A NEW TRADE WAR: APPLYING DOMESTIC ANTITRUST LAWS TO FOREIGN PATENTS

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INTRODUCTION

In a global economy that is increasingly interconnected, the issue of applying domestic law to conduct occurring in foreign jurisdictions is the subject of much heated debate and discussion. In the antitrust context, courts and regulators continue to struggle with this issue as companies become ever more multinational, and the scrutinized behavior covers ever more jurisdictions.

Adding to the complexity of this issue, many jurisdictions are trying to address the role that intellectual property rights play in high-technology markets. Some companies—whose products use intellectual property developed by others, or have business strategies dependent upon such practices—are complaining to competition authorities across the globe about the cost of access to that technology, even if the technology is patented in other jurisdictions. How is an antitrust regulator to respond when the rights at issue are foreign? The answer is not always clear.

In the United States, after a long history of what many foreign allies perceived as overly aggressive extraterritorial application of domestic antitrust laws,[1] a consensus appears to have emerged. Courts are increasingly hesitant to apply U.S. antitrust law to foreign conduct that lacks a sufficient nexus to the United States. The primary concerns against such extraterritorial application of U.S. antitrust law involve international comity and sover-

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1 INT'L COMPETITION POLICY ADVISORY COMM., U.S. DEP'T OF JUSTICE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, ANNEX 1-C: U.S. EXPERIENCE WITH INTERNATIONAL ANTITRUST, at ii (2000), http://www.justice.gov/atr/icpac/1c.pdf ("For much of the postwar period, extraterritorial application of U.S. antitrust laws had been a significant source of tension between the United States and its trading partners. In response to U.S. assertions of extraterritorial jurisdiction, some nations introduced laws that could impede U.S. investigatory efforts to compel production or gain access to information or witnesses located abroad.").

eignty. As the United States Supreme Court remarked in the landmark *F. Hoffman-La Roche Ltd. v. Empagran S.A.*[2] decision,

> [W]hy is it reasonable to apply [U.S. antitrust laws] to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* . . . Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?[3]

Unfortunately, an increasing number of nations are arriving at differing conclusions, particularly with respect to the application of domestic antitrust laws to foreign patents. Competition authorities in some jurisdictions have begun regulating royalties and other nonprice conduct for patents issued in *foreign* jurisdictions. This trend is troublesome for at least two reasons. First, the extent to which competition law trumps intellectual property rights varies dramatically in different countries. Second, foreign patents, by definition, are only enforceable in the countries that issue those patents.[4] As a result, competition authorities that limit the use of foreign patents become de facto worldwide regulators that impose their countries' antitrust laws on intellectual property rights issued by foreign countries and concerning conduct occurring wholly or primarily in those foreign jurisdictions.

This Article analyzes this disturbing trend and the resulting perils. First, Part I describes the limited reach of domestic antitrust laws under the well-accepted "effects test." Part II describes recent efforts by the antitrust agencies of the European Union, China, and Korea to regulate the enforcement of foreign patents. Next, Part III addresses the problems with applying antitrust laws extraterritorially to conduct involving foreign patents, such as failing the traditional "effects test," ignoring concerns regarding international comity, and overriding the sovereignty of other jurisdictions. Finally, Part IV concludes.

I. THE LIMITED REACH OF NATIONAL ANTITRUST LAWS

As a general matter, the "territorial principle" of international law and comity dictates that states shall not apply their laws to conduct undertaken abroad.[5] Historically, the purpose of this principle was to protect a state's

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2 542 U.S. 155 (2004).

3 *F. Hoffman-La Roche Ltd.*, 542 U.S. at 165.

4 *See infra* Part III.

5 *See* G.W. Haight, *Antitrust Laws and the Territorial Principle*, 11 VAND. L. REV. 27, 27-28 (1957) ("Another maxim or proposition is, that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein, whether they are natural-born

exclusive authority "to regulate events occurring within its borders."[6] As Justice Holmes recognized in one of the earliest Supreme Court cases to consider extraterritorial application of U.S. antitrust laws, "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done."[7] The territorial principle, then, is an extension of a state's territorial sovereignty, and legal rules and rights are tied to the state's territorial borders.[8] It is for this reason that attempts to regulate foreign activity are often met with disdain and protest by the international community.[9]

There are, however, a number of exceptions to this general principle, particularly in the antitrust arena, where acts occurring in a foreign country may have harmful economic effects domestically.[10] Most antitrust law regimes have recognized that there must be some nexus between the foreign situation and the domestic market in order for a country to validly assert jurisdiction over foreign conduct.[11] Specifically, most jurisdictions have recognized that government agencies and courts cannot assert antitrust jurisdiction without the presence of "direct, substantial, and foreseeable" anticompetitive effects, in what has come to be known as the "effects test."[12]

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subjects or others. . . . for it would be wholly incompatible with the equality and exclusiveness of the sovereignty of all nations, that any nation should be at liberty to regulate either persons or things not within its own territory." (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (8th ed. 1883))).

6 Hannah L. Buxbaum, *Territory, Territoriality, and the Resolution of Jurisdictional Conflict*, 57 AM. J. COMP. L. 631, 636 (2009).

7 Am. Banana Co. v. United Fruit Co., 213 U.S. 347, 356 (1909) (citing Slater v. Mexican Nat'l R.R. Co., 194 U.S. 120, 126 (1904)) (holding that conduct occurring entirely in Central America was outside the scope of the Sherman Act). This approach was later replaced by an "effects test" pursuant to which conduct occurring abroad, but having anticompetitive effects in the United States, is covered by the Sherman Act. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945). The effects test has evolved over the years and was eventually adopted in the Foreign Trade Antitrust Improvements Act. This evolution is the subject of numerous articles. *See, e.g.*, Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law: What is a "Direct, Substantial, and Reasonably Foreseeable Effect" Under the Foreign Trade Antitrust Improvements Act?*, 38 TEX. INT'L L.J. 11 (2003).

8 ABDELHAMID EL OUALI, TERRITORIAL INTEGRITY IN A GLOBALIZING WORLD: INTERNATIONAL LAW AND STATES' QUEST FOR SURVIVAL 6 (2012); KAL RAUSTIALA, DOES THE CONSTITUTION FOLLOW THE FLAG? 5 (2009).

9 Won-Ki Kim, *The Extraterritorial Application of U.S. Antitrust Law and its Adoption in Korea*, 7 SINGAPORE J. INT'L & COMP. L. 386, 395-96 (2003) (describing the negative international response to the United States' assertion of extraterritorial antitrust jurisdiction).

10 MAHER M. DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW 423 (2010).

11 *Id.* at 425.

12 *See, e.g.*, 15 U.S.C. § 6a (2012) (stating only conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import, or export commerce falls within the jurisdiction of the Sherman Act); Monopoly Regulation and Fair Trade Act [MRFTA], Act No. 3320, Dec. 31, 1980, *amended by* Act No. 7315, Dec. 31, 2004, art. 2-2 (S. Kor.), *translated in Korean Laws in English: Monopoly Regulation and Fair Trade Act*, MINISTRY OF GOV'T LEGISLATION,

Since public international law provides no guidance or interpretation of the requirements of "direct, substantial, and foreseeable" effects, their interpretation is left to the courts, legislatures, and antitrust authorities of countries implementing the effects test.[13]

By way of example, in the United States, the Foreign Trade Antitrust Improvements Act ("FTAIA") implements the effects test by extending the Sherman Act to certain extraterritorial conduct and establishing a uniform test under which jurisdiction can only be asserted over conduct that has a "direct, substantial, and reasonably foreseeable" effect on U.S. domestic or export commerce.[14] The FTAIA thus clarifies that U.S. antitrust law—and, specifically, the Sherman Act—does not prohibit anticompetitive behavior occurring outside the U.S., as long as the adverse effect of such behavior exists primarily in foreign markets. If negative effects occur within the United States, however, then such conduct may well fall within the scope of the Sherman Act.[15] Notably, the U.S. Department of Justice's interpretative guidance on the application of U.S. antitrust laws to foreign conduct indicates that

> [t]o the extent that conduct in foreign countries does not "involve" import commerce but does have an "effect" on either import transactions or commerce within the United States, the Agencies apply the "direct, substantial, and reasonably foreseeable" standard of the FTAIA. That standard is applied, for example, in cases in which a cartel of foreign enterprises, or a foreign monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary, *as well as in cases in which foreign verti-*

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http://www.moleg.go.kr/FileDownload.mo?flSeq=34252 (last visited Aug. 27, 2015) (stating MRFTA extends to "an act performed abroad" only when it affects the domestic market). The European Community uses the "direct, foreseeable, and substantial" effects test as well. *See* Leigh Davison & Debra Johnson, *The EU's Evolving Stance on the International Dimension of Competition Policy: A Critical Commentary*, 37 INTERECONOMICS 244, 249 (2002).

13 DABBAH, *supra* note 100, at 426.

14 15 U.S.C. § 6a (2012).

15 DABBAH, *supra* note 100, at 448. It would be remiss not to note that the effects doctrine remains the subject of debate and controversy in the United States, with U.S. courts arriving at differing conclusions as to the interpretation of what constitutes a "direct, substantial, and reasonably foreseeable" effect. *See generally* Mark S. Popofsky, *Extraterritoriality in U.S. Jurisprudence*, *in* 3 ISSUES IN COMPETITION LAW AND POLICY 2417 (2008). Recently, the Second Circuit held that foreign anticompetitive conduct can meet the FTAIA's "direct, substantial, and reasonably foreseeable effect" test so long as there is a "reasonably proximate causal nexus between the conduct and the effect." Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 398, 411-12 (2d Cir. 2014). This interpretation is consistent with the Seventh Circuit's approach in *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 856-57 (7th Cir. 2012) (en banc). The Ninth Circuit, however, has taken a stricter approach, holding that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." United States v. LSL Biotechs., 379 F.3d 672, 680 (9th Cir. 2004).

