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Korean Antitrust for Proof of Price-Fixing: Comparative Analysis with the U.S. Antitrust

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Abstract

Antitrust finds competitors' price-fixing illegal per se. Parallel pricing among competitors has been frequently observable in daily economic lives, and it becomes more and more so by virtue of technological developments and globalization in the 21st century. The question is whether the evidence tells us unlawful price-fixing is occurring. Indeed, it is one of the most challenging questions in antitrust jurisprudence, requiring tight legal standards for deriving conspiratorial price-fixing from the evidence. This article addresses Korean and the U.S. antitrust approaches to this issue by identifying and evaluating their legal devices and reasoning processes in light of relevant comparable cases of the two antitrust authorities. It argues that more practical use of legal devices is necessary to the extent that parallel pricing phenomenon may be consistent with a legitimate explanation as with a collusive explanation. This article concludes that since procedural devices may functionally minimize mistaken conclusions based on ambiguous evidence, they should be carefully employed along with reasoned analysis for competitive harm.

I. The Conceptual Foundation for Fundamentals

Parts I and II pinpoint and evaluate the functions and operations of the legal devices of Korea and the U.S. antitrust. In search of the judicial approaches to parallel pricing cases, this article compares and appraises the common and different evidentiary standards of proof in Korea and the U.S. so as to find out whether similar or differing approaches may result in different outcomes.[1] Part I generally examines how antitrust laws of Korea and the U.S.

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1) This article does not intend to substantially discuss, however, the historical

have laid the substantive foundations to find an illegal price-fixing from circumstantial evidence. We will see that the antitrust tribunals of the two countries have ended up with establishing expansive substantive criteria and strict remedial measures.

1. The Substantive Rules and Remedial Measures

In the U.S. antitrust, price-fixing conduct is illegal per se and therefore actual proof of any restraint on competition is not required.[2] The following finding by the U.S. Supreme Court suitably explains why price-fixing is deemed illegal as a matter of law:[3]

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions.

That very reason equally holds true for Korean antitrust, which statutorily finds price-fixing unlawful in and of itself.[4] Under the MONOPOLY

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developments of the relevant antitrust rules and policy of Korea and the U.S. antitrust because related issues thereof are too broad to be handled in short.

2) *See generally* Herbert Hovenkamp, *The Antitrust Enterprise*, Chapter 6, at 125-49 (2008).

3) *See* United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927). As a rigid per se rule of price fixing, the U.S. Supreme Court found that "[u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

4) *See* Hanguk Gongjeonggeoraewiwonhoe [Korea Fair Trade Commission], Hanguk Gongjeonggeoraewiwonhoe 20 nyeonsa Yeongu [The 20 Years' History of Korea Fair Trade

REGULATION AND FAIR TRADE ACT as amended on March 22, 2010 ("MRFTA"), Article 19(1) titled "Prohibition of Unfair Collaborative Acts" contains a nonexclusive list of specific types of prohibited anticompetitive agreements and practices.[5] Article 19(1)-1 provides that "(1) [n]o firm shall agree, or cause certain firms to agree, with other firms by contract, accord, resolution, or any other means to jointly engage in an act, falling under any of the following subparagraphs, that unfairly limits competition: 1. an act of fixing, maintaining, or changing prices."[6]

Agreement is the gist of collusion action under both countries' antitrust laws.[7] The collusion regulatory rules of the two countries are not meant to prohibit independent action by a single firm.[8] In practice, plaintiff must

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COMMISSION] (2001); *see generally* OHSEUNG KWAN, GYEONGJEBEOP [ECONOMIC LAWS], Chapter 6 (2002).

5) Article 19(1) was amended for a couple of purposes of establishing a per se illegality for naked, hard-core cartels that have clearly harmful effect on competition and widening an antitrust screen for other various collaborative acts that may have pro-competitive effect on competition (*e.g.*, research and development works, strategic alliances).

6) *See* Chapter 4 Article 19(1) of the MRFTA [DOKJEOMGYUJE MIT GONGJEONGGEORAEE GWANHAN BEOPRYUL] as amended on March 22, 2010. The 1992 amendment of the MRFTA had made it clear that mere agreement is what the law prohibits. *See* Judgment of Feb. 23, 1999, *98Du15849* (Supreme Court of Korea), *in re* Collusion of Kuk-Je Land & Construction Corp.

7) It has been generally understood that the U.S. antitrust stems from the common law of contracts, in which offer, acceptance, and consideration are necessary elements for a valid contract to exist. *See* E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY AND PROCEDURE, 18-43 (1994). Antitrust understandings for conscious parallelism still revolve around the notion of agreement in the contract law sense. *See* Herbert Hovenkamp, *Book Review, The Rationalization of Antitrust*, 116 Harv. L. Rev 917, 921-23 (2003). Korea, as a civil law country, can stay out of the conceptual complications and therefore directly encloses the notion of agreement in Article 19(5) without any reserve. *See* SOO-IL SON, GONGDONGHANGWIEU GYUJEWA CHUJEONGJOHANGEU MUNJEJEOM, GYEONGJEBEOPEU JEMUNJE [REGULATION OF CONCERTED ACTION (CARTEL) AND PROBLEMS OF PRESUMPTION CLAUSE], Chapter 5, at 375 (2000).

8) *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (finding that "[t]he conduct of a single firm is governed by [Section] 2 [of the Sherman Act] alone … Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade … by *separate* entities."). Section 2 of the Sherman Act provides in part that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2. Likewise, in Korean antitrust, the MRFTA Article 3-2 covers a *single* firm's abuse of market-dominant position, which provides in relevant part that "(1) No market-dominating enterpriser shall commit acts that fall under any of the following subparagraphs: 1. an act of determining, maintaining, or changing unreasonably the price of

establish that two or more firms agreed to coordinate their conduct in a certain manner. In Korean antitrust, however, agreement as literally translated into Korean means a meeting of the minds among competitors, which may include conduct not rising to the level of a contract, combination, or conspiracy as understood under Section 1 of the U.S. Sherman Act.[9)]

Under both the U.S. and Korean antitrust laws, conspirators found to fix prices are subject to monetary fines and/or criminal imprisonment. The U.S. Sherman Act Section 1 provides in relevant part that: "[e]very person who shall [be in violation of Section 1] … shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."[10)] To obtain a monetary relief under Sections 4 and 4A of the Clayton Act, a Sherman Section 1 private plaintiff must show an injury in the plaintiff's business or property as a result of the conspiracy.[11)]

Article 21 of the MRFTA provides that "[w]here there is one of unfair collaborative acts that violate the provisions of Article 19, the [KFTC] may order for concerted firms to discontinue the act, publicly announce that it has

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goods or services." Unlike Korean and the U.S. antitrust, however, Article 82 of EUROPEAN UNION COMPETITION LAW that regulates abuse of market-dominating firms can in principle reach oligopoly pricing as it prohibits one or *more* undertakings' conduct. The so-called collective dominant position theory enables Article 82 to do that. *Compare* Erhard Kantzenbach et al., *New Industrial Economics and Experiences from European Merger Control – New Lessons about Collective Dominance?*, in THE EUROPEAN COMMISSION (1995) *with* George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439 (1982).

9) The Sherman Act Section 1 provides in relevant part that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. Agreement is called Hap-Yeo in Korean and is 合意 in Chinese. *See* Judgment of Feb. 13, 1996, *94Gu36751* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Five Personal Computer Manufacturing Companies, Eleventh Special Division.

10) 15 U.S.C. § 1. The alternative maximum fine is "the greater of twice the gross gain or twice the gross loss." 18 U.S.C. §3571(d) (providing that "(d) Alternative Fine Based on Gain or Loss.—If any person derives pecuniary gain from the offense, or if the offense results in pecuniary loss to a person other than the defendant, the defendant may be fined not more than the greater of twice the gross gain or twice the gross loss, unless imposition of a fine under this subsection would unduly complicate or prolong the sentencing process.").

11) 15 U.S.C. §§ 15 and 15a.

received corrective orders, or take other corrective measures."[12] Article 22 of the MRFTA enables the KFTC to impose "a surcharge not exceeding an amount equivalent to ten (10) percent of the turnover determined by the implementing statute of Presidential Decree. In the absence of any turnover, a surcharge may be imposed up to but not exceeding two (2) billion Won."[13] Article 66 provides in pertinent part that any person who engages in collusive conduct "shall be punished by imprisonment for not more than three (3) years or a fine up to but not exceeding two (2) hundred million Won … The punishments of imprisonment and fine … may be imposed concurrently."[14]

Unlike the U.S. antitrust, Korean antitrust's corrective measures for price-fixing include a public announcement that it has received corrective orders. The public announcement measure is based upon an idea that if the announcement is made through major daily newspapers, it will do damage to the conspirators' corporate reputation and images as being subject to social opprobrium and criticism. It is thus intended to deter competitors from engaging in collusive price-fixing. The criminal measures of the two countries commonly purport to attach personal stigma and criminality to the conspirators, whether corporate or individual.[15]

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For effective enforcement of the substantive collusion rules, civil and criminal sanctions have increased for purposes of wiping out explicit collusion to fix prices. However, if the competing firms merely substitute other means of price coordination for explicit price-fixing agreement, it is likely to militate against the sanctions' intended result of deterrence or prevention of collusive conduct. Furthermore, price coordination in nature may not need any sort of formal or detailed agreement on output or the volume of sales because price increase at a certain rate or for a certain amount can be easily agreed upon.

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12) Art. 21 of the MRFTA as amended on March 22, 2010.

13) Art. 22 of the MRFTA as amended on March 22, 2010. Two billion Won is approximately equivalent to two million U.S. Dollars.

