Pervasiveness of Price Fixing in Korea: An Analysis of Causal Factors in Comparison with the United States

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Price fixing is one of the most serious forms of corporate crime, but is rarely recognized as such by the public. For consumers, price fixing has a direct impact, as it raises prices and reduces choices. The scrutiny against, and prosecution of, such anticompetitive practice is important not only to protect the consumer but also to uphold free and open competition in the economy. Even though government administrators and policymakers fittingly perceive the illegality of the practice and its severity, the extent to which anti-competitive legislation is enforced varies greatly from country to

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country. For example, although South Korea is known to be a country with a relatively high level of cartel activities, its antitrust laws and actual prosecution of corporations engaging in price fixing have been found to be lax. On the other hand, the United States, the nexus of global trade and world markets but also a business-friendly country, is known to have relatively low-level cartel activity. The question is: What accounts for the fact that price fixing scandals have become a pedestrian phenomenon in South Korea? This paper provides a comparative analysis of the nature of price fixing in South Korea and the United States, arguing that price fixing occurs more frequently in Korea because of its lax laws against price fixing, as evidenced by moderate fines and penalties. The paper also identifies the factors that account for the lenient laws against anticompetitive activities in South Korea, and explores ways to improve mechanisms to deter those activities.

Key Words: Price Fixing, Cartel, Corruption, Korea Fair Trade Commission, Sherman Act, Antitrust Law, Competition Law, Collusion

I. Introduction

Price fixing is a universal problem affecting practically every society from east to west, and is an issue of interest to not only policymakers but also to the public who, as consumers, bear the brunt cost of the illegal practice. Price fixing occurs when colluding partners agree to set prices, thus manipulating the competitive economic environment and keeping consumer prices artificially higher as to avoid competition that can cut into profit. Price fixing is a cancer-like process that first destroys the system of fair competition in an economy and then slowly spreads to other sectors of society to ultimately bring about a breakdown of the social system. In addition to its expansive impact, the problem of price fixing is its clandestine nature, meaning that it is carried out furtively, slyly, and of course, illegally.

These aspects alone mean price fixing has all the elements of corruption. Price fixing, hitherto insufficiently recognized as one of the most damaging forms of corruption, not only weakens the competitiveness of firms but also undermines the value of democracy, the rule of law, and sustainable development. Moreover, price fixing will lead to a loss of confidence and trust in firms, which can lead to an overall loss of trust in society. All of this makes price fixing one of the most damaging forms of corruption in the private sector. In the past, discussions of the issue of corruption have been mostly limited to the public sector, as the problem has been narrowly seen as the abuse of public power for private gains. Recently, however, corruption has been increasingly recognized as a pervasive problem affecting the private sector as well. These discussions resulted in the establishment of the United Nations Convention against Corruption (UNCAC) in 2003.[1]

Price fixing continues to be a significant part of the landscape of corporate crime in South Korea (henceforth Korea), for it occurs with great regularity and has involved a wide array of goods and services. From 1981 to 2012, 899 cases of various forms of price fixing were identified that faced administrative or criminal sanctions, including charges of production restriction and bid rigging (Korea Fair Trade Commission, 2013). Since the mid-2000s, the number of such cases has increased, jumping from 44 cases in 2007 to 65 cases in 2008, 61 cases in 2009, 62 cases in 2010, and 71 cases in 2011.[2] Still, between 2006 and the first half of 2010, only 15 cases were handed over to prosecutors and only four individuals involved in cartel agreements faced charges (Kwon et al., 2011: 119). The cases of price fixing that faced either administrative or criminal sanctions involved, among others, such

1. The United Nations Convention against Corruption (UNCAC) was the first legally binding international anti-corruption agreement. Its aims include preventing corruption, criminalizing such acts of corruption as bribery and embezzlement, and strengthening international cooperation in investigation, enforcement and prosecution of offenders.
2. In 2011 alone, the Korea Fair Trade Commission (KFTC) reportedly identified 990 cases of suspected collusion on price fixing. However, only 71 cases faced either administrative or criminal sanctions.

