create more regulations,' he said.")

104. *University at Albany Alumni to be Honored May 3 for Contributions*, UNIVERSITY AT ALBANY: NEWS CENTER, <http://www.albany.edu/news/50061.php?WT.svl=headline> [<https://perma.cc/L66J-DNBW>] (last visited Oct. 15, 2017).

105. See Kim, *supra* note 93. The MRFTA's substantial Article 10 (Ceiling on Total Amount of Shareholding in Other Domestic Companies) was deleted altogether in the March 2009 amended version during the Lee Myung-Bak administration. MRFTA, Act No. 9554, Mar. 25, 2009 (S. Kor.). For Article 10's text, see MRFTA, Act No. 8666, Oct. 17, 2007 (S. Kor.).

106. *Anti-trust Trade Commission Unveils Plan to Ease Regulations for Conglomerates*, *supra* note 2.

107. *FTC Head: Excessive Market Regulation in Korea*, KBS WORLD RADIO (Oct. 31, 2008), http://rki.kbs.co.kr/english/news/news_Ec_detail.htm?No=58732&id=Ec [<https://perma.cc/6HWH-CP2U>].

led to worldwide crisis, and advocated a return to unconstrained growth. Per the economist James Riedel, a main contribution of South Korea's leaders to the country's postwar economic ascendance had been "principally in removing the obstacles to growth which they themselves put there in the first place."¹⁰⁸ While doing so, they could "anticipate and offset the market distortions that result[ed] from *dirigiste* strategies of industrialization"¹⁰⁹ that protected Korean industries during their early development. Lee Myung-Bak did not possess the absolute sway over economic policy enjoyed by certain of his more authoritarian predecessors, but the MRFTA was not averse to his virtual control over competition policy.

An opportunity to test the extent to which the MRFTA's appointment and removal powers would bend for Lee emerged ahead of schedule, in ad hoc fashion. Chairman Baek criticized the *chaebols'* desire for a "poison pill" takeover defense and a dual-class stock system in an October 2008 interview with a major left-leaning Korean newspaper, stating that it was contradictory for them to "want deregulation on the one hand, while demanding protection of management rights on the other."¹¹⁰ Baek's outspoken stance appeared at odds with that of the pro-*chaebol* Lee—given "the wave of business-friendly and deregulatory measures sweeping the government since the inauguration of the Lee Myung-Bak administration, it seem[ed] unusual for a government agency to put the brakes on a demand from conglomerates."¹¹¹ Baek proceeded to publicly warn against government policy that would coddle *chaebol* to the detriment of an efficient free market:

A company's access to the market, [self-liquidation], spin-off or acquisition of other companies should be permitted along with the organic evolution of the market . . . Corporate takeovers are no doubt necessary for the development of the market economy . . . The market can develop only if companies that experience management failures feel the threat of losing their management rights. Having the government intervene to protect their management rights would undermine market efficiency.¹¹²

Within eight months of Baek's stand and after hardly a year of his three-year KFTC commissioner term had passed, he "unexpectedly" resigned from

108. James Riedel, *Economic Development in East Asia: Doing What Comes Naturally?*, in *ACHIEVING INDUSTRIALIZATION IN EAST ASIA* 1, 36 (Helen Hughes ed., 1988).

109. *Id.* at 37.

110. Fair Trade Commission voices opposition to takeover defense mechanisms, THE HANKYOREH, (Oct. 8, 2008), http://english.hani.co.kr/arti/english_edition/e_business/314710.html [<https://perma.cc/MAE4-88JV>].

111. *Id.*

112. *Id.*

his post in June 2009 to head the National Tax Service.¹¹³

None of the MRFTA's requirements to remove a commissioner for cause had been met. Lee instead managed to circumvent the removal clause thanks to the same implicit power dynamic enabled by the FTC Act that the U.S. Ninth Circuit had succinctly summarized—the power to remove is the power to control, and the removal power need not be exercised to exert effective control as its mere existence likely influences behavior.¹¹⁴ Baek's sudden resignation only to move on to the National Tax Service implied that Lee had a hand in the matter, and had Baek resisted, he risked non-renewal of his commissioner term followed by ejection from government service. The “voluntary” departure was indicative of Lee's ability to shuffle KFTC leadership at will, a path made simpler in the absence of a *Humphrey's Executor* type of check. Regarding Baek's replacement, Dr. Chung Ho-Yul, South Korea's largest law firm discerned that he had not been tapped from the KFTC's internal pool of candidates; it also opined that Chung's prior service “as an adviser for the current administration's fair trade policies makes it likely that the administration will be able to continue its efforts to revitalize the economy by loosening corporate regulations.”¹¹⁵ Yet the elasticity of the MRFTA's stated appointment and removal powers was underscored when Lee again made a mid-stream chairman switch in January 2011 after a brief 18-month tenure for Chung, bringing in economic policy specialist Kim Dong-Soo to take over for the remainder of his presidency.¹¹⁶ The FTC Act's textual ambivalence towards agency independence yielded few guideposts for its foreign derivatives in these circumstances. The de facto at-will, activist calibrations of KFTC leadership by Lee facilitated a South Korean national silo in antitrust enforcement.