14) Art. 66 of the MRFTA as amended on March 22, 2010. Other corrective measures normally are administrative warning or advice.

15) For understanding developments of the U.S. criminal enforcement programs, see William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L. J. 377 (2003); *see also* Donald I. Baker, *The Use of Criminal Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693 (2001).

The absence or lack of direct evidence therefore quite often precludes us from finding price-fixing with confidence. For these reasons, the fact that concerted price-fixing is illegal is one thing; and proof of agreement is the other because it necessitates a satisfactory presentation of quantitative and qualitative circumstantial evidence as the case may require.

2. The Operation of Defenses and Justifications

Both countries' antitrust reaches out various rudimentary ways of concerted conduct that may not amount to full-blown price-fixing. The U.S. courts have found that "[a] knowing wink may mean more than words" and that ""[a] gentlemen's agreement" will do."[16] Moreover, once the agreement to fix a price is made, it is conclusively presumed that a conspiracy to restrain trade exists. It is "immaterial whether the agreements were ever actually carried out, whether the purpose of the conspiracy was accomplished in whole or in part or whether effort was made to carry the object of the conspiracy into effect."[17] In other words, mere attempt to fix prices concertedly—as opposed to actual performance is sufficient to be proscribed; and it does not count as a defense that the attempt to increase prices in concert did not succeed at the end of the day.[18]

In the Korean collusion case of thirteen airline companies, the airline companies were held liable for fixing inbound airfares. They argued that the airfares were not actually charged to customers even if they had discussed the fare issues at a meeting of the companies. Korea Fair Trade Commission (Hanguk Gongjeonggeoraewiwonhoe: "KFTC") found that the mere agreement of defendants' engaging in one of the listed acts under Article 19(1) constitutes unlawful concerted acts and actual performance pursuant to the agreement is not required.[19] In Korean practice, defendants sometimes have

16) *See* Esco Corp. v. United States, 340 F.2d 1000, 1007 (9th Cir.1965); *see also* T.R. Coleman v. Cannon Oil Co., 849 F.Supp. 1458, 1469 (M.D.Ala. 1993).

17) *See* Plymouth Dealers' Ass'n of No. Cal. v. United States, 279 F.2d 128, 132 (9th Cir. 1960), quoting United States v. Trenton Potteries Co., *supra* note 3, at 420 (1927).

18) *See, e.g.*, Re-decision 96-19 of October 15, 1996, *9608JoYi1210* (Korea Fair Trade Commission), *in re* Reconsideration Request of Three Paper Manufacturing Companies.

19) Re-Judgment 98-28 of Sep. 29, 1998, *9806SimYi1009* (Korea Fair Trade Commission), *in re* Reconsideration Request on Collusion of Twelve Airline Companies; Judgment 98-75 of May 19,

argued that the parallel pricing in question is reasonable or justifiable since they raised the prices to save themselves from the deteriorating economy, to recover from their management failures,[20] to avert the cutthroat competition,[21] or to prevent the extraordinary price competition because business situations demanded the parallel pricing retrieve business losses.[22]

Where eight electric steel manufacturers were found liable for fixing, maintaining, and changing the prices of steel products,[23] one of defendants argued that their exchanges of price information were not intended to limit competition, but to save themselves by improving management balance of accounts and overcoming accumulated deficits in the steel industry.[24] The Supreme Court of Korea affirmed the lower court's finding that assuming the argument were true, it would be one of the extenuating circumstances for purposes of damages but could not serve to rebut the illegality of price fixing unless the concerted action falls under one of the justifiable acts of Article 19(2) or is authorized pursuant to Article 58.[25]

1998, *9802GongDong0121* (Korea Fair Trade Commission), *in re* Collusion of Thirteen Airline Companies.

20) Judgment of Apr. 28, 1999, *98Nu10686 and 98Nu11214 as consolidated* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Dongsuh Food Co., Ltd. and Nestle Korea Inc.

21) Re-decision 99-21 of May 3, 1999, *9901SimIl 0014 or 0016* (Korea Fair Trade Commission), *in re* Reconsideration Request of Three Color Steel Sheet Manufacturing Companies.

22) Re-decision 97-17 of Jun. 11, 1997, *9612JoYi1913* (Korea Fair Trade Commission), *in re* Reconsideration Request of Seventeen Asphalt Sales Agents.

23) Decision 2000-86 of May 31, 2000, *2000GongDong0419* (Korea Fair Trade Commission), *in re* Collusion of Eight Electric Steel Manufacturing Companies; *see also* Hae-Sik Park, *Budanghan Gongdonghangwieu Chujeonggwa Siljiljeok Gyeongjaengjehaneu Eumi* [*The Meaning of Unfair Concerted Action and Substantially Limiting Competition*], 1 ECONOMIC LAW CASE STUDY (2004).

24) Re-Judgment 2000-48 of Oct. 17, 2000, *2000SimSam0896, 0897, 0898, 0899, 0900, 0911* (Korea Fair Trade Commission), *in re* Reconsideration Request for Collusion of Eight Electric Steel Manufacturing Companies.

25) *See* Judgment of May 27, 2003, *2002Du4648* (Supreme Court of Korea), *in re* Collusion of Eight Steel Manufacturing Companies for Electric Furnace; *see also* Judgment of March 26, 2002, *2000Nu15035* (Seoul High Ct.), *in re* Collusion of Eight Electric Steel Manufacturing Companies. Article 19(2) of the MRFTA provides that "[t]he prohibition of [unfair collaborative acts] shall not apply where concerted practices are authorized as satisfying the requirements determined by the Presidential Decree and where they are conducted for the purposes listed in any of the following subparagraphs: 1. Industry rationalization; 2. Research and technology development;

In Continental Baking Co. v. United States,[26] the U.S. Sixth Circuit Court of Appeals noted that "[t]he dividing line between justification and explanation may well be a fine one, but for that reason those walking on it must tread carefully." The Court found that:[27]

> Any evidence of justification or reasonableness after such an agreement has been established is properly excluded in a Sherman Act case. A defendant cannot say 'I have entered into a price-fixing agreement, but the prices fixed are reasonable ones dictated by economic pressures.' The fact that the prices were reasonable is no defense. Once the defendant admits the agreement he may say no more for it is illegal per se.

In a parallel pricing case, defendants are required to come forward with independent business justifications or defenses in order to *explain away* the alleged concerted action that plaintiff seeks to establish or has established. Defendants should counter or rebut an allegation of concerted action by contending, for example, that the parallel pricing just reflects a normal or independent course of pricing decisions in the oligopoly industry.[28] The pertinent question to be posed is therefore whether the external accord of concerted action, no matter how significantly uniform or parallel, can be adequately explained by independent business justifications.[29]

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3. Overcoming economic depression; 4.Industrial restructuring; 5. Rationalization of trade terms and conditions; or 6.Enhancement of competitiveness small and medium enterprises." Article 58 provides that "[the MRFTA] shall not apply to the acts of a firm or a trade association conducted in accordance with any act or any decree to such an act."

26) *See* Continental Baking Co. v. United States, 281 F.2d 137, 143-44 (6th Cir. 1960); *see also* Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1956).

27) *See* Continental Baking Co. 281 F.2d 137, at 143-44; *cf.* United States v. FMC Corp., 306 F. Supp. 1106, 1135 (E.D.Pa. 1969).

28) *See* AMERICAN BAR ASSOCIATION, ANTITRUST LAW DEVELOPMENTS, 12-13 & FN 59 (5th ed. 2002).

29) *See* William E. Kovacic, *The Identification and Proof of Horizontal Agreements under the Antitrust Laws*, in THE ANTITRUST BULLETIN, FN 103, 148, 150 (Spring 1993).

3. The Meaning of Price and Sufficient Similarities

Although this article deals with parallel price *increases*, illegal price-fixing includes price decreases or any other concerted pricing conduct as long as competitors' particular pricing decisions have the effect to *stabilize* relevant market prices. The broad antitrust reach is predicated upon an idea that defendants' concerted act of price decreases has led to higher price levels than would have prevailed without the concerted conduct and, therefore, that collusion to decrease or stabilize prices at a certain level or rate has the same effect as collusion to fix higher prices.

In United States v. Trenton Potteries Co., the U.S. Supreme Court has found that "agreements to fix or maintain prices [cannot be found to be] reasonable restraints and therefore permitted by the [Sherman Act], merely because the prices themselves are reasonable."[30] As early as 1940, the U.S. Supreme Court has held that stabilizing prices as well as raising them is an unreasonable interference with the free play of the market and is unlawful per se, noting that "in terms of market operations stabilization is one form of manipulation."[31]

That comprehensive construction applies to Korean antitrust as well for the same reason. In the 2001 collusion case of tinplate steel manufacturers, The Supreme Court of Korea interpreted the meaning of prices under the collusion prohibition provision as follows:[32]

> The prices under Section 1 of Article 19(1) include considerations that firms offer in exchange for products or services, which indicate a series of economic benefits in transactions that sellers receive as consideration from buyers. [In other words], without holding on to the titles thereof, the prices of relevant products and services encompass whatever sellers are actually required to provide in return for the

30) *See Trenton Potteries Co.* 273 U.S., at 396-98.

31) *See Socony-Vacuum Oil Co.* 310 U.S., at 223; *see also* United States v. Container Corp. of America, 393 U.S. 333, 337 (1969); *see also* FMC Corp., 306 F.Supp., at 1147.

32) Judgment of Mar. 8, 2001, *2000Du10212* (Supreme Court of Korea), *in re* Collusion of Tinplate Steel Manufacturing Companies.

products or services with reference to the characteristics of relevant products or services, the terms and conditions of transactions.