products and services as beverages, insurance, home appliances, noodles, sugar, flour and gas. Most of the colluders were conglomerates (*jaebeol*). For example, in February 2009, the five largest beverage companies in Korea, including Coca Cola Korea, were charged with colluding for the purpose of a price hike from February 2008 to February 2009 (*The Korea Times*, August 16, 2009). In October 2011, twelve life insurance companies — including the biggest names in the insurance industry such as Samsung, Kyobo, ING and Metlife — were fined a total of 365.3 billion won (US$ 315 million at the exchange rate of 1,100 won per US$ 1) by the Korea Fair Trade Commission (KFTC) for price fixing (*The Korea Herald*, October 14, 2011). Through collusion, these companies raised the insurance premium charged to customers and reduced insurance payouts. In January 2012, KFTC fined Samsung Electronics and LG Electronics a total of 44.64 billion won (US$ 40 million) for fixing the prices of laptop computers, flat panel TVs, and washing machines (*The Korea Herald*, January 12, 2012). Then again in March 2012, KFTC charged four major local noodle makers a combined fine of 135.4 billion won (or about US$ 122 million) for fixing the prices of ramen over many years (*Dong-A Ilbo*, March 22, 2012). The clandestine deals were made under the disguise of an exchange of market information. Noodle manufacturer Nongshim, which has a more than 70 percent market share of ramen, allegedly raised its price first and other co-conspirators followed suit.

A report by KFTC shows that Korean firms have been actively involved in price fixing overseas as well. According to the document, they have been slapped with a total of 2.4 trillion won (US$ 2.1 billion) in fines by overseas antitrust regulators over the past 15 years (*The Korea Times*, February 28, 2012). In the United States alone, three of the ten largest fines levied to date for price fixing have involved Korean conglomerates. Also, Korean firms have had to pay about US$ 1.27 billion in antitrust fines since 2005, and 15 Korean executives have faced criminal charges in the country. The total is the second-largest nationally accumulated figure in the United States, following Japan whose firms accrued a total of US$ 1.36 billion in fines during the same period.

In contrast to the frequent occurrences of price fixing by Korean firms at home, the United States seems to have more successfully deterred anticompetitive collusive activities, as evidenced by a smaller number of prosecuted cases, despite its huge economy nearly 14 times larger than that of Korea in terms of total GDP. Even among the prosecuted cases in the United States, many involve foreign companies, since the Sherman Act — the first and most significant U.S. antitrust law — can be applied to foreign business conduct that affects commerce in the United States (see Sprigman, 2005). One of the most recent cases of sanctions pertains to AU Optronics, a Taiwanese company fined a total of US$ 500 million in September 2012 for its role in a global LCD screen price fixing collusion (*The New York Times*, September 20, 2012). The company's former president and executive vice president were each sentenced to three years in prison. In the same year, the Japanese-based DENSO Corporation, along with four other companies, was found guilty of colluding to fix prices for heater control panels in cars sold in the United States. DENSO Corporation, along with its co-conspirators Furukawa Electric Co. and Yazaki Corporation, entered guilty pleas and were forced to pay more than US$ 748 million in criminal fines (U.S. Department of Justice, April 26, 2012). Also, nine DENSO executives were each sentenced to 1-2 years in prison. In 2007, the Department of Justice found British Airways and Virgin Airways to be guilty of colluding to fix fuel surcharge prices between 2004 and 2006. Although Virgin Airways was granted immunity, British Airways was fined US$ 300 million. There were also prominent cases involving Korean conglomerates. In 2008, the U.S. Department of Justice levied US$ 400 million in fines against LG Display for fixing the price of its thin film transistor liquid crystal display (the TFT-LCD). At the time, this was the second-largest antitrust fine ever levied by the U.S. Department of Justice. In 2005, Samsung Electronics was fined US$ 300 million for manipulating the price of dynamic random access memory (DRAM) chips. Its colluding partners — Hynix, a Korean manufacturer, and Infineon Technologies AG, a German manufacturer — were forced to pay US$ 185 million and US$ 160 million fines, respectively. In another case that incurred a large fine, Korean Air

was charged with price fixing on passenger and cargo flights along with its competitors, and was ordered to pay a US$ 300 million fine.