B. *Lenient Domestic Enforcement for the Mega-Conglomerate*

113. *KFTC Leader Resigns*, GLOBAL COMPETITION REV.: GCR ALERTS, (June 23, 2009) <http://globalcompetitionreview.com/news/article/16214/kftc-leader-resigns> [<https://perma.cc/FC9L-N4NW>] (“Yong-Ho Baek, head of Korea's Fair Trade Commission, has unexpectedly resigned to take up an appointment at the National Tax Service”).

114. See *Silver v. US Postal Service*, *supra* note 62 at 1039, and accompanying text (discussing how the removal power influences behavior through subservience, indicated by the lack of independence.).

115. *Korea Fair Trade Commission Appoints New Chairman*, KIM & CHANG: NEWS & UPDATES (Jul. 30, 2009), [http://www.kimchang.com/UserFiles/files/NewsandUpdates-KoreanCompetitionLawandPolicy\(090730\).pdf](http://www.kimchang.com/UserFiles/files/NewsandUpdates-KoreanCompetitionLawandPolicy(090730).pdf) [<https://perma.cc/4RFM-AB8A>]. Chung in a press interview “emphasized that the KFTC must focus its policies on creating a market economy that is up to global standards, and added that the Commission needs to be able to smoothly mediate possible conflicts between governmental industrial policies and antitrust law.” *Id.*

116. *Pres. Lee conducts reshuffle of Cabinet, presidential office*, THE DONG-A ILBO (Jan. 1, 2011), <http://english.donga.com/List/3/all/26/400329/1> [<https://perma.cc/V324-L9BJ>].

National Champions

The FTC Act's called-for consideration of the public interest prior to initiation of a proceeding and the MRFTA's tolerance of unfair collaborative acts conducted in the public interest, e.g. for the overcoming of economic depression, reflect the same root concept: antitrust enforcement, or a purposeful lack thereof, as a governmental means to societal ends. Within numerous countries, including South Korea, where some semblance of "corporatocracy" is condoned by the government, the common denominator of the public interest with respect to competition policy does not necessarily equate to lower consumer prices. Great expectations for national champions and the trickle-down benefits of their success in international competition can and have overshadowed immediate regard for domestic consumer welfare.¹¹⁷ Mercantilist directives only exacerbate the overriding focus on top-heavy economic growth. Whereas the consumer is paramount in the liberal economic model, mercantilists are more concerned with the production side,¹¹⁸ an inclination which explains their typical reticence toward strong antitrust policies.

The writing had already been on the wall for Seoul's new regulatory direction with Chairman Baek's appointment and his ensuing pro-business announcements at President Lee's behest, and it gained momentum as the worldwide recession worsened. In January 2009, Baek made an unprecedented declaration that the MRFTA's exemptions in the public

117. See HWANG LEE, DEVELOPMENT OF COMPETITION LAWS IN KOREA 16 (ERIA Discussion Paper Series, 2015) ("The importance of national champions (that may be able to spread positive effect[s] on the domestic economy) and international competitiveness have been emphasi[z]ed in many Asian countries, including Korea, in this age of global competition. While such theories have valid aspects, from a competition policy perspective, they can be dangerous. It is doubtful whether a national champion that is created and grown without active competition is sustainable in the long run. If domestic consumer welfare is sacrificed in pursuit of industrial policies, the benefits and disadvantages must be closely evaluated and compared. In Korea, recent studies show that the trickle-down effect of large conglomerates has drastically decreased and that the benefit of growth largely remains within large conglomerates. Hence, the effects of industrial policies differ in each stage of economic development, and the countermeasures need to change along with them."). See also generally LI-WEN LIN & CURTIS J. MILHAUPT, *We are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697, 746 (2013) ("[N]ational champions represent much more than a purely financial investment for the party-state. SASAC, as the organizational manifestation of the party-state in its role as controlling shareholder, seeks to maximize a range of benefits extending from state revenues to technological prowess and from soft power abroad to regime survival at home . . . Of course, the country's interests are defined by and consistent with the interests of the managerial elites that play key roles in the operation and evolution of the system.").