In the collusion case of four installment financing companies, Seoul High Court found that the parallel interest rate decreases give rise to an act that substantially limits competition.[33] There, defendants alleged that since the change from the prior higher rates to the uniform interest rate of 25 percent resulted in a decreased interest rate, the act has the effect to promote competition as opposed to limit competition. The Court held that the defendants have lowered the installment interest rates in concert in order to safely maintain their business profits and to avoid further competitive decreases of installment interest rates. It reasoned that appreciable interest rate decreases for installment purposes were expected in response to the considerably reduced market-wide interest rates on which the defendants had relied in raising funds from other financing companies.

To be sure courts generally have demanded more than the price uniformity or parallelism, but it has been questioned many times whether the price increases themselves can operate as one of so-called plus factors to support an inference of collusive price fixing. As a practical matter, the inquiry requires evaluation of the degree of persuasiveness in view of the "incredible" identities of parallel pricing.[34] In Korean antitrust, an external accord of parallelism in prices is not only one of the factors plaintiff must establish but also may strengthen, if found to be *significantly* uniform, the existence of concerted action.[35]

Similarly, the U.S. antitrust appears to find parallel pricing as a relevant plus factor. The Tenth Circuit Court of Appeals has held that "[i]t is also true it 'has never (been) held that proof of parallel business behavior conclusively

33) Judgment of Apr. 18, 2002, *2001Nu2579* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Four Installment Financing Companies.

34) *See* Phillip E. Areeda & Herbert J. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, paragraphs 1425C & 1434B (2nd ed. 2000).

35) *See, e.g.*, Judgment 2002-098 of May 17, 2002, *2002YuGerl0457* (Korea Fair Trade Commission), *in re* Collusion of Four Credit Card Companies; *see also* Judgment 2001-126 of Sep. 10, 2001, *2001DokJum1934* (Korea Fair Trade Commission), *in re* Collusion and Fine Recalculation of POSCO Steel Service & Sales Co., Ltd.

establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense.' But [the U.S. Supreme Court] and others recognize that such behavior is another item to be weighed, and generally to be weighed heavily, in the determination."[36] The Third Circuit Court of Appeals has held that "when two or more competitors in [highly concentrated markets] act separately but in parallel fashion in their pricing decisions, this may provide probative evidence of the existence of an understanding by the competitors to fix prices."[37] The courts have made it clear, however, that for parallel pricing to be relevant it should be "unusually" parallel or uniform under the circumstances.[38]

In practice, plaintiffs occasionally set forth the evidence that defendants have increased prices at similar times within similar price increase ranges even though the times and ranges are not exactly the same. In such cases, some or all of defendants contend that they should not be deemed to have participated in the alleged collusion plan because of the differences in the times of participation and in price increase ranges among the collusion participants. In United States v. Socony-Vacuum Oil Co., the U.S. Supreme Court has found that "[it is not] important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible."[39] Hardly could this article find parallel pricing cases in the lower U.S. courts where this issue has arisen, however. It may be that the closeness in times and pricing ranges do not so much matter because unlawful price-fixing has been quite broadly construed in the U.S. jurisprudence.[40]

In Korean antitrust, the similarities or differences often have been alleged

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36) *See Morton Salt Co.* 235 F.2d, at 577, citing Theatre Entreprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954); *see also* In re Citric Acid Litigation, 191 F.3d 1090, 1102 (9th Cir. 1999), quoting In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432, at 441-60 (9th Cir. 1990); T.R. Coleman, 849 F.Supp., 1466.

37) *See in re* Baby Food Antitrust Litigation, 166 F.3d 112, 122 (3rd Cir. 1999); *see also* Federal Trade Commission v. Cement Institute, 333 U.S. 683, 715 (1948); Pittsburgh Plate Glass Co. v. United States, 260 F.2d 397, 400 (4th Cir. 1958).

38) S*ee T.R. Coleman*, 849 F. Supp., at 1467; *see also in re* Baby Food Antitrust Litigation, *supra* note 37, at 135; Wilcox v. First Interstate Bank of Oregon, N.A., 815 F.2d 522, 525-26 (9th Cir. 1987).

39) *See* Socony-Vacuum Oil Co., 310 U.S., at 223.

40) *See* Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CAL. L. REV. 835, 863 & FN 118 (1987).

and contested in practice. In the collusion case of thirty two banking companies where the defendants were held liable for fixing interest rates, the KFTC deemed a couple of alleged participants not to have engaged in the interest rate maintenance scheme because they increased the rates in 15 to 30 days after others had increased them.[41] After this case has been decided, defendants time and again raised the question as part of their defenses. Korean antitrust tribunals generally have found that minor deviations in the times of price increases do not undermine an illegality of price-fixing. For example, in the collusion case of seventeen asphalt sales agents, the KFTC has found that although one of the defendants matched the prices one month after other defendants had raised prices, it does not disturb a finding of the concerted price fixing.[42] Whenever this question was raised, the KFTC has reasoned as follows:[43]

> The scope of agreement under the collusion prohibition clause includes cases not only where defendants change prices at the same time but also various types of agreements where price changes cannot be deemed to have resulted from free price changes pursuant to individual firm's independent decision-making, such as where defendants change prices successively within certain intervals during the price changing periods or where defendants determine prices in

41) Judgment 93-27 of Apr. 20, 1993, *9303Dan173* (Korea Fair Trade Commission), *in re* Collusion of 32 banking companies including Je-Il Bank.

42) Re-Judgment 97-17 of Jun. 11, 1997, *9612JoYi 1913* (Korea Fair Trade Commission), *in re* Reconsideration Request of Sixteen Asphalt Sales Agents; Re-decision 98-39 of Nov. 6, 1998, *9809SimYi1400 or 1401* (Korea Fair Trade Commission), *in re* Reconsideration Request of DaeHan Cast-Iron Product Manufacturing Corp. and LightTech Industry Corp.; Re-decision 99-21 of May 3, 1999, *9901SimII 0014 or 0016* (Korea Fair Trade Commission), *in re* Reconsideration Request of Three Color Steel Sheet Manufacturing Companies.; Re-Judgment 98-21 of Aug. 19, 1998, *9806SimYi1011* (Korea Fair Trade Commission), *in re* Reconsideration Request of Three LPG Container Valve Manufacturing Companies.

43) *See, e.g.*, Judgment of Jul. 29, 1998, *9805SimYi0735* (Korea Fair Trade Commission), *in re* Reconsideration Request of Four Sanitary Paper Manufacturing Companies; *see also* Re-Judgment 2001-055 of Nov. 3, 2001, *2001SimII2010* (Korea Fair Trade Commission), *in re* Reconsideration Request of Eleven Property Insurance Companies; Re-Judgment 2001-04 of Jan. 17, 2001, *2000SimYi1267* (Korea Fair Trade Commission), *in re* Reconsideration Request of Four Installment Financing Companies.

different ways or establish maximum prices, minimum prices, or average prices by differentiating changes in prices.

A notable technical question here is to what extent differences in increased price or rate amount are permissible. In the collusion case of seven cement manufacturers, the KFTC found that although the differences in price increase rates among defendants amount to 1.4 percent (increases from 13.4 to 14.8 percent), they are deemed to substantially have merged into a point of 14 percent increase on the average and therefore may well constitute an external accord of concerted action.[44] In the 2002 collusion case of four credit card enterprisers, there was evidence that although the transaction rates have increased, the exact amount of the increases are all different among defendants (a difference in about 1 percent rate), and that there is more than one month gap in time between the first and the last rate increase moves.[45]

The credit card enterprisers argued that there are no simultaneous, parallel rate increases within the meaning of the collusion regulation clause because there exist substantial differences in ranges and times of the transaction rate increases. Upon appeal, Seoul High Court found in 2004 that the differences do not preclude a finding of collusive price-fixing.[46] The Court held that the rate increases constitute a sufficient external accord of concerted action, reasoning that because the extent of differences is not enough to affect consumers' decision to choose or change a credit card company, it can be seen as economically the same rate increases. In 2006, The Supreme Court of Korea affirmed the judgment of Seoul High Court.[47]

Recently, an interesting factual question has been raised beforeThe Supreme Court of Korea with respect to the collusion case of ten (10)

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44) Re-Judgment 99-23 of May 4, 1999, *9902SimYi0247* (Korea Fair Trade Commission), *in re* Reconsideration Request of Seven Cement Manufacturing Companies.

45) Re-Judgment 2002-029 of Sep. 9, 2002, *2002SimIl0814* (Korea Fair Trade Commission), *in re* Reconsideration Request of Four Credit Card Enterprisers.

46) Judgment of Feb. 3, 2004, *2002Nu17295* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Four Credit Card Companies; Judgment of May 27, 2004, *2002Nu17073* (*unpublished*) (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Four Credit Card Companies.

47) Judgment of Oct. 12, 2006, *2004Du9371* (Supreme Court of Korea), *in re* Request for Reversing Corrective Orders on Collusion of Four Credit Card Companies.

construction companies for sales of apartment houses within the Dongbak residential development district.[48] The facts showed that the sales prices in certain land measure offered by the ten companies were divergent among themselves ranging from 6,704,000 Won up to 7,611,000 Won. In 2009, Korean Supreme Court held that it should be difficult to assert the existence of an external accord of acts simply from the facts.

The review of cases indicates that under modern Korean antitrust, collusive parallel pricing does never call for the same amount of price increases within the same time frames. A complaint for collusion in parallel pricing is likely to be found valid whenever the prices have been reached by the substantially similar amount within substantially close time frames. Unless the facts require otherwise, the KFTC and Korean courts seem willing to extend the allowable degrees in parallel pricing cases. On the whole, both countries' antitrust is highly expansive.