These cases reveal two important and contrasting features. First, the number of price fixing cases in the United States is far smaller than in Korea. Second, the United States has a very strict law against price fixing, as manifested by the fact that guilty parties, including company executives, face criminal charges and enormous fines, penalties that are much more severe than those applied in Korea. The question is: What is the nature of laws against price fixing in the United States versus those in Korea? How has the former been more successful in curtailing this serious corporate crime? In spite of the importance of the above questions, to date there has been scant, if any, scholarly attention paid to these issues. This study attempts to redress this imbalance by comparing the nature and prosecution of price fixing in the United States and Korea. It demonstrates that the two countries are starkly different in terms of the frequency of this type of corruption, as well as in the rate of prosecution against colluders, and in the level of penalty levied against the perpetrators. The paper also explores the reasons for the greater frequency of price fixing in Korea, and offers practical policy suggestions to alleviate the problem.

II. Price Fixing: Definition and Characteristics

Price fixing is a criminal activity where competing businesses collude to fix or raise prices for their services or products rather than allowing them to be determined naturally through real competition or free-market forces (see Connor, 2008; Marshall and Mark, 2012; Kaplow, 2013). Price fixing also occurs when suppliers maintain their price at a certain level by controlling supply. There are many different ways in which price fixing is carried out: manufacturers and retailers conspiring to sell at the same retail price; limiting discounts; setting common after-service privileges; establishing uniform costs and markups; setting a common minimum sales price; adhering to a list price; adhering uniformly to terms of sale; and discontinuing a free service (Office of Fair Trading, 2004: 14). In general, price fixing involves conspiracy on the part of sellers to push the price of a product or service as high as possible, leading to greater profits for sellers and precluding the public from the benefits of price competition. That is why most countries have antitrust legislation, which makes it illegal for businesses to conspire with competitors to fix prices.

While there is a broad range of price-fixing behavior, there are basically two types of price fixing: vertical and horizontal. Horizontal price fixing occurs when competitors at the same level of distribution agree to establish maximum or minimum prices for their goods or services, e.g. all supermarkets in one neighborhood selling bags of potato chips at the same price. One of the most recent cases of horizontal price fixing is the case involving, as noted above, a number of airlines that were fined heavily for fixing fuel surcharges between 2004 and 2006. Vertical price fixing, on the other hand, involves price fixing among partners at different levels of distribution, such as manufacturers and wholesalers setting a maximum or minimum price at which retailers can sell certain products. For example, a high-quality jeans manufacturer may not permit discounting at a retail level in order to maintain its name value and status as a premium good. This is known as resale price maintenance (RSM) (Jones and Turner, 2010: 83; see McMurray, 2012).

A useful concept in discussing price fixing is the idea of the cartel. It refers to an agreement among competing firms to manipulate prices for the purpose of maximizing profits (Kim, 2007). More conventionally, a cartel is a group of businesses or countries that is formed to limit competition by controlling or monopolizing production and distribution of a product or service (see Wells, 2002; Freyer, 2006; Levenstein and Suslow, 2006). A cartel also regulates supply in order to control, fix or manipulate prices. Cartel members can violate the principle of free market competition by colluding on such matters as price fixing, bid rigging, total industry output, allocation of territories and customers, establishment of common sales agencies or any combination of these factors. Antitrust laws found in practically all nations

forbid private cartels,[3] but proving the existence of a cartel is reportedly very difficult.