118. See, e.g., Rodrik, *supra* note 93 (stating that mercantilists rely on a "sound production structure").

interest for certain “unfair collaborative acts” were in effect despite none having been explicitly granted up until that point; global law firms jumped to report the news and its transnational implications for their practices.¹¹⁹ This regulatory green light further empowered *chaebol*, many of which already featured questionable corporate governance mechanisms such as pyramidal share ownership. According to the 2008 annual KFTC report on owner share structure, the controlling families of the 28 largest privately owned South Korean conglomerates held, on average, 49.3 percent of voting rights but only 14.2 percent of the stock.¹²⁰ 2008 was both the year of President Lee’s inauguration and the report’s final year of publication; KFTC compilations of data readily usable by *chaebol* critics did not serve the Lee administration’s interests.

International as well as domestic media outlets, on the other hand, proceeded to highlight recurring patterns of Seoul’s generosity toward the mega-conglomerates in antitrust enforcement matters. In February 2012, *The Economist* reported that the KFTC had “detected over 3,500 cases of price-fixing in 2010, but only 66 led to fines. The average penalty amounted to just 2.3% of unfairly earned revenue.”¹²¹ While major *chaebol* Samsung and LG were targeted for fixing the prices of notebook PCs and flat-screen TVs from June 2008 to September 2009, Samsung received a scant \$23 million fine while LG’s lesser penalty was waived under the KFTC’s leniency program; incidentally, it was the third time in a two-year span that both conglomerates had chosen to price-fix and risk a regulator response.¹²² According to a follow-up report from late 2012, “*chaebol* engaged in more than two-thirds of 76 business categories in South Korea . . . Between January and June, the operating profits of the ten accounted for more than 70% of the profits of all the companies listed on the Korea Exchange.”¹²³ In

119. See Shinya Watanabe & Peter J. Wang, *Antitrust Alert: Korea Considers Antitrust Exemptions for Certain Cartels to Assist Economic Recovery*, JONES DAY (Jan. 2009), <http://www.jonesday.com/antitrust-alert—korea-considers-antitrust-exemptions-for-certain-cartels-to-assist-economic-recovery-01-05-2009/> [<https://perma.cc/R8RZ-5H8Q>] (“In an effort to aid the country’s recovery from economic crisis, the Chairman of the Korea Fair Trade Commission (KFTC) reportedly has announced that the KFTC may invoke its power to exempt certain cartels from the Korea antitrust laws, so long as the cartels do not engage in ‘direct price fixing.’ The Korea Monopoly Regulation and Fair Trade Act (MRFTA) and a Presidential Decree have authorized such exemptions, but so far none [have ever] been granted . . . Nevertheless, such exemptions would protect cartel members from liability only under Korean law. Therefore, the risk of antitrust liability elsewhere remains—including civil and criminal liability in the United States.”).

120. Witt, *supra* note 24, at 220.

121. *Let Them Eat Cake; Bakers and Chaebol in South Korea*, THE ECONOMIST, Feb. 4, 2012 at 71.

122. *Id.*

123. *Bashing the Big Guys; Presidential Politics in South Korea*, THE ECONOMIST, Oct.

2011, the major national newspaper *Hankook Ilbo* stated that the agency was “quickly developing an ‘all bark and no bite’ reputation.”¹²⁴ From January 2011 to September 2014, the KFTC successfully pursued a single case of abuse of market dominance that resulted in corrective orders and fines, compared to thirty-eight successful cases in 2007.¹²⁵

The MRFTA’s elastic mandate, as exhibited in its arbitrary exemptions for “unfair collaborative acts” deemed to further the public interest, did not impede these lax enforcement patterns. Nor could non-governmental actors exert meaningful pushback beyond drawing attention to the trend.¹²⁶ In a familiar narrative for state-sponsored capitalist economies, top-down economic oversight absent polycentric consultation and consensus-building marginalized the input of a normally vibrant Korean civil society.¹²⁷ The *chaebol* enjoyed a mercantilist focus on the “peculiar economic interests” of elites and social subgroups that could benefit the nation-state’s macroeconomic performance—a far cry from liberalism’s traditional emphasis on the individual, and global welfare by extension.¹²⁸ Subsumed under Lee’s pro-*chaebol* agenda, the KFTC proved as rudderless as the deferential early incarnations of the FTC.