> *cal restrictions or intellectual property licensing arrangements have an anticompetitive effect on U.S. commerce.*[16]

Other key jurisdictions have likewise adopted the effects test. The European Union's approach is largely consistent with that of the United States, with the General Court of the European Union adopting a version of the effects test in Gencor Ltd. v. Commission[17] in 1999.[18] The Court explained that "[a]pplication of the [EU's Merger Control Regulation][19] is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."[20]

Likewise, Korea's Monopoly Regulation and Fair Trade Act ("MRFTA") reflects the effects doctrine in its Article 2-2, which provides that when there is an effect on the domestic market, the MRFTA applies even "[i]n cases where an act [is] performed abroad."[21] The Korean Supreme Court explicitly set forth the limits of that jurisdiction in the recent *Air Cargo*[22] decision:

> MRFTA should apply to the conduct that has direct, substantial and reasonably foreseeable effect on the domestic commerce. To determine whether MRFTA should apply to foreign conduct, the court should adopt the totality of the circumstances test such as the conduct's contents, intent, characteristics of the relevant goods and services, transaction structure and the extent and substances of the effects on the domestic market.[23]

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16 U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.121 (1995) [hereinafter GUIDE FOR INT'L OPERATIONS] (emphasis added), *available at* http://www.justice.gov/atr/public/guidelines/internat.htm.

17 Case T-102/96, Gencor Ltd. v. Comm'n, 1999 E.C.R. II-753.

18 However, some consider the EU's approach to extraterritoriality as requiring "something more than a finding of effects." Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62 AM. J. COMP. L. 87, 95 (2014).

19 Council Regulation 4064/89, 1989 O.J. (L 395) 1 (addressing the control of concentrations between undertakings).

20 *Gencor Ltd.*, 1999 E.C.R. at II-785, ¶ 90; *see also* 2 HERBERT HOVENKAMP ET AL., IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW 41-41 n.150 (2d ed. 2014) (citing EU cases establishing a U.S.-style "effects test" for the extraterritorial application of European competition law).

21 Monopoly Regulation and Fair Trade Act [MRFTA], Act No. 3320, Dec. 31, 1980, *amended by* Act No. 7315, Dec. 31, 2004, art. 2-2 (S. Kor.), *translated in Korean Laws in English: Monopoly Regulation and Fair Trade Act*, MINISTRY OF GOV'T LEGISLATION, http://www.moleg.go.kr/FileDownload.mo?flSeq=34252 (last visited Aug. 27, 2015); *see also* Joseph Seon Hur, Ph.D., *Extraterritorial Application of Korean Competition Law*, 6 REGENT J. OF INT. L. 171, 174 (2008).

22 Supreme Court, 2012Du13665, May 16, 2014 (S. Kor.), *translated in Decisions*, SUP. CT. OF KOREA, http://library.scourt.go.kr/SCLIB_data/decision/23-oh2014.5.16.2012Du13665.htm.

23 Supreme Court, 2012Du13665, May 16, 2014, ¶ 2.A (S. Kor.), *translated in* Bae, Kim & Lee LLC, Unofficial Translation (on file with authors); *see also* Sai Ree Yun et al., *Korea*, *in* THE CARTELS AND LENIENCY REVIEW 235, 239 (Christine A. Varney ed., 3d ed. 2015) (characterizing the Korean

Although in many ways China's approach to extraterritorial application of its Anti-Monopoly Law ("AML") is still developing, Article 2 of the AML provides that "this law shall apply to the monopolistic conducts outside the territory of the People's Republic of China that has the effect of eliminating or restricting competition on the domestic market of China."[24] Thus, the AML explicitly provides for a version of the effects doctrine, though the application and interpretation of this provision has yet to be refined.[25]

In short, most jurisdictions having sophisticated antitrust enforcement regimes recognize that there is no basis for extraterritorial application of domestic antitrust laws absent a direct, foreseeable, and substantial effect on domestic markets. There seems to be universal recognition that, in theory, attempts to regulate primarily foreign conduct implicates concerns related to state sovereignty and international comity. However, as discussed below, recent investigations by competition authorities in Asia suggest that practice does not always follow theory.

II. RECENT EFFORTS BY ANTITRUST AGENCIES TO REGULATE THE ENFORCEMENT OF FOREIGN PATENTS

Despite the apparent consistency of the "effects" doctrine in theory, recent decisions by antitrust agencies demonstrate wide divergence in its application to foreign intellectual property rights. At one end of the spectrum, the EU has adopted a traditional approach that, consistent with principles of international comity and sovereignty, regulates only domestic conduct related to domestic patents.[26] China's National Development and Reform Commission has taken something of a middle road, pushing the boundaries of the traditional effects test by calling for some restrictions on foreign activity related to non-Chinese patents, but stopping short of explicitly trammeling on issuing states' sovereignty.[27] At the other end of the spectrum, the Korea Fair Trade Commission has advocated for the extraterritorial application of Korean antitrust law to what amounts to almost entirely foreign conduct by a non-Korean firm related to its non-Korean pa-

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Supreme Court's action as having narrowed the scope of Article 2-2 to require a "'direct, substantial and reasonably foreseeable effect' on the Korean market").

24 Michael Faure & Xinzhu Zhang, *Towards an Extraterritorial Application of the Chinese Anti-Monopoly Law That Avoids Trade Conflicts*, 45 GEO. WASH. INT'L L. REV. 501, 528 (2013) (quoting Zhonghua Renmin Gongheguo Fanlongduanfa (中國人民共和國反壟斷法) [The Anti-Monopoly Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008) 2007 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 68, art. 2) (internal quotation marks omitted).

25 *Id.*

26 *See infra* Part II.A.

27 *See infra* Part II.B.

tents.[28] The cases detailed below illustrate the antitrust agencies' different approaches.

A. *EU Investigations into the Use of SEPs by Motorola and Samsung*

The European Commission took a measured approach in its investigations into the use of standard-essential patents ("SEPs") by Motorola Mobility and Samsung. Consistent with traditional jurisdictional limits under the effects test, the European Commission refrained from pursuing any regulatory measures outside its sovereign territory.

1. Motorola

In April 2014, the European Commission ("Commission") adopted an infringement decision against Motorola Mobility ("Motorola") for enforcing an injunction against Apple before a German court.[29] At issue in the case was Motorola's attempt to seek, and enforce, an injunction against Apple regarding one of its SEPs reading on what is known as the General Packet Radio Service ("GPRS") standard.[30] Importantly, Motorola had "committed to the European Telecommunications Standards Institute ("ETSI") to license [those SEPs] on fair, reasonable and nondiscriminatory ("FRAND") terms and conditions."[31] In essence, the Motorola SEPs in question relate to a key industry standard for mobile and wireless communications in Europe, allowing technology companies to make compatible products and helping devices, such as smartphones, to communicate and transmit internet protocol data through the wireless network.[32]

In February 2012, Apple submitted a complaint to the Commission relating to Motorola's enforcement in Germany of its Cudak GPRS SEP in a culmination of patent-related litigation spanning numerous countries between Motorola and Apple beginning in 2010.[33] In the course of the German proceedings, Motorola alleged that Apple (including its iPhone 4s) had infringed its Cudak GPRS patent, which had been granted in Europe in March 2003.[34] In the course of the injunction proceedings, Apple made six successive licensing offers to Motorola and submitted these offers to the

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28 *See infra* Part II.C.

29 *See generally* Commission Decision of 29 April 2014 Addressed to Motorola Mobility LLC, Case AT.39985, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

30 *Id.* ¶ 1.

31 *Id.*

32 *Id.* ¶ 87.

33 *See id.* ¶¶ 110-15.

34 Commission Decision of 29 April 2014 Addressed to Motorola Mobility LLC, Case AT.39985, ¶¶ 152-53, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

German courts as well.[35] In its second licensing offer, Apple proposed to enter into a license agreement which would have given Motorola the right to set the royalties according to FRAND principles, without any limitations (other than FRAND and Article 102 TFEU) with respect to the royalty rates and the method of calculation of the final amount of royalties.[36] The offer also allowed for a full judicial review of the amount of FRAND royalties, whereby Motorola and Apple could submit their own evaluations, calculations, and reasoning for consideration to the court. Motorola, however, "rejected this offer and continued the injunction proceedings."[37]

The Commission, responding to Apple's complaints about Motorola's enforcement actions in Germany, launched an investigation into Motorola's conduct. In April 2014, it issued a decision that determined the relevant product market to be the licensing of the GPRS SEP,[38] and the relevant geographic market to be the entire European Economic Area ("EEA") (made up of the EU plus Iceland, Liechtenstein, and Norway) and not just those Member States where Motorola's Cudak GPRS SEP is enforceable.[39] Finding Motorola had market dominance because of its 100 percent share of the market for the licensing of the Cudak GPRS SEP, the Commission concluded that Motorola's seeking and enforcing an injunction against Apple on the basis of the Cudak GPRS SEP was an abuse of its dominant position in the EEA market for the licensing of the GPRS technology.[40] Specifically, the Commission concluded that, in light of Motorola's commitment to ETSI to license the Cudak GPRS SEP on FRAND terms and conditions and Apple's willingness to enter into a license agreement on FRAND terms and conditions, Motorola's choice to continue to seek an injunction against Apple had the potential to produce anti-competitive effects.[41] Specifically, these effects included a temporary ban on the online sale of Apple's GPRS-compatible products in Germany, the inclusion of disadvantageous licensing terms in Motorola's subsequent settlement agreement with Apple, and a negative impact on standard-setting.[42]

Significantly, the Commission's decision represents a restrained approach to the application of antitrust law to the enforcement of patents that is consistent with international law and principles of comity. The decision only had an impact on Motorola's ability to enforce a European patent in Germany, a European Member State. The decision makes no attempt to

35 *Id.* ¶ 120.