The leading groups in analyzing cartels are the "Chicago school," particularly Robert H. Bork, Richard A. Posner, and Frank H. Easterbrook, and the mainstream economist school. There are no real ideological differences between the two schools of thought, but they differ in their degree of emphasis on the role of government regulation in proving the existence of cartels. While the Chicago school believes that government regulation plays an important role in hindering the formation and continuance of cartels, the mainstream economist school holds that the government's role is minimal. Representative theories on the formation of cartels are provided in Stigler (1964) and Osborne (1976), where Stigler argues simply that cartels are formed when the expected profit from price fixing exceeds the anticipated revenue from business deals without price fixing. Osborne, on the other hand, lists four conditions under which cartels are formed: 1) potential competitors can expect mutually satisfying levels of output and profit; 2) there must be strict rules on the allocation of market shares; 3) in order to enforce the cartel agreement, there must be schemes to resist those competing firms that try to break the cartel; and 4) there must be strategies to suppress the growth of external competitors and to block their entry into the given industry.

In dealing with the problem of price fixing, two strategies are widely used by governments in many parts of the world. The first is to implement a control mechanism in which price fixing is punished severely so that the cost in the form of penalty far exceeds the profit gained through the illegal process. The second is an incentive mechanism through which businesses involved in price fixing are encouraged to report on their illegal activities by giving them either amnesty

3. There is one noteworthy exception. Cartels are illegal in the United States, but the Organization of Petroleum Exporting Countries (OPEC), arguably the world's largest and most powerful cartel, is protected under the country's foreign trade laws. There have been attempts to penalize OPEC, but to no avail, as political and diplomatic considerations as well as concerns over the U.S.'s own economic interests prevailed.

or a reduction in penalty. Further discussions on these two strategies are provided below.

III. Laws and Penalties Associated with Price Fixing in the United States and Korea

A. The United States

In the United States, Section 1 of the Sherman Act of 1890 provides the basic legal framework with which price fixing cases are prosecuted. Several other antitrust acts were enacted to complement the Sherman Act, including the Clayton Act of 1914, the Federal Trade Commission Act of 1914, and the Robinson-Patman Act of 1936 (see Letwin, 1981; Sullivan, 1991; High and Gable, 1992). These acts were designed to prohibit anticompetitive practices, including price fixing, while at the same time preventing unreasonable concentrations of economic power that could undermine competition. A significant landmark in legal framework for trade was the establishment of the Federal Trade Commission (FTC), which formalized rules for fair trade and had the power to investigate and enforce laws against unfair trade practices. Since the end of World War II, antitrust enforcement increasingly came under the administration of both the Antitrust Division of the Department of Justice and the FTC. After 1992, the enforcement mandate of the Department of Justice was expanded to include the investigation of foreign companies suspected of price fixing activities.

Section 1 of the Sherman Act declares 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 hereby declared to be illegal." The broad common-law concepts and general meaning of the passage meant it lacked detail, but has been refined through judicial decisions over the years. Section 1 violations are categorized into two types: actions that can be regarded as "per se" violations, and those that are assessed in view of the "the Rule of Reason" (see Posner, 2002; Hylton, 2003; Mann and Roberts, 2004). Per se violations refer to restraints on trade that are conclusively

considered to be anticompetitive and therefore require no presentation of evidence (Greenberg, 2011: 447). Examples of per se violations include horizontal price fixing, cartels, and group boycotts (Jones and Turner, 2010: 84). Assessing potential violations under the Rule of Reason is more complex, as the court has to look into a number of factors to decide whether a particular trade activity has unreasonably restricted competition. The court thus considers such factors as the composition of the relevant industry, the defendant's status within that industry, and the defendant's intent in its adoption of the restraint. Vertical price fixing used to be treated as a per se violation, but was incorporated into the Rule of Reason category in 2007 by a controversial Supreme Court ruling (Gift, 2009: 1). As a result, it has become increasingly difficult to prosecute cases involving vertical price fixing. To date, horizontal price fixing, which is much more violated type of the two, remains per se.