13, 2012 at 49.

124. Kim Yoo-chul, *FTC Chief Acts as if Twain’s Man with Hammer*, THE KOREA TIMES (Nov. 21, 2011), http://www.koreatimes.co.kr/www/news/opinion/2016/05/264_99184.html [<https://perma.cc/J9DH-8E7C>].

125. Hwang Lee, *Overview of Current Antitrust Enforcement in Korea*, COMPETITION POL’Y INT’L (Sept. 12, 2014), <https://www.competitionpolicyinternational.com/assets/Uploads/AsiaSept2014-2.pdf> [<https://perma.cc/M3VP-KQHW>] (“Since the 2009 Qualcomm and Intel cases that involved loyalty rebate practices, we haven’t seen many notable cases of abuse of market dominance. In fact, since 2011 until today, the KFTC has been successful in only one case about hindering kiwi fruit distribution to impose corrective orders and fines of half a million USD. This is a dramatic decline compared to the 38 successful cases pursued in the sole year of 2007. Many experts are concerned with this trend pointing [out] that it may undermine the reputation of the KFTC as the guard of sound market competition.”).

126. See, e.g., *Anti-trust Trade Commission Unveils Plan to Ease Regulations for Conglomerates*, *supra* note 2 (“In response, a civic organization accused the FTC of virtually giving up its role as the ‘guardian of the market economy’ to focus on the corporate-friendly policies of the administration of President Lee Myung-Bak . . . Kim Jin-bang, a senior activist with the People’s Solidarity for Participatory Democracy and a professor at Inha University, blamed the FTC for ‘Its plan to ease regulations, despite a lack of plans for supervisions and punishments, which shows that (the FTC) may sit idly by if the market collapses.’”).

127. See Witt, *supra* note 24, at 219 (stating that the large conglomerates comprise “the major non-state actor[s] in economic policy-making.”). Though meaningful “civil regulation” of conglomerates has yet to coalesce in East Asian states such as South Korea and Japan, it may be latent given the historical potency of “people power” in their national politics. See generally Kyu Hyun Kim, *The Age of Visions and Arguments: Parliamentarianism and the National Public Sphere in Early Meiji Japan* (2007); Kuk Cho, *Transitional Justice in Korea: Legally Coping with Past Wrongs after Democratization*, 16 PAC. RIM L. & POL’Y J. 579 (2007).

128. See Gilpin, *supra* note 21, at 283.

C. Regulator Bias against Foreign Firms and Competitors

The U.S.' rise atop the liberal international order coincided with Great Britain's early twentieth century decline, but also was precipitated by a culture of free investment that resisted strong financial institutional sway and social democratic interferences in the public firm. The Gilded Age's exponential industrial expansion, dependent on a small number of powerful trusts, gave way to large public firms with diffuse ownership and frequent differences in opinion between shareholders and managers.¹²⁹ Their eventual prevalence and sophistication largely spared U.S. antitrust regulators of concerns over the national economic consequences that discrete enforcement action or inaction against any one firm might trigger. In contrast, competition authorities in countries that were slower to industrialize and/or operate within a more coordinated variety of capitalism have had to contend with the national ramifications of penalizing national champions, many of them controlled by dominant families. Mercantilist political pressures can further obfuscate regulator responsibilities within the interdependent global economy.¹³⁰ Per Gilpin:

Nation-states are induced to enter the international system because of the promise of more rapid growth; greater benefits can be had than could be obtained by autarky or a fragmentation of the world economy. The historical record suggests, however, that the existence of mutual economic benefits is not always enough to induce nations to pay the costs of a market system or to forgo opportunities of advancing their own interests at the expense of others. There is always the danger that a nation may pursue certain short-range policies. . . . in order to maximize its own gains at the expense of the system as a whole.¹³¹

The KFTC's 2007-2009 investigation into the U.S. semiconductor and telecommunications firm Qualcomm for abuse of market dominance¹³²—

129. See generally Mark J. Roe, *Political Preconditions to Separating Ownership from Corporate Control*, 53 STAN. L. REV. 539 (2000) (describing how the political environment of the United States encouraged the rise of public firms in the early twentieth century).