36 *Id.* ¶ 125.

37 Summary of Commission Decision of 29 April 2014, Case AT.39985, 2014 O.J. (C 344) 6, 7, ¶ 14.

38 Commission Decision of 29 April 2014 Addressed to Motorola Mobility LLC, Case AT.39985, ¶ 213, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

39 *Id.* ¶¶ 213-17.

40 *Id.* ¶¶ 225, 271.

41 *Id.* ¶¶ 279-80.

42 *Id.* ¶ 311.

restrict Motorola's enforcement of its non-European patents outside the EEA, even though Motorola similarly was seeking injunctions outside Europe using non-European SEPs.[43] Indeed, the decision is careful to note that it applies only with respect to Motorola's enforcement of the Cudak GPRS SEP, a European patent, in Germany, and not any of Motorola's other SEPs, whether in Germany or otherwise.[44] Thus, the Commission refrains from interfering with the extraterritorial enforcement of foreign patents.[45]

2. Samsung

The Commission took a similar approach in its Samsung decision, which it adopted at the same time as the Motorola decision. Like Motorola, Samsung owns a number of SEPs related to various mobile telecommunications standards, including the 3G UMTS standard, which Samsung had committed to license on FRAND terms to ETSI.[46] In April 2011, Samsung began to seek injunctions against Apple in several EU Member States on the basis of its SEPs issued in Europe.[47] The Commission notified Samsung of its concern that it considered Apple a willing licensee on FRAND terms for Samsung's SEPs and that, therefore, the seeking of injunctions against Apple in the EU may constitute an abuse of dominant position in violation of EU antitrust law.[48]

To address the Commission's concerns, Samsung provided the Commission with commitments that it will not, for five years, seek injunctive relief in the EEA on any of its "Mobile SEPs" against licensees who commit to a specified licensing framework.[49] Under Samsung's commitments, "Mobile SEP" is defined as "a patent (including all existing and future members of its patent family in the EEA) *granted in the EEA* that is or may become, and remains, Essential to any Mobile Standard in at least one EEA

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43 *See, e.g.*, Apple Inc. v. Motorola, Inc. 757 F.3d 1286, 1294 (Fed. Cir. 2014).

44 Commission Decision of 29 April 2014 Addressed to Motorola Mobility LLC, Case AT.39985, ¶ 517, http://ec.europa.eu/competition/antitrust/cases/dec_docs/39985/39985_928_16.pdf.

45 Additionally, the Commission emphasized that Motorola's action for an injunction was limited to only those patents Motorola voluntarily committed to license on FRAND terms. In this instance, the Commission, concerned that a dominant market player was not abiding by its commitment to license its SEPs on FRAND terms in Europe, responded by precluding injunctions only in the EEA and only on patents granted in the EEA, leaving all other patent remedies available to Motorola in all other jurisdictions.

46 Press Release, European Comm'n, Antitrust: Commission Accepts Legally Binding Commitments by Samsung Electronics on Standard Essential Patent Injunctions 2 (Apr. 29, 2014), http://europa.eu/rapid/press-release_IP-14-490_en.htm.

47 *Id.*

48 *Id.*

49 *Id.*

Contracting Party and which has been declared as such to an SSO."[50] The licensing framework provides for a negotiation period of up to twelve months, and, if no agreement is reached, any dispute over FRAND terms for the Mobile SEPs in question will be resolved by a court or, if both parties agree, by an arbitrator.[51]

Therefore, the Samsung decision is similar to the Motorola decision in that the commitments to which Samsung is bound limit only Samsung's ability to seek injunctions within the EEA on patents issued in Europe. The Commission made no attempt to reach enforcement of foreign patents outside the EEA, even though Samsung similarly was seeking injunctions outside Europe using non-European SEPs.[52] Together, the two decisions create a "safe harbor" for potential licensees: they are protected against injunctions by Samsung and Motorola *in Europe*, based on *European SEPs*, if they are willing to enter into a license on FRAND terms.[53]

B. *China's Investigation of Qualcomm*

China's anti-monopoly regulator, the National Development and Reform Commission ("NDRC"), took a more nuanced approach in its investigation of Qualcomm, a leading mobile device chip maker and holder of a significant number of SEPs in mobile telecommunications technologies. In November 2013, the NDRC launched an investigation into Qualcomm's alleged abuse of its dominant position in several markets, including the licensing of SEPs for the CDMA, WCDMA, and LTE wireless communications standards, as well as the supply of baseband chips.[54] The NDRC launched the investigation "after receiving complaints that the San Diego-based company was charging higher prices in China than it does in other countries."[55] It ultimately determined that Qualcomm abused its dominant

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50 Samsung Elecs. Co., Commitments Offered to the European Commission 14 (Sept. 27, 2013) (emphasis added), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1301_5.pdf.

51 Press Release, European Comm'n, *supra* note 46, at 2.

52 *See, e.g.*, Letter from Michael B.G. Froman, U.S. Trade Representative, to Irving A. Williamson, Chairman, U.S. Int'l Trade Comm'n (Aug. 3, 2013), https://ustr.gov/sites/default/files/08032013%20Letter_1.PDF.

53 Memorandum from European Commission, Antitrust Decisions on Standard Essential Patents, MEMO/14/322, at 2 (Apr. 29, 2014), http://europa.eu/rapid/press-release_MEMO-14-322_en.pdf.

54 Nat'l Dev. & Reform Comm'n, Administrative Penalty Decision No. [2015] 1 (Feb. 9, 2015), *available at* http://www.ndrc.gov.cn/gzdt/201503/t20150302_666209.html, *translated in* Freshfields & Fangda, Unofficial Translation, Administrative Penalty Decision: *Fa Gai Ban Jia Jian Chu Fa* No. [2015] 1 [hereinafter NDRC Penalty] (on file with authors).

55 Kevin Yao & Matthew Miller, *China Accuses Qualcomm of Overcharging, Abusing Dominance*, REUTERS, Feb. 19, 2014, http://www.reuters.com/article/2014/02/19/us-china-ndrc-idUSBREA1I0A820140219.

position in three ways: supracompetitive pricing, unfair terms, and bundling, all in contravention of China's AML.[56]

With respect to Qualcomm's SEPs licensing practices, the NDRC defined the relevant product market as "the aggregation of the individual relevant product markets for the licensing of each Wireless SEP [Qualcomm] holds"[57] and the relevant geographic market as the "the aggregation of the national or regional markets for the various Wireless SEPs [Qualcomm] holds"[58] (*i.e.*, every country of origin of Qualcomm's SEPs, not just those issued in China). It further found that since Qualcomm holds a 100 percent market share in every licensing market where it owns SEPs, it is capable of controlling the market, including licensing terms and royalty rates, and can "block or affect [the] market entry of other undertakings."[59]

The NDRC found that Qualcomm abused its market dominance in the SEP licensing market by charging unfairly high royalties by incorporating—and charging royalties for—expired SEPs in the patent portfolios it made available to its licensees.[60] In addition, the NDRC found that Qualcomm charged unfairly high royalties by requiring licensees to grant back their patents to Qualcomm free of charge, in violation of the AML.[61] With respect to bundling, the NDRC found that Qualcomm abused its market dominance by bundling the sale of non-SEPs with SEPs in its patent portfolio, thus effectively forcing licensees to pay for licenses for unneeded or unnecessary non-SEPs, in violation of the AML.[62]

In regards to the baseband chip market, the NDRC concluded that the relevant geographic market is "global in scope"[63] and found that Qualcomm held a dominant position in this market by virtue of its market share (in excess of 50 percent) and percentage of sales revenue. It found that Qualcomm abused this dominant position by imposing unfair conditions on the sale of baseband chips by, inter alia, conditioning the sale of baseband chips to its SEPs' licensees on the acceptance of its standard licensing terms and conditions, which included the unfairly high royalty fees and bundling practices determined to be anticompetitive.[64]

Despite the broad geographic market definition, however, the NDRC seemingly limited its penalties to practices "within the territory of the People's Republic of China."[65] The penalties included restrictions on Qualcomm's SEP licensing practices in China, restrictions on royalty base rates

56 NDRC Penalty, *supra* note 54, § II.
57 *Id.* § I.A.
58 *Id.*
59 *Id.*
60 *Id.* § II.A.1.
61 NDRC Penalty, *supra* note 54, § II.A.2.
62 *Id.* § I.B.
63 *Id.*
64 *Id.* § II.C.
65 *Id.* § III.A.

charged in China, and restrictions on the sale of baseband chips to manufacturers of wireless communication terminal devices within the territory of China.[66] Significantly, the NDRC concluded that "[Qualcomm]'s licensing of Wireless SEPs outside the territory of the People's Republic of China that does not result in significant effect on elimination or restriction of the competition in China shall not be subject to the abovementioned decision."[67]

The actual extent of the geographic reach of the NDRC's investigation, however, is hazy. Following issuance of the NDRC's decision, Qualcomm submitted to the NDRC a confidential "rectification plan" designed to remedy the alleged abuses.[68] The NDRC reviewed and accepted the plan, effectively ending the investigation.[69] But because the rectification plan remains confidential, the geographic application of the corrective measures is not public.