II. The Underlying Procedural Devices

Having discussed the substantive laws and practice of Korean and the U.S. antitrust, Part II addresses the following question: "how and to what extent has antitrust employed its procedural devices that tailor economic analysis to account for the competitive benefits and hazards of business phenomena?" Although Korean and the U.S. antitrust authorities and courts have broadly construed the meaning of agreement, it has been difficult to answer the question of whether *in hindsight* competitors' parallel price increases were from the invisible hands of the market or from the invisible price-fixing.[49] Antitrust must consider the probative value of large amounts of conflicting evidence and apply thereto certain practical procedural standards that are not specified in antitrust statutes.

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48) Judgment of Apr, 9, 2009, *2007Du6892* (Supreme Court of Korea), *in re* Request for Reversing Corrective Orders on Collusion of Ten Construction Companies for Sales of Apartment Houses within Yongin City Dongbaek Residential Development District.

49) *See* Inkwan Lee, D*amhape Gwanhan Gyeongjehakjeok Geomto* [*Economic Review of Collusion*], FAIR TRADE LAW STUDY IV, Chapter 19 Fair Trade and Legal Principles, at 576-97 (2004).

Establishing and employing adequate procedural devices is crucial to countering the hazards of excessive deterrence to which the broad substantive rules may give rise. Antitrust jurisprudence has been developing procedural mechanism, as set up and adjusted by courts in the U.S. antitrust as a common law country, and by legislation and sometimes by the KFTC or courts in Korean antitrust as a civil law country.[50] Part II analyzes and compares the procedural devices of the two countries, which revolve around the three related legal questions: what evidence is sufficient to show the existence of concerted conduct?; which party (plaintiff or defendants) has the burden of proof or persuasion?; and what presumptions are employed in this regard?

1. Development of the Standards of Review

The U.S. Supreme Court has rather broadly formulated the relevant standard of review in drawing the inferences of concerted action from circumstantial evidence. In American Tobacco Co. v. United States, the U.S. Supreme Court had held that "where the circumstances are such as to warrant a jury in finding that conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement, the conclusion that a conspiracy is established is justified."[51] In Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., the U.S. Supreme Court restricted the broad reach of its prior holding, however, finding that "[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely."[52] Through the mid-1980s, lower courts had followed the general

50) *See* CHANMOO HUR, GONGJEONGGEORAEBEOPGWA CARTELGYUJE [ANTITRUST LAW AND CARTEL REGULATION] (2000).

51) *See* American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946).

52) *See Theatre Entreprises, Inc*., 346 U.S., at 541. For the cases in which the U.S. Supreme Court had formulated relevant standards in different ways and terms, see Interstate Circuit v. United States, 306 U.S. 208, 227 (1939) (holding that "[a]cceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."); *see also* United States v. Paramount Pictures, Inc. 334 U.S. 131, 142 (1948) (finding that "[i]t is not necessary to find an express agreement in order to find a

standard formulation.[53]

In Matsushita Electric Industrial Co. v. Zenith Radio Corp., the U.S. Supreme Court established in 1986 the modern standard of proof to determine the existence of concerted action with the power of circumstantial evidence, holding that:[54]

> The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the [defendants]. That is, there must be direct or circumstantial evidence that reasonably tends to prove that [the defendants have] a conscious commitment to a common scheme designed to achieve an unlawful objective.

By way of comparison, contemporary Korean antitrust law expressly defines the relevant standard of proof where direct evidence is lacking. Article 19(5) of the MRFTA is intended to reach conscious parallelism in providing that:[55]

> Where two or more firms are committing any of the acts listed in [the Article 19(1)], they shall be *presumed* to have agreed to commit any of the acts among themselves where it is highly plausible that the firms have jointly committed the act in light of relevant circumstances, such as the traction field or characteristics of goods and services, economic reasons and ramifications of the acts, the times and aspects of contacts

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conspiracy. It is enough that a concerted of action is contemplated and that the defendants conformed to the arrangement."); United States v. Masonite Corp., 316 U.S. 265 (1942).

53) *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 28, at 5; *see also* Kovacic, *supra* note 29, at 24.

54) *See* Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 597-98 (1986); *see also* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984). Subsequently, lower courts have adopted differing versions of the Matsushita standard. For this purpose, see SULLIVAN & HOVENKAMP, *supra* note 7, at 344-45. For recent discussion of the case, *Conference on Matsushita at 20: Proof of Conspiracy, Summary Judgment, and the Role of the Economist in Price Fixing Litigation*, 38 LOY. U. CHI. L. J. 399-512 (2007).

55) Article 19(5) of the MRFTA as amended on March 22, 2010. [Emphasis added]. The U.S. Supreme Court has defined conscious parallelism as "the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions."

among the firms.

Before Article 19(5) was amended in 2007, it provided that "[w]here two or more firms are committing any acts listed in [the Article 19(1)] that substantially limit competition in a relevant market, they shall be presumed to have committed an unfair collaborative act despite the absence of an express agreement to engage in such an act." In practice, however, the post-amendment clause and the pre-amendment clause do not seem to make any difference with respect to the evidentiary proof of collusion.[56] Therefore, the higher courts' findings rendered before the amendment remain effective as a matter of law.

With the pre-amendment clause, it has been contested that the provision may give a highly strong tool to the KFTC by allowing an illegal agreement to be presumed simply with certain uniform or parallel acts among competitors.[57] In practice, however, both the KFTC and Seoul High Court have found that parallel price increases among competitors alone are not enough to establish unlawful price fixing under Article 19(5), requiring the so-called plus facts as additional evidence.[58] Indeed price parallelism and some additional evidence have been customarily submitted and required. For that reason, there has been a serious gap between the seemingly arbitrary standard of Article 19(5) and the evidentiary requirements in practice. It has become necessary to interpret the presumption clause to adequately decide conscious parallelism cases.[59]

In re Dongsuh and Nestle Korea collusion case, Korean Supreme Court clarified the import of Article 19(5) by finding that:[60]

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56) *See* Hoyoung Lee, *2008 Gongdonghangwigwalleon Pallyeeu Donghyang* [*Trends of Collusion Related Cases of 2008*], 19 JOURNAL OF KOREAN COMPETITION LAW (May 2009).

57) *See* SON, *supra* note 7; *see also* SUNGYUN YOON, BUDANGHAN GONGDONGHANGWIEU CHUJEONGJOHANG, JAYUGYEONGJAENGGWA GONGJEONGGEORAE [THE PRESUMPTION CLAUSE OF UNFAIR COLLABORATIVE ACTS, FREE COMPETITION AND FAIR TRANSACTIONS], Chapter 6 (2002).

58) *See* OHSEUNG KWAN ET EL., GONGJEONGGEORAEBEOP SIMGYEOLLYE 100 SEON [100 CASES IN FINDINGS OF THE FAIR TRADE COMMISSION] (1996).

59) *Cf.* Sungmoo Jung, *Dokjeomgyujebeopsang Chujeongjohange Gwanhan Yeongu* [*A Study of Presumption Clause under Monopoly Regulation Law*], at 87-109, LL. M. Dissertation (Seoul National University, 2003).

60) Judgment of March 15, 2002, *99Du6514 and 99 Du6512 as consolidated* (Supreme Court of Korea), *in re* Collusion of Dongsuh Fool Co., Ltd. and Nestle Koera Inc.

> In order to prove the unfair collaborative acts that Article 19(1) provides, the plaintiff is required to establish above all that the act in issue has been furthered under the express or implied agreement of the involved firms. It is not easy to prove such an agreement because unfair collaborative acts are in nature likely to have been done in secret. Article 19(5) is therefore intended to ensure the effective regulation of unfair collaborative acts.

The Court literally interpreted the clause, holding that:[61)]

> In substitution of proving agreement among firms, Article 19(5) requires plaintiff to prove the two elements: the fact that two or more firms are engaged in any act that falls under each subsection of Section 19(1) (External Accord of Acts); and the fact that the act constitutes one that substantially limits competition in a relevant market (Competition Limiting Effect).

Recently, in the 2009 collusion case of the sales of apartment houses within the Dongbaek residential development district,[62)] Korean Supreme Court refined the above standards as follows:

> In light of the intention and structure of the agreement presumption clause for unfair collaborative activities, in determining the existence of 'external accord of act,' although circumstances regarding the process and reason of how each firm has led to the price determination can be taken into account, certain simple circumstances that might presume an agreement or tacit understanding among firms should not be considered.

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61) *See id.*

62) *See* Judgment of Apr. 9, 2009, *2007Du6892* (Supreme Court of Korea), *in re* Request for Reversing Corrective Orders on Collusion of Ten Construction Companies for Sales of Apartment Houses within Yongin City Dongbaek Residential Development District.

2. The Controlling Tests in Weighing Evidence

The U.S. has several procedural rules that operate in collusion cases, of which a couple of procedural motions are relevant to discuss as mostly frequently used in the U.S. antitrust practice. The U.S. Supreme Court has found that "[o]n a claim of concerted price fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement."[63] As the first procedural matter, defendant may move for a motion to dismiss for plaintiff's "failure to state a claim upon which relief can be granted."[64] "To withstand a motion to dismiss, the plaintiff for a Sherman Act conspiracy claim must allege (1) concerted action; (2) by two or more persons; and (3) that unreasonably restrains interstate or foreign trade or commerce."[65]

At the next procedural stage,[66] defendants generally move for a summary judgment and may be entitled to the judgment as a matter of law where it is shown that there is no genuine issue of any material fact.[67] In order to defeat the summary judgment motion, plaintiff may not simply rely on their pleadings but must present some evidence on every material issue for which they will bear the burden of proof at trial.[68] In collusion cases, plaintiff must

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63) *See Monsanto Co.* 235 F.2d, at 763.

64) Federal Rules of Civil Procedure Rule 12(b)(6).