130.

The mercantilist model can be derided as state capitalism or cronyism. But when it works, as it has so often in Asia, the model's 'government-business collaboration' or 'pro-business state' quickly garners heavy praise. . . . Even in Britain, classical liberalism arrived only in the mid-nineteenth century — that is, *after* the country had become the world's dominant industrial power.

Rodrik, *supra* note 93.

131. Gilpin, *supra* note 21, at 290.

132. For an English-language official summary of the resultant KFTC decision, see generally KOREAN FAIR TRADE COMM'N [KFTC], DECISION NO. 2009-281, QUALCOMM'S

which culminated in a then-record agency fine of \$208 million for a single company¹³³—exemplified the workings of the Lee Myung-Bak administration's short-range antitrust policy at the free market's expense. The KFTC concluded in July 2009 that Qualcomm had violated Korean law by charging discriminatorily higher royalties for usage of non-Qualcomm chips by mobile handset makers that had been licensed its technology, implementing discounts and rebates towards purchase of its CDMA chipsets, and continuing to require 50 percent royalty payments following the expiration of licensed patents.¹³⁴ However, Qualcomm's licensing deals had long been public knowledge, as was the company's preferential treatment of certain licensees, such as Nokia, which received special terms in 2008 as part of a new agreement.¹³⁵ The KFTC itself pointed out that "Qualcomm was able to maintain its high market share close to a monopoly for more than a decade."¹³⁶ Hence the timing of the agency's hammer, given longstanding public knowledge of Qualcomm's marketing practices and its 98 percent market share of the Korean CDMA modem chip market since 2002, attracted due criticism.

The MRFTA was a willing straw man in its latitude with respect to presidential determination of categories and standards for abusive market-dominating acts, and its imprecise statutory guidance suited the KFTC. The agency found market dominance abuse under Section 3-2, specifically "acts of unreasonably interfering with business activities of other entrepreneurs" and "acts of unfairly excluding competing entrepreneurs," as well as unfair business practices under Section 23 ("acts of unfairly taking advantage of its position in the business area").¹³⁷ In assessing the applicability of these

ABUSE OF DOMINANCE (2012) http://www.ftc.go.kr/eng/bbs.do?command=getList&type_cd=54&pageId=0302 [<https://perma.cc/8LVC-4Z7R>] (explaining Qualcomm corporation's anti-competitive behaviors and analyzing the commission's decision on the case).

133. *Id.* at 23. See also *S. Korea fines Qualcomm \$208 mln in anti-trust case*, REUTERS (Jul. 23, 2009), <http://www.reuters.com/article/qualcomm-korea/update-2-s-korea-fines-qualcomm-208-mln-in-anti-trust-case-idUSSEO19318620090723> [<https://perma.cc/55ZM-96WA>].

134. *Id.* at 1.

135. Scott Moritz, *Qualcomm plays favorites with Nokia*, FORTUNE (Jul. 24, 2008, 4:54 PM), <http://archive.fortune.com/2008/07/24/technology/qualcomm-royalty.fortne/index.htm> [<https://perma.cc/NT7R-AZYR>] ("Analysts estimate the new deal with Nokia trims that royalty rate in half to 2% or lower. . . For more than a decade, the San Diego-based tech giant has successfully leveraged its claims to some basic technology in wireless networks and phones into lucrative licensing deal. . . [P]hone makers have to shell out an estimated 4.5% payment to Qualcomm for each phone sold.")

136. Press Release, Korea Fair Trade Comm., Qualcomm's Abuse of Market Dominance 3 (Jul. 23, 2009) http://www.ftc.go.kr/eng/bbs.do?command=getList&type_cd=52&pageId=0305 [<https://perma.cc/4RFX-YNQR>].

137. See MRFTA, *supra* note 87 and accompanying text; Lee, *supra* note 132, at 9; MRFTA, Act No. 3320, Dec. 31, 1980, art. 3-2, 23 (S. Kor.).