While the extraterritorial reach of Qualcomm's settlement with the NDRC is unclear, there are indications of some limitation on Qualcomm's licensing practices outside China. Presumably those restrictions relate to Qualcomm's non-Chinese patents, or jurisdictions where Qualcomm lacks patents.[70] The extent to which resolution of the NDRC's investigation trammels on other states' sovereignty is unclear. Nevertheless, the fact remains that the licensing restrictions agreed upon by Qualcomm are not solely limited to licensing practices in China, unlike those of the European Commission.

C. *Korea's Investigation of Microsoft's Acquisition of Nokia's Devices and Services Business*

At the opposite end of the spectrum from the European Commission's treatment of SEPs, the Korea Fair Trade Commission's ("KFTC") investigation into Microsoft Corporation's ("Microsoft") acquisition of Nokia Corporation's ("Nokia") Devices & Services business ("D&S Business")

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66 *Id.*

67 NDRC Penalty, *supra* note 54, § III.A.

68 *See* Press Release, Qualcomm Technologies, Inc., Qualcomm and China's National Development and Reform Commission Reach Resolution, (Feb. 9, 2015), http://files.shareholder.com/downloads/QCOM/3864235320x0x808060/382E59E5-B9AA-4D59-ABFF-BDFB9AB8F1E9/Qualcomm_and_China_NDRC_Resolution_final.pdf.

69 *Id.*

70 *See* Qualcomm Technologies, Inc., Qualcomm and China's National Development and Reform Commission Reach Resolution, Qualcomm Shareholder Presentation 3 (Feb. 9, 2015), http://files.shareholder.com/downloads/QCOM/3960635251x0x808100/D7ED1834-CA51-4278-8787-2096BAFB19E2/NDRC_Resolution_Executive_Presentation.pdf (indicating that a key part of the resolution is that it "requires no licensing changes outside China *with limited exceptions*" (emphasis added)).

illustrates the potential for regulators to overreach their jurisdiction in seeking to limit a company's ability to enforce its foreign patents. In September 2013, Microsoft and Nokia announced that Microsoft would acquire the D&S Business for approximately $7.2 billion.[71] The D&S Business included Nokia's "Mobile Phones and Smart Devices" business unit, which developed and supplied mobile phones and related software, smartphones, and the Lumia tablet.[72] The D&S Business also included a design team; operations and production facilities; D&S-related sales and marketing functions; related support functions; and Nokia's heretofore unlicensed design patents covering the "look and feel" of the acquired lines of devices produced by the D&S business.[73]

As is common during the finalization of major business acquisitions, the parties revised the proposed deal several times prior to closing. On April 16, 2014, Microsoft and Nokia restructured the transaction to exclude Nokia's two Korean subsidiaries: Nokia TMC Ltd. and Nokia Korea Limited.[74] Nevertheless, and even though the acquisition was subsequently ap-

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71 Arjun Kharpal, *Nokia-Microsoft Merger Delayed Due to Asia Hurdles*, CNBC (Mar. 24, 2014, 9:21 AM), http://www.cnbc.com/id/101519164.

72 *See* Joint Press Release, Microsoft to Acquire Nokia's Devices & Services Business, License Nokia's Patents and Mapping Services (Sept. 3, 2013), http://www.microsoft.com/en-us/news/press/2013/sep13/09-02announcementpr.aspx.

73 *Id.*

74 *Nokia's Factory in Korea Excluded from M&A Deal*, BUS. KOREA (Apr. 23, 2014, 11:44 AM), http://www.businesskorea.co.kr/article/4250/microsoft-nokia-merger-nokia%E2%80%99s-factory-korea-excluded-ma-deal.

proved by the antitrust regulators in all other relevant jurisdictions[75] the KFTC withheld approval and launched an investigation.[76]

Microsoft's acquisition of the D&S Business allowed it to become an original equipment manufacturer ("OEM") of smartphones. While Microsoft previously had a long history developing and licensing operating system ("OS") software such as Windows and Windows Phone, the acquisition of the D&S business enabled it to manufacture smartphones itself.

The KFTC recognized that the acquisition was a vertical transaction between businesses with almost no horizontal overlap, and that Microsoft's incentive is to promote rather than foreclose OEM access to its Windows Phone operating system and other mobile applications.[77] Finding no anticompetitive effects with respect to the market for mobile OSs and applications, the KFTC instead focused on the market for smartphones.[78] It ultimately concluded that, because Microsoft owns a number of widely used patents for mobile OSs, it has an incentive post-acquisition to increase the royalties it charges to manufacturers of smartphones that run the Android OS and, therefore, ultimately increase the cost of producing an Android smartphone.[79] In essence, the KFTC believed a decision by Microsoft to

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[75] Most of the relevant jurisdictions approved the transaction without any investigation, with the exceptions of Taiwan and China, who approved the transaction following investigations. *See* Liam Tung, *China Finally Gives the Green Light for Nokia-Microsoft Devices Unit Sale*, ZDNET (Apr. 8, 2014, 8:52 AM), http://www.zdnet.com/article/china-finally-gives-the-green-light-for-nokia-microsoft-devices-unit-sale/; *February, 2014 Notice of Approval of Microsoft/Nokia Transaction with Conditions Attached*, TAIWAN FAIR TRADE COMM'N (Mar. 25, 2014, 3:56 PM), http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=179&docid=13429. Russia, India, Israel, and Turkey were the first to approve the deal, not long after it was signed. Gregg Keizer, *U.S. Antitrust Regulators OK Microsoft-Nokia Deal*, COMPUTERWORLD (Dec. 2, 2013, 2:05 PM), http://www.computerworld.com/article/2486398/mobile-wireless/u-s--antitrust-regulators-ok-microsoft-nokia-deal.html. The United States Department of Justice approved the acquisition on November 29, 2013. *Early Termination Notices, Transaction No. 20140115, Microsoft Corporation; Nokia Corporation*, FED TRADE COMM'N (Nov. 29, 2013), https://www.ftc.gov/enforcement/premerger-notification-program/early-termination-notices/20140115. The European Commission cleared the acquisition on December 4, 2013. Press Release, European Commission, Mergers: Commission Clears Acquisition of Nokia's Mobile Device Business by Microsoft (Dec. 4, 2013), http://europa.eu/rapid/press-release_IP-13-1210_en.htm. The Chinese Ministry of Commerce approved the deal in April 2014. Sven Grundberg, *Nokia Gets Chinese Regulatory Approval for Microsoft Deal*, WALL ST. J. (Apr. 8, 2014, 6:08 AM), *available at* http://www.wsj.com/articles/SB10001424052702304819004579488773400060370.

[76] *See* Complaint at 6-7, ¶ 16, Microsoft Corp. v. Samsung Elecs. Co., 60 F. Supp. 3d 525 (S.D.N.Y 2014) (No. 14-CV-6039) (alleging that Samsung was using the merger clearance process as a mechanism to have the KFTC force Microsoft to lower its existing patent royalties).

[77] *See* Press Release, Korea Fair Trade Comm'n, KFTC Commences Procedures for Collecting Opinions Regarding Tentative Consent Decree Regarding Microsoft Corporation (MS)—Nokia Business Combination 7 (May 19, 2015), *translated in* Yoon & Yang LLC, Unofficial Translation [hereinafter KFTC Press Release] (on file with authors) (acknowledging that the Microsoft-Nokia deal constituted vertical integration).

[78] *See id.* at 2 (finding anticompetitive effects in the market for cellphones).

[79] *Id.* at 8.

increase royalties would restrict competitors in the downstream market from purchasing essential production elements in the upstream market.[80] The KFTC ultimately sought to limit certain Microsoft licensing practices that were established *before* its acquisition of Nokia's D&S business, and that had little to do with the transaction.

In light of the KFTC's conclusion that Microsoft's patent licensing practices would likely restrain competition, the KFTC and Microsoft ultimately entered into a consent decree instituting a number of measures to correct the allegedly anticompetitive effects of the D&S Business acquisition.[81] These proposed corrective measures included a commitment to license Microsoft's smartphone-related SEPs on "fair, reasonable and non-discriminatory" terms, restraints on the royalties Microsoft sets for its non-SEP smartphone-related patents, and limits on seeking injunctions against entities infringing Microsoft's smartphone-related patents.[82]

Significantly, the licensing practices at issue in the KFTC's investigation concerned Microsoft's worldwide smartphone patent portfolio, which contains primarily non-Korean patents.[83] Why might the KFTC seek to regulate a patent portfolio that is overwhelmingly non-Korean? The answer is relatively obvious. One of the primary beneficiaries of the KFTC's actions is Samsung, the Korean smartphone giant with a 65 percent share of all Android devices.[84]

The KFTC's jurisdictional power grab is striking. First, upon the exclusion of Nokia's Korean subsidiaries, Microsoft's acquisition of the D&S Business involved no Korean companies and thus fell below the notification threshold in Article 12 of the Korean MRFTA and Article 18 of the MRFTA Enforcement Decree.[85] That is, the acquisition fell below the min-

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80 *Id.* at 2. *See also* Korea Fair Trade Comm'n, Draft Tentative Consent Decree in the Case Concerning Violations of Business Combination Regulations by Microsoft Corporation and Nokia Corporation, at KR 25, Case No. 2014GiGuel1474, May 19, 2015 (S. Kor.), *translated in* Yoon & Yang LLC, Unofficial Translation [hereinafter Draft Microsoft Decree] (on file with authors).