65) *See in re* Currency Conversion Fee Antitrust Litigation, 265 F. Supp. 2d 385, 417 (S.D.N.Y. 2003), quoting *in re* Nasdaq Market-Makers Antitrust Litigation, 894 F.Supp. 703, 710 (S.D.N.Y.1995).

66) *See* Eliot G. Disner, *Antitrust Law for Business Lawyers*, QUESTIONS, ANSWERS, LAW, AND COMMENTARY, at 13, FN 2 (2nd ed. 2003).

67) Rule 56 of the Federal Rules of Civil Procedure provides in relevant part that "[summary] judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages." For understanding the development of summary judgment standards, see John R. Heninger, *The Evolving Summary Judgment Standard for Antitrust Conspiracy Cases*, 12 J. CORP. L. 503 (Spring 1987).

68) *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (finding that "each element must be supported in the same way as any other matter on which the plaintiff bears the burden

establish that there is a genuine issue of material fact as to whether defendants entered into an illegal conspiracy that caused plaintiff to suffer a cognizable injury. The U.S. Supreme Court has found the standard of proof as follows:[69]

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 [of the Sherman Act] must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently.[70] Respondents … in other words, a plaintiff must show that the inference of conspiracy is reasonable in light of the competing inference of independent action or collusive action that could not have harmed respondents.[71]

The U.S. federal courts of appeals have adjusted the general summary judgment standard in different ways, however. Some courts have explicitly put the applicable tests or steps before conducting analysis of facts of cases. Others have simply noted the Matsushita court's standard up front as the commending summary judgment principle without setting up relevant subtests. The difference of the federal circuits' standards appears to lie mainly in their approaches to the question of which party—plaintiff or defendants bears the burden of establishing the concerted or independent nature of parallel pricing with other plus factors. Most of U.S. federal circuits generally overturn the initial presumption in favor of non-intervention and shifts the burden of proof regarding concerted action onto the party alleging collusive price-fixing.

For purposes of summary judgment analysis where collusive conduct should be inferred from parallel behaviors, the Eleventh Circuit Court of Appeals has recently found the three-part test that a court should apply as

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of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") [internal citations omitted]; *see also* Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986).

69) *See Matsushita Electric Industrial Co.*, 475 U.S. 574; *see also* Monsanto Co., 235 F.2d 573.

70) *See* Monsanto Co., 235 F.2d, at 764.

71) *See Matsushita Electric Industrial Co.*, 475 U.S., at 588.

follows:[72]

> (1) plaintiff must establish a pattern of parallel behavior; (2) plaintiff must demonstrate existence of one or more plus factors that tend to exclude possibility that alleged conspirators acted independently; and (3) defendants may rebut inference of collusion, arising from existence of plus factors, by presenting evidence establishing that no reasonable factfinder could conclude that they entered into price fixing conspiracy.

Similarly, the Third Circuit Court of Appeals has held that to establish concerted action on the basis of consciously parallel behavior, a plaintiff must show: "(1) that the defendants' behavior was parallel; (2) that the defendants were conscious of each other's conduct and that this awareness was an element in their decision-making processes; and (3) certain 'plus' factors."[73] The Second and Ninth Circuit Courts of Appeals have commonly placed the initial burden of proof on defendants to establish independent reasons or justifications of parallel pricing. The Second Circuit Court of Appeals has clarified the applicable test by finding that "[w]hen the defendants establish that their conduct is consistent with independent action, the plaintiffs are required to come forward with evidence that tends to exclude the possibility of independent action."[74] *In re* Coordinated Pretrial Proceedings in Petroleum Antitrust Litigation, the Ninth Circuit Court of Appeals had found that:[75]

> Where an antitrust plaintiff relies entirely upon circumstantial evidence of conspiracy, a defendant will be entitled to summary judgment if it can be shown that (1) the defendant's conduct is consistent with other plausible explanations and (2) permitting an inference of conspiracy would pose a significant deterrent to beneficial procom-

72) *See* Williamson Oil Co., Inc. v. Philip Morris USA, 346 F.3d 1287, 1301 (11th Cir. 2003).

73) *See* Intervest, Inc. v. Bloomberg, L.P., 340 F.3d 144, 165 (3rd Cir. 2003), quoting Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1242-43 (3rd Cir. 1993).

74) *See* H.L. Hayden Co. of New York, Inc. v. Siemens Medical Sys., Inc., 879 F.2d 1005, 1014 (2nd Cir. 1989).

75) *See in re* Coordinated Pretrial Proceedings, Petrolium Products Anitrust Litigation, 906 F.2d, at 440.

> petitive behavior. (3) Once the defendant has made such a showing, the plaintiff must come forward with other evidence that is sufficiently unambiguous and tends to exclude the possibility that the defendant acted lawfully.

More recently, the Ninth Circuit articulated "a two-part test to be applied whenever a plaintiff rests its case entirely on circumstantial evidence,"[76] finding that "the defendant can rebut an allegation of conspiracy by showing a plausible and justifiable reason for its conduct that is consistent with proper business practice. The burden then shifts back to the plaintiff to provide specific evidence tending to show that the defendant was not acting independently." The Sixth and Tenth Circuit Courts of Appeals have applied the same two-part test by asking a couple of questions: "(1) [I]s the plaintiff's evidence of conspiracy ambiguous, *i.e.*, is it as consistent with the defendants' permissible independent interests as with an illegal conspiracy; and, if so, (2) Is there any evidence that tends to exclude the possibility that the defendants were pursuing these independent interests."[77]

Other Circuit Courts of Appeals simply have stated either the general summary judgment standard under the Federal Rules of Procedure[78] or the standard the U.S. Supreme Court had found, without specifying some relevant tests for purposes of finding a concerted action by circumstantial evidence only. For instance, the Seventh Circuit Court of Appeals held that plaintiff failed to overcome a summary judgment motion because "it has not provided evidence tending to exclude the possibility that [the defendants] acted independently, or that would show that the inference of conspiracy to fix prices is reasonable in light of the competing inference of independent action."[79]

Korean antitrust does not have procedural rules analogous to the U.S.

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76) *See in re* Citric Acid Litigation, 191 F.3d, at 1094, quoting several ninth circuit cases including Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987).

77) *See* Wallace v. Bank of Bartlett, 55 F.3d 1166, 1167-68 (6th Cir. 1995), quoting Riverview Investments, Inc. v. Ottawa Community Improvement Corp., 899 F.2d 474, 483 (6th Cir. 1990); *see also* Gibson v. Greater Park City Co., 818 F.2d 722, 724 (10th Cir. 1987).

78) *See supra* note 67 and the accompanying text.

79) *See* Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 660-61 (7th Cir. 1987).

summary judgment that enable courts to flexibly employ for purposes of dismissing some cases and hearing others. In general, Korean courts as equity courts are willing to allow parties to fully proffer any evidence in order to support each of their claims and arguments.[80] Similar to the required three elements under the U.S. antitrust to withstand a motion to dismiss, Seoul High Court has consistently held that the following three elements must be established in order for an act to constitute one of the unfair collaborative acts under Article 19(1):[81]

> (1) Two or more firms concertedly determined to engage in doing any of the enumerated types of acts under each section of Article 19(1); (2) They agreed to do the concerted action by contracts, accords, resolutions, or any other means; and (3) The concerted action must have a substantially restricting effect on competition in a relevant market.

For purposes of the Article 19(5) presumption clause, Seoul High Court has developed the two-step presumption analysis.[82] The first step is that if two or more firms are found to engage in the externally uniform acts that fall under each section of Article 19(1), the existence of concerted action is presumed even in the absence of explicit agreements. The unlawfulness is

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80) For understanding procedural operations in Korea, see DONG-WHEE LEE, DOKJEOMGYUJE MIT GONGJEONGGEORAEAE GWANHAN BEOPRYUL [INTRODUCTION TO MONOPOLY REGUALTION AND FAIR TRADE LAWS] (1995); *see also* Hovenkamp, *The Antitrust Enterprise*, *supra* note 2, at 145-48.

81) *See* Judgment of Apr. 18, 2002, *2001Nu2579* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Four Installment Financing Companies; Judgment of Mar. 26, 2002, *2000Nu15035* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Eight Steel Manufacturing Companies for Electric Furnace; Judgment of Jun. 5, 2001, *99Nu10898* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Three Petroleum Sales Agents and LG-Caltex Refinery Corp.; Judgment of Jan. 9, 2001, *99Nu7311* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Beer Manufacturing Companies; Judgment of Jun. 20, 2000, *98Nu10839* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Four Sanitary Paper Manufacturing Companies. *But see* Judgment of Oct. 17, 2002, *2001Nu10716* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Eleven Property Insurance Companies .

82) This approach is similar to the approach of Donald Turner's. *See generally* Donald F. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

then presumed when the party arguing for unlawfulness of the presumed concerted action proves the competitive harm in a relevant market.

The firms intending to disapprove the condemnation of unfair collaborative acts must rebut the presumptions by advancing convincing circumstances to show that the uniform acts are not performed in concerted fashion pursuant to the firms' agreements. *In re* Collusion of Beer Manufacturing Companies, The Supreme Court of Korea found that "[t]he defendants who are presumed to agree on concerted action can rebut the presumption by proving the absence of concerted action or other circumstantial evidence that can convince one that consciously parallel conduct does not constitute concerted action pursuant to certain agreements."[83)]

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A cursory examination of the procedural rules of the two countries might lead us to merely suppose that the two countries have some significant procedural differences. Upon closer look, however, the presumption clause Article 19(5) does fittingly play the same role as the U.S. summary judgment standard does in the antitrust context. The presumed concerted action is rebuttable and shifts the burden of proof to defendant: defendant must show that in fact the presumed concerted action is independent in its nature and extent with legitimate business reasons thereof; and plaintiff must then come up with some evidence to rebut the independent business reasons or justifications.