Articles' standards for unreasonableness, unfairness, discrimination, and considerable harm, the KFTC cited a battery of the U.S. case law and analytic tests used in the U.S. and EU courts. The agency conceded "intense debate" over loyalty rebates¹³⁸ and noted clashes even between the DOJ and the FTC.¹³⁹ A Seoul industry watcher had earlier observed that "[c]ompanies here have constantly complained about Qualcomm demanding too much royalty . . . The investigation can be seen as political pressure on Qualcomm to be more friendly [sic] toward South Korean companies which use its technology."¹⁴⁰ In retrospect, a U.S.-based observer was harsher in his assessment that the KFTC had "run amok in recent years, slapping spurious charges on foreign companies as it attempts to execute a protectionist agenda," naming Qualcomm among a list of foreign targets for Korean regulator bias that included Apple, Google, Microsoft, and Intel.¹⁴¹

Prior to its record Qualcomm judgment, the KFTC fined Intel \$25.4 million in June 2008 for rebate incentive schemes offered to Samsung and other South Korean PC manufacturers as far back as 2001 in exchange for their agreement not to purchase from Intel's rival Advanced Micro Devices

138. Lee, *supra* note 132, at 16 (The Le[P]age case is the most recent among others involving multi-product bundled rebate[s] and was subject to a fierce dispute. The Third Circuit Court's decision in favor of the plaintiff is still under intense debate. The court's decision was criticized for being based on insufficient evidences and unclear justifications on the undermining competition as well as neglecting the price-cost safe harbor for assessing illegality of price discounts, which had been established as [an] appropriate pricing test since Brooke.)

139. *Id.* at 17 ("In the Single Firm Conduct Report released in September 2008, the DOJ placed a focus on whether exclusive dealing contributes to maintaining monopoly, and, if so, it stated, such exclusive (sic) conduct could be regulated only if its harm greatly outweighed the consumer benefits. It also said exclusive dealing affecting less than a 30% market share was considered to be in safe harbor. It took a similar approach to bundled discount[s]. According to the report, bundled discounting should only be condemned based on consideration of, among others, whether rivals remain or are likely to remain in the market, or anticompetitive effects from bundled discount[s] are substantially disproportionate to the benefits. When it comes to single-product loyalty rebates, it cast a doubt on the concept of contestability or measurement of efficient scale, and concluded that it would be appropriate to apply the predator pricing approach to single-product loyalty discounts. In response to the DOJ Report, FTC Commissioners Harbour, Leibowitz and Rosch strongly criticized [it because] the focus on the price-cost safe harbor and whether rivals remain in a market could inhibit rival companies from securing the 'minimum viable scale,' leaving unchecked the abuse of monopoly power by a monopolist. In May 2009, the DOJ withdrew the report.")

140. Choe Sang-Hun, *Qualcomm Under Scrutiny by Korean Antitrust Agency*, THE NEW YORK TIMES, Jan. 3, 2007, at C4.

141. Roger Kay, *South Korea at a Crossroads*, FORBES (June 2, 2015, 9:30 AM), <http://www.forbes.com/sites/rogerkay/2015/06/22/south-korea-at-a-crossroads> [<https://perma.cc/UN65-FVHG>] (noting that "[a]n increasing proportion of these decisions have been overturned in South Korean courts, an independent judiciary that has tended to weigh cases on their merits.").

(“AMD”).¹⁴² Such a “time-honored” practice within the industry¹⁴³ did not dissuade the KFTC from turning to its MRFTA Article 3-2 canvas and to a linked Presidential Decree. The agency asserted that Intel had violated Article 3-2 by unfairly excluding competitive enterprisers or doing considerable harm to the interest of consumers,¹⁴⁴ previewing its approach to be used a year later against Qualcomm. With Intel, the KFTC went a step further and also cited a related Presidential Decree clause which describes one manner of competitor exclusion as a situation “[w]here the business is done on the condition that business partners do not trade with business rivals.”¹⁴⁵ Intel, for its part, argued that the rebates did not violate the spirit of the preceding clause (“[w]here goods or services supplied at lower prices than normally trading prices or goods or services purchased at higher prices than normally trading prices are feared to put business rivals out of the business”)¹⁴⁶; according to its submitted economic methodology, an effective price test using a commercially viable share (“CVS”), the rebates had not resulted in unreasonably low prices due to effective price being significantly higher than the average cost.¹⁴⁷ In response, the KFTC determined that competitor exclusion could transpire if certain assumptions in Intel’s methodology were tweaked—specifically, the percentages for CVS and the non-conditional rebate rate.¹⁴⁸ An official summary of the decision did contain the following caveat:

Internationally, the U.S. takes a relatively generous position about loyalty rebate although different from one court to another. The EU and

142. For an English-language official summary of the KFTC decision, see KFTC, DECISION NO. 2008-295, INTEL’S ABUSE OF DOMINANCE (2008) http://www.ftc.go.kr/eng/bbs.do?command=getList&type_cd=54&pageId=0302 [<https://perma.cc/32QR-QRVM>] (discussing a case involving Intel’s exclusive dealing as illustrated by the company’s loyalty rebates and analyzing the commission’s decision on the case).