81 *See generally* Draft Microsoft Decree, *supra* note 80.

82 *Id*. at KR 32-34; KFTC Press Release, *supra* note 77, at 2-5.

83 Approximately 95% of Microsoft's patent portfolio is issued by countries outside of Korea. *See Legal Resources: Microsoft Patents*, MICROSOFT, http://www.microsoft.com/en-us/Legal/Intellectual Property/patents/#dl. In an apparent attempt to sidestep this jurisdictional issue, the KFTC focused on Microsoft's SEPs and "actually essential patents" (which it categorized as "*de facto* SEPs") and emphasized that Microsoft's smartphone patent portfolio is broadly used in the Android OS. Draft Microsoft Decree, *supra* note 80, at KR 13; KFTC Press Release, *supra* note 77, at 5.

84 *Samsung Remains King of the Android Market with 65% Share of All Android Devices*, LOCALYTICS (Feb. 28, 2014, 9:00 AM), http://info.localytics.com/blog/samsung-remains-king-of-the-android-market.

85 Article 18 of the Enforcement Decree states that, in the case of a business combination between foreign companies, notification to the KFTC is required only where the respective domestic sales turnover of the acquirer and the target amount to KRW 20 billion or more. Enforcement Decree of the Monopoly Regulation and Fair Trade Act, Presidential Decree No. 12979, Apr. 14, 1990, art. 18, *amended by* Presidential Decree, July 13, 2007 (S. Kor.).

imum threshold that could possibly have an effect on domestic Korean commerce and that is ostensibly required for extraterritorial application of the MRFTA.

Second, the KFTC's extraterritorial application of the MRFTA did not satisfy the "effects" test, which, as explained by the Korea Supreme Court, only permits jurisdiction where the foreign conduct at issue has a direct, substantial, and foreseeable effect on the Korean domestic market.[86] The KFTC disregarded this jurisdictional prerequisite and based its analysis on a geographically unlimited market for smartphones, not just those manufactured or sold in Korea.[87] Indeed, Microsoft was essentially a nonplayer in the Korean smartphone OS market prior to the acquisition, and Nokia only had a de minimis share of the mobile device market.[88]

Struggling to find a Korea-specific direct, substantial, or foreseeable effect on the downstream market for domestic sales of smartphones, the KFTC focused on Microsoft's pre-acquisition patent licensing conduct. The KFTC determined that, if Microsoft continued enforcing its patents post-transaction, it could "excessively increase the patent royalties in order to increase the manufacturing costs of Android device manufacturers," some of which include Korean-based OEMs.[89]

As noted above, the inherent problem with this analysis is that Microsoft's acquisition of the D&S Business did not involve any patents registered in Korea; thus, the KFTC did not have jurisdiction over any of those patents. To sidestep this jurisdictional issue, the KFTC focused on Microsoft's widely-used smartphone patents, categorizing them as "*de facto* essential" to smartphone manufacturers.[90]

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86 *See* Supreme Court, 2012Du13665, May 16, 2014, ¶ 2.A (S. Kor.), *translated in Decisions*, SUP. CT. OF KOREA, http://library.scourt.go.kr/SCLIB_data/decision/23-oh2014.5.16.2012Du13665.htm ("[The phrase] 'where it affects domestic market' under Article 2-2 of the MRFTA shall be construed [to mean a] direct, [substantial], and reasonably [foreseeable] influence on [the] domestic market by overseas action."); *see also* Sai Ree Yun et al., *supra* note 23, at 235, 239.

87 Draft Microsoft Decree, *supra* note 80, at KR 19-20.

88 *See* Neil Shah, *Apple Records Highest Ever Market Share in Japan & Korea*, COUNTERPOINT TECH. MARKET RES. (Jan. 21, 2015), http://www.counterpointresearch.com/applepulsenov2014 (indicating that at the end of 2014, the four largest shares of the smartphone market in Korea were held by Samsung (46%), Apple (33%), LG (14%), and Pantech (approximately 5%)).

89 Draft Microsoft Decree, *supra* note 80, at KR 25-26. *See also* KFTC Press Release, *supra* note 77, at 2.

90 Draft Microsoft Decree, *supra* note 80, at KR 13. Although beyond the scope of this article, another problematic aspect of the KFTC's investigation and consent decree is that it limited Microsoft's enforcement of non-SEPs. SEPs, which are incorporated into many commonly standardized products like WiFi, Bluetooth and USB ports after a pledge that the owner would license those patents on FRAND terms, can be abused after adoption of the standard if SEP holders demand excessive royalties from implementers. For an in-depth discussion, see 2 HOVENKAMP ET AL., *supra* note 200, § 35.1a; Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1893 (2002); Daryl Lim, *Standard Essential Patents, Trolls, and the Smartphone Wars: Triangulating the End Game*, 119 PENN ST. L. REV. 1, 3 (2014). The KFTC's proposed corrective measures

In essence, the KFTC's decision is an attempt to regulate exports by Korean OEMs into foreign countries, concerning patents issued by *other* jurisdictions. Premising merger challenges on the licensing of foreign patents precludes Microsoft from licensing its non-SEPs in those jurisdictions at royalty rates and in a manner consistent with those jurisdictions' laws. This invasion of sovereignty demonstrates a disregard for principles of international comity and is not in accord with international norms, which include a presumption against the extraterritorial application of law.

III. THE PROBLEMS WITH APPLYING ANTITRUST LAWS EXTRATERRITORIALLY TO CONDUCT INVOLVING FOREIGN PATENTS

Applying antitrust laws extraterritorially to foreign patent rights creates major substantive conflicts because the extent to which competition law supersedes intellectual property rights varies dramatically by jurisdiction. For example, the United States, and to a lesser extent the European Union, strongly disfavors requiring a company to share its proprietary intellectual property rights with other companies, and especially its competitors.[91] In contrast, competition authorities in multiple countries in Asia believe that refusing to license a company's valuable intellectual property to its competitors can be anticompetitive.[92]

The substantive differences in liability standards demonstrate the tension between the increasingly international nature of intellectual property transactions and the inherently national focus of antitrust law. The initial hurdle to the extraterritorial application of domestic antitrust laws is thus the limited territorial scope of antitrust laws. Under the almost universally accepted "effects test," antitrust jurisdiction cannot be asserted extraterrito-

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instituting, inter alia, a commitment to license patents on FRAND terms to smartphone manufacturers, amount to a decision to treat Microsoft's non-Korean patents as de facto SEPs or "commercially essential patents." This is alarming because Microsoft's patents are *not* SEPs encumbered by a voluntary FRAND promise, and therefore were not subject to any licensing commitments or obligations prior to the Nokia acquisition. *See generally* John "Jay" A. Jurata, Jr. & Adya Baker, *Apples and Oranges: Comparing Assertions of SEPs and Differentiating Patents from an Antitrust Perspective and Evidence*, CPI ANTITRUST CHRON., Mar. 31, 2015 [hereinafter *Apples & Oranges*].

91 *See Apples & Oranges*, *supra* note 90.

92 *See, e.g.*, Measures on the Prohibition of Abuse of Intellectual Property Rights to Eliminate or Restrict Competition (promulgated by the State Admin. for Indus. & Commerce, Apr. 7, 2015, effective Aug. 1, 2015), art. VII (China), *translated in China Law Vision*, ANJIE LAW FIRM (Apr. 2015), http://en.anjielaw.com/downloadRepository/6df0e385-4dcb-45ee-945f-4a5c4388482c.pdf ("[A] business operator having a dominant market position shall be prohibited from refusing licensing other business operators to use its IP under reasonable conditions to eliminate or restrict competition, where the said IP serves as an essential facility in manufacturing or business operation."); KOREA FAIR TRADE COMM'N, REVIEW GUIDELINES ON UNFAIR EXERCISE OF INTELLECTUAL PROPERTY RIGHTS 13-14 (2010), http://eng.ftc.go.kr/files/static/Legal_Authority/Review%20Guidelines%20on%20Unfair%20Exercise%20of%20Intellectual%20Property%20Rights_mar%2014%202012.pdf.

rially without the presence of "direct, substantial, and foreseeable" anti-competitive effects domestically.[93] However, as this Part argues, foreign patents do not satisfy the effects test because of the limited territorial scope of a patent grant and the nature of patent enforcement and licensing, which involve primarily foreign conduct. This Part concludes by arguing that imposing limits on the use of foreign patents is contrary to principles of international comity and sovereignty.

A. *The Limited Territorial Scope of Antitrust Laws*

As discussed above in Part I, the European Union, China, Korea, and most jurisdictions have adopted a version of the effects test, recognizing that there must be a "direct, substantial, and foreseeable" effect on domestic commerce before domestic antitrust laws can validly be applied to foreign conduct. In practice, however, the three jurisdictions have taken widely varying approaches in applying the effects test, with the EU construing it strictly, Korea virtually disregarding it, and China somewhere in between.