In general, both antitrust jurisdictions do not appear to have strictly required parties to produce specific evidence in a form of burden of proof or persuasion, but to have liberally permitted them to present arguments and evidence to establish or rebut the existence of collusive price-fixing. The Article 19(5) of Korean antitrust and the U.S. Second and Ninth Circuit Courts of Appeals, however, equally place on the part of defendants the initial burden of coming forward with business justifications or independent reasons for price increases, and on the part of plaintiff the subsequent burden of

83) *See* Judgment of Feb. 28, 2003, *2001Du1239* (Supreme Court of Korea), *in re* Collusion of Beer Manufacturing Companies; *see also* Judgment of May 28, 2002, *2000Du1386* (Supreme Court of Korea), *in re* Collusion of Four Sanitary Paper Manufacturing Companies.

rebutting the independent reasons.

3. The Opposite Ways of Viewing Evidence

The antitrust tribunals of Korea and the U.S. generally have the same principle that the proffered evidence including plus factors should be weighed as a *whole*. The U.S. Supreme Court found that in cases involving alleged conspiracies in violation of the Sherman Act, "[p]laintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."[84)]

Confronted with cases required to assess circumstantial evidence in parallel pricing arrangements, most U.S. federal courts have put into a statement of law the above Supreme Court's directive or similar ones. For example, the U.S. Second Circuit Court of Appeals found that "[a] court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute."[85)]

In Korean antitrust practice, the reviewing courts as well as the KFTC found that to infer a concerted price-fixing from parallel pricing, a court should consider plus factors as a *whole* in addition to the parallel price increases of products or services.[86)] The KFTC held in 2002 that it is a reasonable and desirable analytical way to consider as a whole such factors as the market and market power, each relevant party involved in the market for analysis of market behaviors, the superiority and degree of power that each party

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84) *See* Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).

85) *See* Apex Oil Co. v. DiMauro, 822 F.2d 246, 254-55 (2nd Cir. 1987); *see also* Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028, 1049 (8th Cir. 2000) (The dissenting opinion noted that "[t]he plaintiff's evidence must amount to more than a scintilla, but the plaintiff does not have to outweigh the defendant's evidence item by item."), quoting Rossi v. Standard Roofing, Inc., 156 F.3d 452, 466 (3rd Cir. 1998).

86) *See* Decision 2001-126 of Sep. 10, 2001, *2001DokJum1934* (Korea Fair Trade Commission), *in re* Collusion and Fine Recalculation of POSCO Steel Service & Sales Co., Ltd.

possesses, the distribution structure and transaction characteristics, and conditions in determining prices.[87]

In the collusion case of eleven property insurance companies, Seoul High Court found in 2002 that other factors have been considered as a whole, including the characteristics and current situations of domestic automobile insurance market, determining the structure of automobile insurance fees, the impact that then-automobile insurance fees have had on domestic economy, and then-economic policy background.[88] In the 2003 collusion case of four petroleum producers in the Jeju Island (an island off the southern coast of the Korean peninsula), The Supreme Court of Korea has found that "in weighing the circumstances that can rebut a presumed concerted action of unfair collaborative acts, a court should reasonably consider the additional evidence as a *whole* according to the general norms of business transactions."[89]

In the process of weighing plus factors, either plaintiff(s) or defendants in Korean and the U.S. antitrust may argue for the totality of circumstances test as the case may be. For instance, one U.S. Sherman Act Section 1 plaintiff has contended that "several incidents which it sought to establish as evidence of the conspiracy should not be viewed in isolation, but rather should be considered as tiles in the mosaic of an over-all plan or conspiracy."[90] Upon reviewing relevant cases, however, this article found out that virtually all the courts have considered the adduced evidence on a factor-by-factor basis instead of viewing the evidence in its entirety.

The courts appear to have held that each plus factor must be relevant and significant *in and of itself* before being nested within the totality of circumstances.[91] As far as this article goes, only one U.S. court has clarified the

87) *See* Judgment 2002-225 of Oct. 31, 2002, *2002DokGoan1057* (Korea Fair Trade Commission), *in re* Collusion of LG-Caltex Corp. and SK Gas Corp.

88) *See* Judgment of Oct. 17, 2002, *2001Nu10716* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Eleven Property Insurance Companies .

89) *See* Judgment of Dec. 12, 2003, *2001Du5552* (Supreme Court of Korea), *in re* Collusion of Three Petroleum Manufacturing and Sales Agents and LG-Caltex Refinery Corp.; *see also in re* Collusion of Eight Steel Manufacturing Companies for Electric Furnace, *supra* note 25.

90) *See FMC Corp.*, 306 F.Supp., at 1135.

91) *See Williamson Oil Co.*, Inc., 346 F.3d, at 1310 (noting that "if a benign explanation for the action is equally or more plausible than a collusive explanation, the action cannot constitute a plus factor. Equipoise is not enough to take the case to the jury.").

reason that the totality of circumstances approach should not be proper, noting that "[b]ecause of the episodic nature of the incidents, separated in space and time, and the disparity of their respective elements, linked only by the cast of characters common to most of them, it is necessary to consider some of these incidents separately to define precisely the nature of the conspiracy."[92]

Nevertheless, it seems unwarranted to assert that precisely defining the nature of conspiracy necessitates the use of each factor one by one. For the opposite may be true, that is, the as a whole approach may well lead us to draw a bigger picture of conspiracy in question. Further, it is exactly for the purpose of adequately considering the nature of collusion that we should have recourse to and assess plus factors to begin with. Indeed in the 2002 case of *In re* High Fructose Corn Syrup Antitrust Litigation,[93] Judge Posner writing for the court noted that:

> The [one of the traps] to be avoided in evaluating evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion for summary judgment is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment. It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise what need would there ever be for a trial?

Notwithstanding the Judge Posner's observation, both Korea and the U.S. antitrust are likely to break the proffered evidence into separate categories for analysis purposes, and weigh the evidence on an item-by-item basis for assessing its relevancy and significance. If one item of evidence is found to be irrelevant, it may not be added to the probative value in the total evidence

92) *See FMC Corp.*, 306 F. Supp., at 1135.

93) *See in re* High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651, 656-57 (7th Cir. 2002). For understanding the implications of this decision, see David L. Meyer, *The Seventh Circuit's High Fructose Corn Syrup Judgment – Sweet for Plaintiffs, Sticky for Defendants*, ANTITRUST (Fall 2002).

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Having said that, the technical differences of procedural devices may well affect antitrust practitioners and benches for counseling and litigation purposes although the antitrust tribunals of Korea and the U.S. seem to employ similar procedural tests. The Article 19(5) has the burden-shifting function similar to the U.S. motion for summary judgment: Defendants bear the initial burden to show independent business justifications of parallel pricing while plaintiff the later burden to rebut the independent nature and extent. The burden-shifting operation appears meaningful in that defendant business people normally are in a better position to explain justifiable and rational reasons of parallel pricing.

Although functionally sensible, the presumption clause remains to be a practically dangerous procedural device. Since it might be used to require defendants to bear the burden of showing the absence of agreement, that is, *disproving* the alleged presence of concerted action, it runs the risk of adversely affecting defendant business people. In recent Korean antitrust practice, defendants have had on a couple of occasions to explicitly argue that the plus factors developed in the U.S. antitrust should serve as a useful guideline when it comes to establishing a concerted action from parallel behaviors.[94)]

Korean courts have rejected the argument, reasoning that Korean antirust has the positive provision of Article 19(5) presumption clause. The KFTC has noted that even in the presence of direct evidence it does introduce circumstantial evidence in order to manage the presumption system in a more limited and rigorous manner. Indeed Korean antitrust practice has required plaintiff to come forward with more sophisticated analysis of market conditions and supporting arguments, being prepared to rebut defendant's rational, economic reasons and justifications for parallel pricing.

94) *See in re* Reconsideration Request of Sixteen Asphalt Sales Agents, *supra* note 42; *see also in re* Request for Reversing Corrective Orders on Collusion of Four Installment Financing Companies, *supra* note 33; *in re* Reconsideration Request of Seven Cement Manufacturing Companies, *supra* note 44.

III. The Significance and Viability of Competitive Harm

In general, the U.S. antitrust has been reluctant to control oligopoly pricing because of our inability to appreciate the existence of competitive harm, that is, as a practical matter, we are neither in a position to nor will we be sure whether indeed parallel pricing in hand amounts to a supra-competitive price and therefore has harmed competition. In this regard, Professor Areeda provides for deeper observations noting that:[95]

> [A few firms' consciously parallel pricing] does not mean that consumers will be injured, for oligopoly prices may be lower in the long run if they reflect increased innovations and if the oligopolists are more progressive than more numerous firms would be. Even in the short run, the degree of concentration alone cannot tell us whether output and prices will approach competitive or monopolistic levels in a particular market. Considering the other market characteristics facilitating or impeding tacit price coordination … improves our ability to predict the likelihood or degree of noncompetitive pricing in a market. Nevertheless, many "wild cards" remain—for example, varying perceptions about profit maximizing price levels, differential responses to cost advantages or disadvantages, and different psychologies.

As discussed above, although the words of the substantially limiting effect on competition have been deleted by virtue of the amendment in 2007, certain quantum of competitive harm is currently required for Article 19(5) purposes.[96] Given that what counts in antitrust is the existence of harmful effect on competition, the implications of required competitive harm have been intensively discussed in Korean antitrust academia and practice.

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95) *See* Areeda and Hovenkamp, *supra* note 34, at para. 1429b.

96) *See* Lee, *supra* note 56, at 339-342.