143. Shu-Ching Jean Chen, *Korean Watchdog Says Intel Doesn’t Play Fair*, FORBES (June 5, 2008, 12:04 PM), http://www.forbes.com/2008/06/05/intel-korea-antitrust-markets-equity-cx_jc_0605markets03.html [<https://perma.cc/7XWL-543E>].

144. KFTC, *supra* note 142, at 6.

145. Enforcement Decree of the MRFTA, Presidential Decree No. 12979, Apr. 14, 1990, art. 5-5(2) (S. Kor.).

146. *Id.* at art. 5-5(1).

147. KFTC, DECISION NO. 2008-295, INTEL’S ABUSE OF MARKET DOMINANCE IN KOREA, translated by Byung-Geon Lee, American Antitrust Institute, 2009, http://www.antitrustinstitute.org/files/aai-%20Intel%20KFTC%20summary%203-12-09_031220091229.pdf [<https://perma.cc/MSW6-MFCC>].

148. *Id.* For a closer look at the effective price test using a commercially viable share, see GUNNAR NIELS ET. AL., ECONOMICS FOR COMPETITION LAWYERS 233-234 (2d ed. 2011) (“as efficient competitor analysis in *Intel* shows both the strengths and weaknesses of this test in loyalty rebates—it has the advantage of generating clear thresholds according to a specified formula, but the disadvantage is that the numbers cannot be relied upon unless you are comfortable with the assumptions behind them.”).

Korea are rather strict. Japan has no surcharge provisions on the relevant violation and imposes relatively lenient corrective measures. Given this, the court's ruling on this Case will have the great significance as a precedent.¹⁴⁹

However, even in the EU, the legal debate over Intel's rebates has dragged on. As recently as October 2016, EU Advocate General Nils Wahl rebuked a European General Court for failing to establish an anticompetitive foreclosure effect.¹⁵⁰

With respect to the rebates, the KFTC proved to be an outlier. Having recognized that the MRFTA is "silent on the criteria for determining the unreasonableness of exclusive dealing,"¹⁵¹ the agency under the Lee administration deferentially exercised its discretion in line with Seoul's overarching economic policy of the period. Partiality towards domestic companies over their competitors necessitated a divergent legal stance, and the Korean competition regime could do little but oblige.

CONCLUSION

National antitrust silos are not a novel phenomenon. Former European Commissioner for Competition Joaquín Almunia warned of them years ago,¹⁵² and scholarship touching upon the furtherance of nationalist goals by

149. KFTC, *supra* note 142, at 16.

150. Court of Justice of the European Union Press Release No 114/16, Advocate General Wahl considers that Intel's appeal against the imposition of a €1.06 billion fine for abuse of its dominant position should be upheld (Oct. 20, 2016), <http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-10/cp160114en.pdf> [https://perma.cc/6LHT-2CMK]. The press release continued to state:

[t]he Advocate General therefore concludes that the General Court erred in finding that 'exclusivity rebates' constitute a separate and unique category of rebates that require no consideration of all the circumstances in order to establish an abuse of dominant position. In addition, the Advocate General goes on to determine that the General Court erred in law in its alternative assessment of capability by failing to establish, on the basis of all the circumstances, that the rebates and payments offered by the appellant had, in all likelihood, an anti-competitive foreclosure effect.

Id. (emphasis omitted).

151. KFTC, *supra* note 142, at 7.

152. Almunia, *supra* note 3. Almunia went on to state:

[f]rom our perspective as enforcers: we need to be able to bring cases which involve companies and behaviours that cut across multiple jurisdictions. This requires practical cooperation between our agencies but also a degree of convergence between our policies. And it is also true from the perspective of businesses: cooperation and convergence contribute to a level playing field across jurisdictions, increase legal predictability by reducing the risk of incoherent intervention, and ultimately facilitate cross-border trade and investments to the benefit of our economies. Of course, we all necessarily operate in the context of