The EU's approach with Motorola and Samsung demonstrates adherence to a U.S.-style effects test, with the Commission limiting its decision only to effects produced by anti-competitive conduct in the EEA. In contrast, the KFTC's investigation of the Microsoft/Nokia acquisition stands out as an outlier in its extraterritorial application of domestic antitrust laws. As described above, the KFTC's approach disregarded the effects test completely and omitted any discussion of the propriety of asserting jurisdiction over the combination in the first place.[94] The KFTC asserted jurisdiction over a proposed business combination that did not satisfy minimum notification thresholds required for review under the MRFTA, did not involve the acquisition of any Korean entities or the transfer of any Korean patent rights, and, indeed, did not have a direct, substantial, and foreseeable effect on the domestic Korean market.[95] The NRDC's approach in its investigation of Qualcomm is as unsettled as China's general approach to extraterritorial application of its antitrust laws. Although the NRDC's decision purports to limit the penalties imposed to activities occurring in China, Qualcomm's rectification plan accepted by the NDRC seemingly extends to some conduct undertaken outside China.

In sum, while there may be a place for applying domestic antitrust laws to foreign companies' conduct involving *domestic* patents, under the well-accepted effects test, there is virtually no jurisdictional basis for the extraterritorial application of such laws to foreign companies' conduct involving *foreign* patents. As the lack of any domestic effects-related analysis

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93 *See supra* Part I.

94 *See supra* Part II.C.

95 *See generally* Draft Microsoft Decree, *supra* note 80.

in the KFTC's investigation of the Microsoft/Nokia transaction demonstrates, it strains even the accepted extraterritorial application of antitrust laws to conclude that conduct involving foreign patents could have a "direct, substantial, and foreseeable" effect on domestic commerce.

B. *Foreign Patents Do Not Have a Direct, Substantial, and Reasonably Foreseeable Effect on Domestic Commerce*

There are several reasons why conduct related to foreign patents is unlikely to satisfy the effects test. First, a patent grant is limited in geographic scope by the jurisdiction that issued the patent. Therefore, the patent generally is only enforceable in that specific jurisdiction. Second, injunctions, one of the most commonly sought remedies in patent law, can only be sought in and issued by the jurisdiction that issued the patent. As a result, foreign licensing practices constitute wholly foreign conduct that appropriately is beyond the reach of domestic antitrust laws.

1. The Limited Territorial Scope of Patent Grants

A patent is an intangible asset that conveys little apart from the right to enforce it in the jurisdiction that issued it.[96] The right to enforce a patent, however, is limited geographically. As the Federal Circuit has noted, "[t]he territorial limits of the rights granted by patents are similar to those conferred by land grants. A patent right is limited by the metes and bounds of the jurisdictional territory that granted the right to exclude."[97] That is, the enforcement of patent rights granted by one state "might not be undertaken by the courts of other States without impinging upon the sovereignty of the granting State."[98]

For example, non-U.S. patents are not enforceable in the United States. U.S. courts thus will not impose liability for infringing activity that occurs outside the United States.[99] Throughout the world, countries have

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96 *See* BARUCH LEV, INTANGIBLES: MANAGEMENT, MEASUREMENT, AND REPORTING 5 (2001) ("An intangible asset is a claim to future benefits that does not have a physical or financial (a stock or a bond) embodiment.").

97 *See* Voda v. Cordis Corp., 476 F.3d 887, 901 (Fed. Cir. 2007).

98 MARTA PERTEGÁS SENDER, CROSS-BORDER ENFORCEMENT OF PATENT RIGHTS: AN ANALYSIS OF THE INTERFACE BETWEEN INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW 20 (2002).

99 *See, e.g.*, Rotec Indus., Inc. v. Mitsubishi Corp., 215 F.3d 1246, 1251 (Fed. Cir. 2000) ("[T]he right conferred by a patent under [U.S.] law is confined to the United States and its territories, and infringement of this right cannot be predicated of acts wholly done in a foreign country." (quoting Dowagiac Mfg. Co. v. Minn. Moline Plow Co., 235 U.S. 641, 650 (1915))); Rainer Moufang, *The Extraterritorial Reach of Patent Law*, *in* PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 601, 602 n.8 (Wolrad Prinz zu Waldeck und Pyrmont et al. eds., 2009) ("The principle of *lex*

adopted this limited territoriality principle.[100] Thus, where a patented product is manufactured in a foreign country, issues pertaining to the use and/or infringement of such patent are for the country where such patent rights are effective.[101]

For this reason, conduct related to foreign patents cannot, in and of itself, have a *direct* effect on domestic commerce in a nonissuing state. Any effect outside the jurisdiction that issued the patent is necessarily *indirect*.[102] That is, although enforcing a patent might affect companies domiciled in foreign countries—and potentially consumers there if the product is made in a foreign country with patent protection—it does not constitute a direct effect on the domestic market in that foreign country.

2. Injunctions of Foreign Patents Are Wholly Foreign Conduct

The logical corollary to the uncontroversial proposition that patents have limited territorial scope is that they only can be enforced in the jurisdiction where they were issued. "The patent system . . . functions territorially, on a one-country, one-patent principle. For an invention to be protected in a country a patent must be obtained in that specific country, and for an invention to be protected in multiple countries, patents must be obtained in each of the countries individually."[103] For this reason, patent infringement claims must be litigated in the country where the patent was issued, and, in

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loci protectionis in the field of intellectual property law is enshrined in Art. 8 of the Rome II Regulation.").

100 *See* SENDER, *supra* note 98, § 2.12, at 19 ("[T]he granting of a patent is an exercise of territorially limited sovereign power.").

101 *See* MARK R. JOELSON, AN INTERNATIONAL ANTITRUST PRIMER 143 (2d ed. 2001) ("Since IP rights, such as those granted by the patent . . . are ordinarily national in scope, the territorial limitation concern can generally be addressed neatly and lawfully by the licensing of rights under some national regimes and not others."); *see also* Supreme Court, 91Nu6887, May 12, 1992 (S. Kor.) (unofficial English translation on file with author) ("[I]n the case where a product is manufactured based on a foreign company's patent in Korea where the patent is not registered and the product (the 'patented product') is exported to and sold in a foreign country where the patent is registered, the issues arising from the use or infringement of the patent is just regarding the use or infringement of the patent licenses held by the foreign company, the patent holder, in connection with the import and sale of the foregoing product in a foreign country where the patent is effective, and such issues are irrelevant to the use of the patented product in Korea itself.").

102 *See, e.g.*, Lotes Co. v. Hon Hai Precision Indus. Co., 753 F.3d 395, 414-15 (2d Cir. 2014) (finding that patent infringement suits alleging infringement of Chinese patents filed in Chinese courts, which had the effect of excluding plaintiff from the U.S. market, did not satisfy the FTAIA's effects test).

103 MARKETA TRIMBLE, GLOBAL PATENTS: LIMITS OF TRANSNATIONAL ENFORCEMENT 12 (2012). For a discussion of certain limited exceptions to this proposition see *id*. § 2.1.6, at 64-72.

cases involving multiple parallel patents, patentees must litigate in all the countries where the patent was infringed.[104]

Injunctions, which allow patentees to seek permanent injunctive relief against future infringement, emanate from the principle that patents "'shall have the attributes of personal property,' . . . including 'the right to exclude others from making, using, offering for sale, or selling the invention.'"[105] They are one of the most commonly pursued remedies in patent infringement cases and courts issue them, when appropriate, in order to restrain the defendant from continuing to infringe the plaintiff's patent.[106]

Since enforcement of a patent can only occur in the state where that patent was issued, it follows that injunctive relief is generally available to the patent-holder only in the jurisdiction that issued the patent under the law of that jurisdiction.[107] Although this system may not always be practical in today's increasingly globalized marketplace,[108] considerations related to the limited territorial scope of patents dictate that courts cannot exercise jurisdiction over patents issued in other countries.[109] For example, the Federal Circuit emphatically stated that "while the United States has entered into the Paris Convention, the [Patent Cooperation Treaty], and the Agreement on TRIPS, nothing in those treaties contemplates or allows one jurisdiction to adjudicate the patents of another."[110] Many other jurisdictions are in accord with this approach.[111]

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104 *Id.* at 40.

105 EBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 392 (2006) (citation omitted) (quoting 35 U.S.C. §§ 261, 154(a)(1) (2000)).

106 Conversely, the denial of injunctive relief in a patent infringement case is equivalent to the grant of a compulsory license under the patent, implicating a host of antitrust issues. *See* 2 HOVENKAMP ET AL., *supra* note 200, § 2.2f, at 2-49.

107 *See* TRIMBLE, *supra* note 1033, at 39 ("To avoid cross-border enforcement problems, a patent holder should sue instead, or simultaneously, for infringement of a parallel patent that was granted in the country where the infringer or his assets are located, as long as the patentee holds such a parallel patent in that country and the infringer infringed the patent there as well.").

108 *See id*. at 40-41; John R. Thomas, *Litigation Beyond the Technological Frontier: Comparative Approaches to Multinational Patent Enforcement*, 27 L. & P. INT'L BUS. 277, 278 (1996) ("[E]ven where a single multinational entity infringes parallel patents by marketing the identical technology in several jurisdictions, piece-meal remedies from individual national courts provide the only traditional possibility for relief."); Marketa Trimble, *Cross-Border Injunctions in U.S. Patent Cases and Their Enforcement Abroad*, 13 MARQ. INTELL. PROP. L. REV. 331 (2009) [hereinafter Trimble, *Cross-Border*] (discussing issues with cross-border enforcement of injunctions).

109 Trimble, *Cross-Border*, *supra* note 108, at 363 ("U.S. injunctions, although reaching across U.S. borders, do not extend to foreign patents."). One notable exception, however, may be "pan-European injunctions," which apply extraterritorially to foreign patents. *See id.* at 356 (noting that these pan-European injunctions have been applied to patents issued in European countries under the European Patent Convention and have "been viewed by courts in these cases as a bundle of national patents that have a unitary character justifying unitary relief").