1. Korean Antitrust Practice

The acts substantially limiting competition in a relevant market are defined under Article 2 of the MRFTA as "acts that impact or threaten to impact the determination of price, quantity, quality, or other terms or conditions of transactions in accordance with the intent of a firm or a trade association, because of reduced competition in a relevant market."[97] In earlier cases, a lack of competitive harm has been asserted as a means to arguing for a justifiable basis of parallel pricing.[98] The KFTC had merely found that the competitive harm contains any potential effect on competition as well as any actual effect on competition,[99] and that it does not matter how much harmful effect has been in fact had on consumers.[100] This amorphous and broad construction has persisted for a while.[101]

The meaning and scope of competitive harm under Article 19(5) have been finally up to The Supreme Court of Korea's review.[102] In the collusion case of Dongsuh and Nestle Korea, given that the duopolists' combined market shares were 99 percent in the Korean market, one of the relevant issues was whether their parallel pricing could be found to have the sufficient competitive harm within the meaning of Article 19(5).[103] The Supreme Court of Korea in Dongsuh case first noted that the presence or absence of

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97) Article 2 also defines a relevant market as "a field that does or can have competitive relationships by the objects, levels, or regions of transactions."

98) The first case in which sufficiency of the competitive harm element was at issue came up in the KFTC's reconsideration of six publishing companies' price-fixing case. *See* Judgment 90-62 of Oct. 24, 1990, *9008Dan181* (Korea Fair Trade Commission), *in re* Collusion of Six Publishing Companies including Dong-A.

99) *See, e.g.*, *in re* Reconsideration Request of Sixteen Asphalt Sales Agents, *supra* note 22.

100) *See in re* Reconsideration Request of Three Paper Manufacturing Companies, *supra* note 17.

101) For more in-depth analysis, see Myong-Jo Yang, *Gongdongseongeui Ipjeunggwa Chujeong, Gongjeonggeoraebeop Gangeui 2* [Proof and Presumption of Concerted Action], FAIR TRADE LAW STUDY II, at 206-28 (2000).

102) *See* Judgment of Mar. 12, 1995, *94Nu13794* (Supreme Court of Korea), *in re* Collusion of Korean Pharmaceutical Association.

103) Judgment of Apr. 28, 1999, *98Nu10686 and 98Nu11214 as consolidated* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Dongsuh Food Co., Ltd. and Nestle Korea Inc.

competitive harm should be determined by hypothesizing conditions in which there existed no agreement.[104)]

The Supreme Court of Korea found that whether the act in itself has competitive harm should be decided on a case-by-case, relying upon all the circumstances such as the features of products, consumer standards in selecting products, or the effect that the act had on competition in the market and relevant firms. The Court held that it is not acceptable for the KFTC to control the parallel pricing by presuming the agreement of firms under Article 19(5) because it is clear that the price increases of defendants lack competitive harm.[105)] In reviewing how the lower court has applied the law to the facts, it considered market realities rather than the mere significance of combined market shares. The Court's reasoning is worth quoting in full:

> According to the record, the domestic coffee market at that time had a special feature that the law of supply and demand does not apply—if the prices of coffee products increase, the corresponding demand also increases. Coffee products have the characteristics that product differentiation is feasible as the decision to purchase the products depends upon consumers' tastes, the products' smell, or the

104) Judgment of March 15, 2002, *99Du6514 and 99 Du6512 as consolidated* (Supreme Court of Korea), *in re* Collusion of Dongsuh Fool Co., Ltd. and Nestle Koera Inc. In general, the U.S. courts do not set up a hypothetical competitive price and compare it to then-existing market price for the purpose of finding that the market price is above the competitive level. They rather consider such factors as industry-wide overcapacity. *See, e.g.,* Park v. El Paso Bd. of Realtors, 764 F.2d 1053 (5th Cir. 1985). In antitrust cases, the "before and after" and "yardstick" damages tests are typically employed. Under the before-and-after method, an expert ordinarily compares profits or growth (usually by multiple regression analysis) during relevant damage periods with profits or growth during some earlier periods. Under the yardstick method, the expert ordinarily compares profits in some second "yardstick" market with the market subject to the violation. *See* HOVENKAMP, *supra* note 7, at FN. 135.

105) The Dongsuh Court's holding might appear to have construed the scope of competitive harm more narrowly than ever before as it considered other circumstances than the mere market shares of relevant parties. In the subsequent 2002 collusion case of four sanitary paper manufacturers, however, the Supreme Court of Korean has reverted back to the broad reading of competitive harm in line with the definition under Article 2. The Court has found that as long as "defendants' act of maintaining uniform prices in concert may impact or threaten to impact the determination of prices, it constitutes a substantially limiting effect on competition." *See in re* Collusion of Four Sanitary Paper Manufacturing Companies, Judgement of Feb. 28, 2003, *2001Du1239* (Supreme Court of Korea).

> good will of brand names rather than prices. By aligning with their marketing strategies the above special features of the market and products, defendants have competitively increased the prices of their products in order to lead consumers into perceiving that their products are high quality ones. Also the market shares of defendants have immediately changed. For those reasons, the price increases of defendants clearly reflect price competition between competitors in the market under the extraordinary condition of then-domestic coffee market where if the product price of one company is rather lower than that of the other competitor, the product is not sold well. It is difficult to see that the price increase resulted in competition limiting effect in the relevant market—then-domestic market.

For purposes of comparison, in Brooke Group Ltd., v. Brown & Williamson Tobacco Corp., the U.S. Supreme Court had employed the similar reasoning.[106] When plaintiff was required to establish a competitive injury, the Court held that:

> [E]ven in a concentrated market, the occurrence of a price increase does not in itself permit a rational inference of conscious parallelism or supracompetitive pricing. Where, as here, output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. Under these conditions, a jury may not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.

What the Korean and the U.S. Supreme Courts in Dongsuh and in Brooke Group Ltd. respectively intended to find seems clear: if the nature of the market does not operate under the fundamental economic law of supply and demand as some variable comes into play (such as tastes or brand values of

106) This case is not a collusion case. *See* Brooke Group Ltd., v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 237 (1993) (finding that that "competitor's alleged below-cost sales of generic cigarettes through discriminatory volume rebates did not create a competitive injury in violation of Robinson-Patman Act.").

coffee products in the Dongsuh case), competitive harm may not be presumed but should be actually shown. In this regard, the U.S. Supreme Court in Brooke Group Ltd. clarified that either actual output restriction or supracompetitive pricing can establish competitive harm.[107)]

As a technical matter of Korean antitrust practice, the threshold market share that can pass muster under Article 19(5) seems low.[108)] In the four sanitary paper case, The Supreme Court of Korea has affirmed Seoul High Court's finding that the 29.3 percent market share of the two defendants among the four defendants are insufficient to be deemed to have competitive harm.[109)] In a later 2002 KFTC decision, the KFTC held that the 32.6 percent market share of all collusion participants should be enough to possess a market power and thus competitive harm.[110)] It remains to be seen what percent of combined market shares of defendants would be deemed not to have a competitive harm for Article 19(5) purposes.

2. The U.S. Antitrust Practice

As discussed above, the U.S. antitrust finds price-fixing to be illegal per se and does not require actual proof of its harmful effect on competition. The far-reaching breadth of the per se rule under the Sherman Act is shown as the U.S. Supreme Court has found that:[111)]

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107) *See, e.g.*, Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978).

108) Judgment 2000-85 of May 31, 2000, *9911GongDong1657* (Korea Fair Trade Commission), *in re* Collusion of Four Mobile Communication Enterprisers (finding *the 57 percent market shares* of parties sufficient even though one remaining leading company has the 43 percent market share); *In re* Reconsideration Request of Three Color Steel Sheet Manufacturing Companies, *supra* note 21 (holding that the *combined market shares of 46.3 percent* are not that low percent to keep plaintiff from establishing the existence of a market controlling power); *in re* Reconsideration Request of DaeHan Cast-Iron Product Manufacturing Corp. and LightTech Industry Corp., Re-decision 98-39 of Nov. 6. 1998 *9809SimYi1400* (finding that the allegedly low combined market shares of 40-45 percent in the relevant market do not preclude the presence of competitive harm).

109) *See in re* Collusion of Four Sanitary Paper Manufacturing Companies, Judgment of May 28, 2002, *2000Du1386*; *see also* Judgment of Apr. 18, 2002, *2001Nu2579* (Seoul High Ct.), *in re* Request for Reversing Corrective Orders on Collusion of Four Installment Financing Companies.

110) *See* Judgment 2002-225 of Oct. 31, 2002, *2002DokGoan1057* (Korea Fair Trade Commission), *in re* Collusion of LG-Caltex Corp. and SK Gas Corp.

> It makes no difference whether the motives of the participants are good or evil; whether the price fixing is accomplished by express contract or by some more subtle means; whether the participants possess market control; whether the amount of interstate commerce affected is large or small; or whether the effect of the agreement is to raise or to decrease prices.

In the U.S. antitrust jurisprudence, unreasonably restricting effect on competition is necessary to determine as a preliminary matter whether a particular arrangement constitutes clearly harmful price-fixing and therefore should be found illegal in and of itself.[112] In Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,[113] the U.S. Supreme Court has made it clear how to differentiate the illegal and legal price-fixing arrangements holding that:

> More generally, in characterizing … conduct under the per se rule, our inquiry must focus on whether the effect and, here because it tends to show effect, … the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive."

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111) *See* United States v. McKesson & Robbins, Inc. 351 U.S. 305, 310 (1956).