various antitrust agencies dates back decades.¹⁵³ However, a creeping loss of public confidence in open markets—coupled with the obstacles to coherent global antitrust enforcement that bear the FTC Act's influence, as illustrated in this Article—risks amplifying the problem. As anti-free trade agendas continue to garner more mainstream popularity for formerly counter-establishment parties, a proliferation of protectionist silos could tempt even governments that, for the most part, had moved past them. Why, American officials may ask, should the U.S. continue championing the liberal international economic order when an illiberal China or an ostensibly liberal South Korea bends regulatory rules to disadvantage American companies, workers, and consumers? Skepticism towards a liberal democratic “end of history”¹⁵⁴ in general, and failures of economic liberalism in particular, are threatening to motivate political circles accordingly. Even perennial norms and conventions of the U.S. competition regime which evolved to safeguard regulator independence at home are no longer above disruption; the ambiguous statutory articulations that carried over abroad to empower strong executives are likewise playing a paper tiger role domestically of late.¹⁵⁵

Protectionist policies designed to compromise market competition—for all its documented excesses and inadequacies—would sap its creative vitality

our own market conditions, our own competition laws and our own procedures. The parameters of our cooperation are defined by this fact. In terms of substantive assessment, we have to recognise that each case is necessarily shaped by these specificities — but this should not stop us working towards common principles, built upon a sound economic analysis.

Id.

153. See, e.g., Cushman, *supra* note 16 (discussing the impact of presidential policies on agencies in a 1941 publication);

[U]pon examining the policies behind the antitrust laws of South Korea and Japan and looking at the overall state of the economy of these countries since the enactment of their antitrust laws, one would be hard pressed not to acknowledge that they have also been successful. Their success, however, has not been in the form of implementing their antitrust measures. Rather, it has been in achieving the objectives behind their antitrust laws—the growth of their economies.

Abir, *supra* note 31, at 175.

154. Contrary to popular belief, Francis Fukuyama's thesis did not imply a world free of conflict. See Francis Fukuyama, *The End of History*, 16 NATIONAL INTEREST 1, 3-18 (1989) (arguing that the passing of Marxism-Leninism worldwide would lead to a disappearance of ideological struggles and a decline of large-scale conflicts between states).

155. See, e.g., Josh Boak, *Trump's CEO meetings raise ethics questions*, ASSOCIATED PRESS (Jan. 14, 2017), <https://www.apnews.com/7d256125f53643fbb20e4be2bc993a2b> [<https://perma.cc/C94Q-YME9>] (reporting that Trump's meetings with CEOs regarding the potential mergers of their companies demonstrate a compromised position of the administration's regulatory agency).

and the concurrent liberal peace¹⁵⁶ often taken for granted. Economic liberalism ails not so much from the intrinsic failings of core tenets, but from their more egregious nation-state and corporate violators. Proposals for greater accountability and harmonization have ranged from presumption of an underlying coordination scheme in antitrust investigations of a culpable country's companies,¹⁵⁷ to an international competition regime binding on member states in at least some areas of antitrust.¹⁵⁸ Each has associated costs, but their very debate harnesses polycentric dialogue lacking in nationalist regulatory agendas and calls for "our country, right or wrong" protectionist silos. It should be emphasized to policymakers and politicians collectively that lasting convergence in antitrust enforcement is unachievable without global coherence in regulator autonomy, and the FTC Act's formative influence is not above scrutiny or reproach. Still-elusive realization of the liberal economic international order's intended form will require an expanded constellation of independent competition regulators empowered to enforce antitrust laws consistently.

156. Doyle's characterization of Schumpeter's philosophy is insightful here.

According to Schumpeter (1955:68), when the people's energies are daily absorbed in production, 'economic rationalism,' or the instability of market competition, necessitates calculation. It also 'individualizes' as 'subjective opportunities' replace the 'immutable factors' of traditional hierarchical society. Rational individuals then demand democratic governance . . . Democratic capitalism means free trade and a peaceful foreign policy simply because they are, Schumpeter claimed, the first best solutions for rational majorities in capitalist societies. This is the heart of the contemporary enthusiasm, expressed by many liberal politicians, for global democratization and capitalism as the inevitable and pacific routes to peace . . .

Doyle, *supra* note 20, at 67.

157. See generally Nicolas Petit, *Chinese State Capitalism and Western Antitrust Policy*, 4 CONCURRENTS 69 (2016) (arguing that China's state-led economic organization facilitates antitrust problems).

158. See generally John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, 45 WM. & MARY L. REV. 549 (2003) (criticizing harmonization of international antitrust laws and arguing for diversification and decentralization as an alternative).