110 Voda v. Cordis Corp., 476 F.3d 887, 901 (Fed. Cir. 2007). In limited situations, however, injunctions issued by a U.S. court may reach conduct beyond U.S. borders that harms the interests of a U.S. patent holder. *See* Timothy R. Holbrook, *Extraterritoriality in U.S. Patent Law*, 49 WM. & MARY

Antitrust authorities must therefore use caution before concluding that seeking an injunction on a foreign patent could have a "direct, substantial, and reasonably foreseeable" effect on domestic commerce. Indeed, using domestic antitrust laws to reach foreign conduct relating to the enforcement of foreign patents, like the seeking of injunctions, may be perceived as an extrajudicial attempt to regulate conduct that is otherwise outside the jurisdictional scope of the nonissuing country's authorities. Some also may perceive it not as a means of protecting consumers in that country, but rather as a form of protectionism designed to advance the international interests of domestic conglomerates.[112]

As discussed above, this makes the KFTC's approach to the Microsoft/Nokia acquisition even more striking—and contrary to Korean law. By prohibiting Microsoft from seeking injunctions against licensees for infringement of its non-SEP, non-Korean patents, the KFTC effectively attempts to regulate Microsoft's conduct that is generally outside its jurisdictional scope. Given that Microsoft has virtually no market share in the Korean smartphone market, and its U.S. patents do not affect smartphones made and sold outside the United States, the primary beneficiary of this enforcement action is not the Korean consumer. One is therefore left to wonder whether the KFTC's response is motivated by a desire to support the international interests of domestic smartphone-giant Samsung.

3. Licensing Terms for Foreign Patents Involve Primarily Foreign Conduct

Modern intellectual property licenses may be "international" in three ways: they may involve both U.S. and foreign intellectual property rights, they may involve a single "blended" royalty rate for worldwide sales, or

L. REV. 2119, 2144-54 (2008) (summarizing jurisprudence in which US courts have extended the reach of U.S. patent protection to cover acts outside the United States that affect the rights of the US patent holder).

111 Interestingly, Korea is one such jurisdiction:

> [L]awsuits concerning the establishment of a patent right yet to be registered or a claim for validation, invalidation or revocation of a patent right can generally be seen as falling under the exclusive jurisdiction of the country of registration because a patent right is formed upon the laws of the country where it was registered, and a court cannot rule upon acts to grant patent rights or on the validity of such an act occurring in another country. . . .

Supreme Court, 2009Da19093, Apr. 28, 2011, Summary of Decision ¶ 2 (S. Kor.), *translated in Decisions*, SUP. CT. OF KOREA, http://library.scourt.go.kr/jsp/html/decision/8-40%202011.4.28.2009Da19093.htm.

112 *See, e.g.*, Matthew Miller, *China's Latest Antitrust Probes Revive Protectionism Concerns*, REUTERS (Aug. 7, 2014), http://www.reuters.com/article/2014/08/07/us-china-antitrust-idUSKBN0G70VA20140807 ("China's recent probes into Microsoft Corp. and car companies including Audi and Chrysler have rekindled concerns that Beijing may be using an anti-monopoly law to support domestic firms at the expense of foreign companies.").

they may involve both U.S. and foreign entities as parties to the licensing agreement.[113] However, just as with the enforcement of patent rights, challenges to, and enforcement of, patent licensing terms are subject to the jurisdictional considerations discussed above.[114] That is, licensing practices are considered wholly foreign and beyond the reach of domestic antitrust laws unless the requirements of the effects test are satisfied.[115] Thus, in order for a domestic court or government agency to assert jurisdiction over claims related to international licensing agreements, it must first determine whether the requisite effect on domestic commerce can be found.

For example, if a foreign holder of a U.S. patent licenses a U.S. firm and obligates the U.S. firm to import tied products from the foreign licensor, a U.S. court would only have jurisdiction if there is a "direct, substantial, and foreseeable" anti-competitive effect on U.S. commerce. Notably, where the licensee subject to the tying obligation is foreign, the outcome of the analysis under the effects test is difficult to predict because of the strained nexus to U.S. commerce.[116] The analysis becomes even more complicated in the context of today's increasingly sophisticated licensing practices, which often involve portfolios containing both domestic and foreign patents. Although domestic authorities clearly have the authority to regulate domestic patents, the inclusion of a few domestic patents in a broader worldwide portfolio including hundreds or thousands of foreign patents should not give a domestic agency the right to regulate those foreign patents. Nor should it provide for enforcement activity over the use of those patents in foreign countries.

Indeed, a recent nonantitrust decision by the Supreme Court of Korea confirms that the licensing of foreign patents neither directly nor substantially affects domestic commerce. In March 2009, Samsung entered into a cross-license with a U.S.-based semiconductor company requiring Samsung to pay patent royalties to that company for licensing its worldwide patent portfolio.[117] Samsung withheld fifteen percent of its payment for Korean

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113 2 HOVENKAMP ET AL., *supra* note 200, § 41.1, at 41-2.

114 *See* GUIDE FOR INT'L OPERATIONS, *supra* note 166, § 2.1 ("The Agencies recognize that the licensing of intellectual property is often international. The principles of antitrust analysis described in these Guidelines apply equally to domestic and international licensing arrangements. However, as described in the 1995 Department of Justice and Federal Trade Commission Antitrust Enforcement Guidelines for International Operations, considerations particular to international operations, such as jurisdiction and comity, may affect enforcement decisions when the arrangement is in an international context.").

115 2 HOVENKAMP ET AL., *supra* note 200, § 41.2a, at 41-22 (describing the circumstances under which domestic plaintiffs injured by licensing practices *in the United States* may bring claims in the United States under the effects test).

116 *Id.* § 41.2b4, at 41-38.

117 Supreme Court, 2012Du18356, Nov. 27, 2014 (S. Kor.), *translated in Decisions*, SUP. CT. OF KOREA, https://library.scourt.go.kr/SCLIB_data/decision/64-ph%202012Du18356_2014.11.27.Corp.TaxReturn.htm.

corporate income taxes.[118] The U.S.-based semiconductor company then petitioned the Korean tax authority for a partial refund of those taxes, on the basis that royalty payments for non-Korean patents could not constitute "domestic source income" inside Korea.[119] The Korean tax authority denied that request, but was overturned by a Korean lower court.[120] The Supreme Court of Korea affirmed that decision, ruling that "payment in remuneration for the patent rights registered in the U.S. but not in Korea, it does not constitute a domestic source income, *regardless* of whether the patent right etc. were in fact used in manufacture and sales in Korea."[121] For the same reason that royalty payments for foreign patents do not constitute "domestic source income," royalty payments for such patents neither directly nor substantially affect domestic commerce.

C. *Imposing Limits on the Use of Foreign Patents Raises Sovereignty and Comity Concerns*

No discussion of applying domestic law to foreign patents would be complete without emphasizing the significance of international comity and sovereignty considerations. International comity "is a prudential doctrine reflecting one sovereign's deference to another sovereign's acts and policies."[122] Considerations of international comity often restrain courts from exercising jurisdiction over cases that might otherwise satisfy the effects test.[123]

As this Article demonstrates, antitrust law and patent law often intersect. When determining whether to assert antitrust jurisdiction and bring an action in a particular case, the U.S. Department of Justice and the Federal Trade Commission typically consider the following principles of international comity:

(1) the relative significance to the alleged violation of conduct within the United States, *as compared to conduct abroad*;

(2) the nationality of the persons involved in or affected by the conduct;

(3) the presence or absence of a purpose to affect U.S. consumers, markets, or exporters;

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118 *Id.*

119 *Id.*

120 *Id.*

121 *Id.* Reasoning, ¶ 2.B (emphasis added).

122 2 HOVENKAMP ET AL., *supra* note 200, § 41.2a3(A), at 41-28.3.

123 *See* Thomas, *supra* note 108, at 320-21 (listing examples of U.S. cases where courts assumed jurisdiction but declined to assert it in light of comity and sovereignty concerns).

(4) the relative significance and foreseeability of the effects of the conduct on the United States *as compared to the effects abroad*;

(5) the existence of reasonable expectations that would be furthered or defeated by the action;

(6) *the degree of conflict with foreign law or articulated foreign economic policies*;

(7) *the extent to which the enforcement activities of another country with respect to the same persons, including remedies resulting from those activities, may be affected*; and

(8) the effectiveness of foreign enforcement as compared to U.S. enforcement action.[124]

As explained above, the territorial nature of a patent right means that "[a]ll disputes, including those concerning the infringement of patents, would fall under the exclusive jurisdiction of the protecting State."[125] Under principles of international comity, therefore, attempts to impose limitations on the use of foreign patents would be perceived as a violation of international norms.[126] For instance, the Federal Circuit has definitively declined to exercise supplemental jurisdiction over foreign patent infringement claims on grounds of comity and relations between sovereigns, finding that doing so would "prejudice the rights of the foreign governments" that issued the patents in light of the territorial limits of the rights granted by patents.[127]

In a noteworthy recent decision demonstrating the jurisdictional limits of U.S. antitrust laws, the United States Court of Appeals for the Seventh Circuit threw out antitrust claims by Motorola, a U.S. company, against Asian electronics companies, concluding that the case had no place in a U.S. court. In *Motorola Mobility LLC v. AU Optronics Corp.*,[128] Motorola sought damages from companies over allegations that they fixed prices on LCD panels.[129] Notably, some of the panels were manufactured in Asia, sold to Motorola subsidiaries in Asia, and then built into phones in Asia before being sold in the United States. In an opinion authored by Judge Richard Posner, the Seventh Circuit concluded that

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124 GUIDE FOR INT'L OPERATIONS, *supra* note 166, § 3.2 (emphasis added). Similar considerations are expressed in Article VI(3) of the Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-EC, arts. VI(3)(a)-(f), Sept. 23, 1991, 30 I.L.M. 1491.