112) *See generally* Areeda & Hovenkamp, *supra* note 34, para. 1909-1914; *see id*. para. 1410 Supplement and FN 10 (finding a couple of cases that have seriously considered the significance of market shares: "M.L.C. v. North Am. Philips Corp., 671 F. Supp. 246 (S.D.N.Y. 1987) (Small aggregate share makes alleged price-fixing conspiracy implausible; post-trial judgment for defendants), and [Clamp-All Corp. v. Cast Iron Soil Pipe Institute, 851 F.2d 478 (1st Cir. 1988)] (No inference of conspiracy from identical prices by competitors with differing market positions and different preferences for prices that would maximize profits, thus making collusion more difficult.").

113) *See* Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979), quoting U.S. v. U.S. Gypsum Co. 438 U.S. 422, 436 n. 13, 441 n. 16 (1978); *see also* National Soc. of Professional Engineers v. U.S., 435 U.S. 679, 688 (1978); Continental T. V., Inc. v. GTE Sylvania Inc., 43 U.S. 36, 50 n. 16 (1977); and Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958).

Although the term of unreasonable restraint or competitive injury appears in other procedural stages of the U.S. antitrust practice,[114] the necessary magnitude of proof in the U.S. collusion cases appears different from the competitive harm under Article 19(5) of Korean antitrust. As noted, in the U.S. antitrust, a plaintiff is required to plead that concerted action may "unreasonably restrain interstate or foreign trade or commerce" in order to withstand a motion to dismiss. In a price-fixing litigation context, unreasonable restraint is not required to be proved but a mere allegation is sufficient to jump through the first procedural bar. In this regard, Professor Areeda adequately explains the significance of market shares finding that:[115]

> Although market shares are irrelevant to the per se condemnation of a horizontal agreement fixing price, they do bear on the motive to enter such an agreement, for competitors aggregating a minor share would not ordinarily be able to affect market prices and thus are unlikely to have tried to do so. When the number of cumulative shares of the alleged price-fixers is small, they should be deemed to lack the motive to enter the alleged agreement.

In short, a showing of competitive harm has been demanded in antirust analysis for purposes of asking and answering whether certain pricing arrangement can be characterized as a price-fixing without requiring full-blown antitrust analysis. It appears that antirust authorities and courts of the two countries commonly ask for a competitive harm in antitrust analysis to

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114) To obtain a monetary relief under §§ 4 and 4A of the Clayton Act, a Sherman Section 1 private plaintiff must show an *injury* in the plaintiff's business or property as a result of the conspiracy. 15 U.S.C. §§ 15 and 15a. By contrast, the MRFTA do not have a specific injury requirement for Article 19 purposes because a fine is imposed as administrative measure, but merely actual commitment—as opposed to mere agreement—is required for a fine to be imposed upon. The standard under the Clayton Act demands much higher burden of showing a causal link between plaintiff's injury and defendants' price-fixing than Article 19(5). The competitive injury requirement under the Clayton Act does not seem comparable to the competitive harm under Article 19(5) of Korean antitrust. In terms of the required quantum of evidence, it would be fair to say that the competitive harm of Article 19(5) falls between the requirement of competitive harm for mere characterization purposes and the competitive injury requirement of the U.S. Clayton Act Sections 4, 4A.

115) *See* Areeda & Hovenkamp, *supra* note 34, para. 1412 Supplement.

consider an economic plausibility of concerted conduct from particular pricing arrangements.[116] As an initial matter, Korean antitrust generally examines the combined market shares of colluders, barriers to entry, actual output restriction (excess capacity), and/or supra-competitive prices in order to predict whether the structural evidence of a particular industry shows that concerted action is plausible in an economic sense. Once characterized as a price-fixing, a competitive harm is provisionally assumed particularly in face of high market shares of relevant parties among other factors.

After all, it seems clear that antitrust authorities are willing to condemn any concerted action "to limit output and charge a higher than competitive price."[117] As a practical matter, as Professor Areeda noted "varying perceptions about profit maximizing price levels" appear to be the most demanding factor to be considered. Insisting on evidence of immediate and concrete harm, in the form of a supra-competitive price or otherwise, may challenge antitrust analysis. In practice, it is highly difficult—if not impossible—to prove actual competitive harm by showing a *supra*competitive price, that is, whether a particular price level that allegedly resulted from concerted conduct are indeed above the level that would have prevailed in the absence of it.[118] That is true even in the case of outright price-fixing among competitors.[119]

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To be sure the failure to show an actual harm may keep us from having a

116) *See* GONGJEONGGEORAEWIWONHEO GONGDONGHANGWISIMSAGIJUN [KOREA FAIR TRADE COMMISSION, STANDARDS OF REVIEW FOR COLLABORATIVE ACTIVITIES] (as amended on April 9 2009), *available in English at* http://eng.ftc.go.kr/. *Cf.* Areeda & Hovenkamp, *supra* note 34, para. 1500-1511.1; *see also* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY—THE LAW OF COMPETITION AND ITS PRACTICE, at 249-266 (1999); STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW, at 118-27 (1992).

117) *See* RICHARD A. POSNER, ANTITRUST LAW 95 (2nd ed. 2001) (arguing that "[s]ome degree of tacit coordination of pricing in reaction to external shocks, such as an increase in raw-material costs, is inevitable and unobjectionable. What is not inevitable and is objectionable is a tacit agreement to limit output and charge a higher than competitive price.").

118) *See, e.g.*, J. Baker & T. Bresnahan, E*mpirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L. J. 3 (1992); *see also* J. Kattan, *Market Power in the Presence of an Installed Base*, 62 ANTITRUST L. J. 1 (1993).

119) *See* Areeda & Hovenkamp, *supra* note 34, at para. 1421c2 (noting that "even conscious price fixing can lack effect, as is suggested by the difficulties many plaintiffs have in proving that they paid more than the price that would otherwise have prevailed.").

grip on the general shape of the antitrust gist—the effect on competition.[120] Putting too much emphasis on the harm may simply lead us to elude relevant points at issue, however, by making us out of step with the whole evidence's probative value other than actual competitive harm. More to the point, the difficulty can hardly be used as a reason for denying the weight of competitive harm because as Judge Posner put, "conjecture has its place in building a case out of circumstantial evidence."[121]

IV. Discussion

As a matter of antitrust laws, there are almost no differences between the substantive laws of Korea and the U.S. antitrust in that concerted conduct is broadly construed in its scope and extent. The different approach appears to lie in the operation of procedural devices. Korean antitrust possesses the unique provision of Article 19(5), which has the function to shift the burden of proof between the parties similar to the U.S. motion for summary judgment under the Federal Rules of Civil Procedure. In fact, the U.S. antitrust seems to have strict standards for proof of concerted conduct. If the plaintiff does not meet the standard, a court may simply dismiss the parallel pricing case.

Of importance to Korean antitrust is that the presumption clause Article 19(5) is intertwined and interacts with its competitive harm requirement. The clause is dangerous in practicality, however, To the extent that it is used to require defendants to bear the burden of disproving the alleged presence of concerted action, it may adversely affect defendants. Another way to offset the over-deterrence danger of the clause in finding defendants liable under ambiguous circumstances should take seriously the magnitude of competitive

120) Professor Hovenkamp finds that "the Chicago theory that market power is a relative rarity has given way to numerous econometric procedures for measuring market power with greater precision than we have had in the past. These procedures indicate that significant market power is not all that rare, even in markets that do not have dominant firms." Econometric analysis generally applies statistical and mathematical methods in economics to describe the numerical relationships between key economic forces. *See* HOVENKAMP, *supra* note 116, at 64.

121) *See in re* High Fructose Corn Syrup Antitrust Litigation, 295 F.3d, at 660.

harm in parallel pricing cases at hand. Together with the procedural device, therefore, adequate use of the competition harm requirement should have the significant function for Article 19(5) purposes.

As the development of Korean antirust practice showed, the gradually careful use of the competitive harm prerequisite under the Article 19(5) has reduced the potential danger of over-deterrence or over-enforcement that the clause may convey. Although Korean antitrust tribunals had been focused on the market shares of relevant parties in measuring competitive harm, Korean Supreme Court in Dongsuh and recent courts considered other market circumstances that may make it easier for competitors to coordinate price increases.[122] In the mean time, more knowledgeable antitrust analysis has allowed the KFTC to find and advance several ways of establishing the required competitive harm, for example, by showing barriers to entry or excess capacity in addition to the mere market shares of the alleged conspirators.[123]

Nonetheless, a consistent, cautious approach continues to be necessary as long as the presumption clause remains to stand out in Korean antitrust. In general, at the heart of Korean antirust practice for collusive parallel pricing is the extent to which the competitive harm requirement and the procedural instrument affect relevant parties in a way that shifts a higher or lower burden of showing concerted conduct. In practice, the outcome of parallel pricing cases should be contingent upon how the presence and magnitude of competitive harm can be technically adjusted in any given fact pattern, and due consideration should be taken into as for defendants' rational and legitimate reasons or explanations of parallel pricing.

KEY WORDS: Korean antitrust, parallel pricing in Korea antitrust, conscious parallelism in Korean antitrust, Korean antitrust, proof of price-fixing, presumption of agreement(s)

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122) *See, e.g.*, Judgment 2004-255 of August 31, 2004, *2004GongDong0998* (Korea Fair Trade Commission), *in re* Collusion of Thirteen Corrugated Cardboard Manufacturing Companies; *See* Judgment 2002-225 of Oct. 31, 2002, *2002DokGoan1057* (Korea Fair Trade Commission), *in re* Collusion of LG-Caltex Corp. and SK Gas Corp; *in re* Request for Reversing Corrective Orders on Collusion of Four Credit Card Companies, *supra* note 46.

123) *See* KOREA FAIR TRADE COMMISSION, STANDARDS OF REVIEW FOR COLLABORATIVE ACTIVITIES, *supra* note 116.