125 SENDER, *supra* note 98, § 2.16, at 22.

126 Thomas, *supra* note 108, at 334 ("The adjudication of domestic patent rights in foreign courts has frequently been considered an example of [interference with the affairs of another state], because the resulting judgments have been presumed to divest individual nations of their inherent authority to control property rights of their own creation.").

127 Voda v. Cordis Corp., 476 F.3d 887, 901 (Fed. Cir. 2007).

128 775 F.3d 816 (7th Cir.), *cert. denied*, 135 S. Ct. 2837 (2015).

129 *Id.* at 817.

> Motorola's foreign subsidiaries were injured in foreign commerce—in dealings with other foreign companies—and to give Motorola rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own economies. The foreign subsidiaries can sue under foreign law—are we to *presume* the inadequacy of the antitrust laws of our foreign allies?[130]

Interestingly, the KFTC vigorously advocated in favor of the application of comity principles in its amicus filing in *Motorola Mobility*. There, the KFTC observed that it "has a keen interest in the correct interpretation of extraterritorial application of foreign countries' antitrust laws for the globally harmonized enforcement of each jurisdiction's antitrust laws."[131] The KFTC objected to U.S. jurisdiction over transactions involving allegedly price-fixed products sold and delivered to Motorola's foreign subsidiaries, incorporated into mobile phones, and subsequently shipped to the United States. In its brief, it wrote:

> The KFTC is seriously concerned about the potential negative impact of expansive application of the U.S. antitrust laws to claims where, as here, the underlying transactions took place outside the United States and had no direct effect on the U.S. market.[132]
>
> The KFTC fully agrees with Judge Posner's apt observation in the panel decision that extraterritorial reach of U.S. law, including the antitrust laws, should be applied with care:
>
> "The [U.S.] Supreme Court has warned that rampant extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs.' The [U.S. law on extraterritorial effect] was intended to prevent such 'unreasonable interference with the sovereign authority of other nations.' The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer' . . . ."[133]
>
> If this Court applies the U.S. antitrust laws to the present case as urged by Plaintiff, the reach of the U.S. antitrust laws will in effect extend to any intermediary product produced or purchased outside the United States, so long as it is eventually incorporated into an end product sold in the United States. Such unduly expansive application of the U.S. antitrust laws is likely to create conflicts with the sovereignty of other countries including Korea and interfere with their antitrust enforcement. *Under prevailing international norms, claims should be brought in a country in which the underlying transactions took place and should be governed by the laws of that country rather than by the antitrust laws of the U.S., the commerce of which was not directly affected by the transactions*.[134]

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130 *Id.* at 824-25.

131 Brief of the Korea Fair Trade Commission as Amicus Curiae in Support of Appellees' Opposition to Rehearing *En Banc* at 1, *Motorola Mobility*, 775 F.3d 816 (No. 14-8003).

132 *Id.* at 5.

133 *Id.* at 2 (citations omitted) (quoting *Motorola Mobility*, 775 F.3d at 824).

134 *Id.* at 3 (emphasis added).

In stark contrast, international comity concerns were seemingly not part of the calculus in the KFTC's investigation of the Microsoft/Nokia combination; its proposed corrective measures in the Microsoft/Nokia acquisition demonstrate a virtual disregard for principles of international comity and sovereignty. Foregoing an effects-based analysis for the extraterritorial application of the MRFTA—or virtually any jurisdictional analysis whatsoever—the KFTC strove to regulate Microsoft's foreign patent licensing practices by imposing restrictions on Microsoft's ability to set royalty rates and seek injunctions on patents issued outside Korea. As the Federal Circuit has recognized, such extraterritorial application of domestic law threatens to "disrupt . . . foreign procedures" related to patents in the issuing jurisdictions, contrary to principles of international comity and unreasonable interference with the authority of other sovereigns.[135]

The NDRC's approach, at least on its face, appears somewhat more restrained. By limiting its penalties to activities that "result in significant effect on elimination or restriction of the competition in China," it appears to avoid the extraterritorial application of its laws on foreign activity altogether.[136] Further, unlike the KFTC's investigation, which focused entirely on Microsoft's foreign patent portfolio, the Chinese investigation of Qualcomm focused only on Qualcomm's Chinese patents. However, the NDRC's extraterritorial reach may be broader than initially perceived because there appear to be some licensing restrictions on non-Chinese patents.[137] If that is indeed the case, then the NDRC decision against Qualcomm also would constitute an extraterritorial power grab: it would be an attempt to regulate Qualcomm's patent licensing practices *outside* China, albeit one that does not so obviously disregard foreign nations' sovereignty and authority with respect to patent rights.

Finally, consistent with the EU's resistance to exercise jurisdiction over foreign conduct of foreign nationals,[138] the Commission's investigations of Samsung and Motorola avoid the pitfalls of the previous two examples. By restraining Motorola's and Samsung's ability to seek injunctions *domestically* over *domestic* patents, the Commission is careful to avoid interfering with the authority of other sovereigns.

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135 Voda v. Cordis Corp., 476 F.3d 887, 903 (Fed. Cir. 2007).

136 NDRC Penalty, *supra* note 54, § III.

137 Yao & Miller, *supra* note 55.

138 *See generally* Scott, *supra* note 188.

D. *Attempts to Regulate Foreign Patents Can Have a Negative Effect on Innovation and Domestic Economies*

Unbridled extraterritorial application of domestic antitrust laws to foreign patents can undermine the very purposes of the patent system itself, as well as the goals of competition by harming innovation.

First, it weakens the patent system globally by eroding patent owners' rights to exclude or exploit, and their ability to choose how to utilize their valid patent rights. Patent rights are as fundamental to preserving research and innovation as the antitrust laws are to preserving free market competition. Together, these complementary bodies of law form a system that rewards risk taking and entrepreneurialism necessary for economic growth.

Second, it discourages innovation by eliminating the responsibility of would-be infringers to "innovate around" any patent they do not want to license. This destroys the potential to compete or differentiate products based on innovation, which is a "strong driver of competition and innovation that can facilitate the development of leap frog technologies."[139] Ultimately, unbridled extraterritorial application of domestic antitrust law fails to appreciate that "non-standardized technologies differentiate devices, create competition and drive innovation in the marketplace."[140]

Third, such action has the potential to harm national competitiveness should other jurisdictions also seek to use domestic antitrust law as a way to promote the competitiveness of national champions abroad. Some of the same companies that benefit from recent antitrust investigations in Korea and China have their own significant patent portfolios.[141] Thus, there would be nothing preventing other jurisdictions from regulating the worldwide patent portfolios of Samsung and other entities simply because those portfolios include a nominal number of domestic patents.

Finally, such recent decisions are sure to increase transaction costs for licensing of intellectual property. As companies recognize the increasing risk of extraterritorial application of domestic antitrust laws, many will resort to national or regional patent licenses, each of which is separately negotiated. This "back to the future" approach to licensing of intellectual property would eliminate many of the well-recognized benefits of portfolio licensing. For example, it is well recognized that "for parties with large patent portfolios . . . it is impossible to examine the entire portfolio on a

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139 Fiona M. Scott-Morton, Deputy Assistant Attorney Gen. for Econ. Analysis, Antitrust Div., U.S. Dep't of Justice, The Role of Standards in the Current Patent Wars, Address at the Charles River Associates Annual Brussels Conference: Economic Developments in European Competition Policy 8 (Dec. 5, 2012), http://www.justice.gov/atr/public/speeches/289708.pdf.

140 *Id.*

141 *See, e.g.*, Guo Xiaofeng, *How The Qualcomm Anti-Trust Case Could Affect China's Mobile Phone Manufacturing Industry*, BUS. INSIDER (Oct. 21, 2014, 4:17 PM), http://www.businessinsider.com/how-qualcomm-anti-trust-case-could-affect-china-phone-manufacturers-2014-10.

patent-by-patent, country-by-country basis for all possible products."[142] Eliminating worldwide portfolio licenses for fear of being on the wrong end of extraterritorial application of domestic antitrust law would return to the days of "costly and inefficient endeavor[s] of a patent-by-patent licensing scheme,"[143] negating the many benefits of "worldwide freedom to manufacture."[144]

CONCLUSION

The extraterritorial application of domestic antitrust law to foreign patents has been inconsistent among many countries. As a general matter, the United States and European Union generally will not apply domestic antitrust law to foreign patents unless there is a sufficient nexus to domestic commerce. However, an increasing number of other nations are taking a different approach that regulates royalties and other nonprice conduct for patents issued in foreign countries. This trend is particularly troublesome because it ignores the principles of international comity and it overrides the sovereignty of other jurisdictions.

Because of the pitfalls of regulating foreign patents, antitrust authorities should exercise restraint when regulating them. Any approach to the contrary protects the needs of national champions at the expense of protecting consumers.

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142 Tex. Instruments, Inc. v. Hyundai Elecs. Indus. Co., 49 F. Supp. 2d 893, 901 (E.D. Tex. 1999).
143 *Id.*
144 *Id.* at 907.