As noted above, a general trend in the United States is to deter price fixing not only by imposing exorbitant fines but also through the criminal prosecution of individuals. In 1974, a violation of Section 1 of the Sherman Act became a felony with a maximum prison sentence of up to three years per count. The statutory maximum fine for individuals under the law was also increased from US$ 100,000 to US$ 350,000 (Golub et al., 2005: 5). For corporations, the maximum fine increased ten-fold, soaring from US$ 1 million to US$ 10 million in 1990 (*Ibid.*). Moreover, from 1987, prosecutors have been empowered to charge corporations a higher fine than the maximum, based on the company's net sales. So while the current maximum penalty for individuals is a US$ 10 million fine and a ten-year prison sentence, and for corporations the maximum fine is US$ 100 million, the amount can be raised above the maximum to twice the financial gains made through price fixing (U.S. Department of Justice, April 26, 2012; cited from Kim et al., 2012: 23), which explains why some fines levied against violating corporations amount to hundreds of millions of dollars. All of these new provisions, of course, are intended to consolidate the ability of the Department of Justice to impose heavy penalties that would ultimately deter corporations from engaging in price fixing.

A discussion of American antitrust laws could not be complete without mention of the leniency policy. It is a controversial policy that serves as a "carrot" inducing colluders to voluntarily divulge evidence of their anticompetitive activities. Under the policy — implemented in 1978 — the "cooperating" firm receives some form of leniency, e.g., reduced fines or amnesty (see Zingales, 2008). There are many conditions for granting leniency, but the most important ones seem to be that a corporation must report its illegal activity before an investigation begins, thus becoming the first to report the illegal activity. As a result, firms race to submit applications for leniency, to be the first to destabilize the cartel in return for more "favorable" penalties. It is worth noting, however, that the leniency policy in the United States is provided hand-in-hand with a firm "stick," meaning that corporations and individuals implicated in anticompetitive activities face harsh penalties. Thus, the policy is only meant to facilitate more effective ways of encouraging colluding firms to come forward with their illegal activities and help with an investigation. Over the past fifteen years, the Department of Justice (2012) has levied fines exceeding US$ 5 billion against firms for their anticompetitive activities, and in accordance with the spirit of free and fair competition, many executives implicated in price fixing have received prison sentences.

B. Korea

The Korea Fair Trade Commission (KFTC) oversees the enforcement of the Monopoly Regulation and Fair Trade Act (MRFTA), which was enacted in 1980 to regulate collusion and investigate price fixing. Like Section 1 of the Sherman Act, Article 19 of MRFTA prohibits:

> contract, agreement, resolution or any other means by and among enterprises, that unreasonably restricts competition, to engage in concerted practices (i) fixing, maintaining or changing price, (ii) determining terms and conditions of trade, (iii) restricting production, delivery, transportation or trade, (iv) restricting territory or customers, (v) restricting the establishment or extension of facilities, (vi) restricting types or specification for the production or trade of goods, (vii) establishing a company,

etc., to jointly carry out or manage material parts of a business, or (viii) that substantially suppresses competition in a market by means of interfering with or restricting other person's business (Lee, 2005: 158).

According to the Enforcement Decree of the Monopoly Regulation and Fair Trade Act, violations of fair competition, including price fixing, are subject to a surcharge of three to ten percent of the sales turnover in the affected market. In cases where such revenues cannot be determined, the surcharge can range between 500 million won (US$ 450,000) and 2 billion won (US$ 1.8 million) (Seul, 2010). This surcharge can only be applied, however, to firms that occupy "market-dominant" positions in a given industry, meaning that they either hold over 50 percent of the market share or have annual sales revenue of at least one billion won (about US$ 900,000). What this means in practice is that KFTC's administrative sanctions are toothless and ineffective: the maximum fine the watchdog can levy against cartels is only 10 percent of estimated revenue from collusion, and KFTC has rarely ever pushed for violators to be sentenced to prison terms. To make matters worse, KFTC does not even levy this maximum fine. In 2011, for example, KFTC decided to levy administrative sanctions, in the form of fines, against firms implicated in 13 cases of price fixing. Cartel member sales revenues from the affected markets amounted to about 23 trillion won (or about US$ 20.1 billion), but the total fines amounted to only 469 billion won (or about US$ 430 million), which represents less than two percent of the illegally gained revenue (People's Solidarity for Participatory Democracy, 2012; cited in Oh, 2012: 51). Although the surcharge is unreasonably low, firms charged with price fixing have increasingly challenged KFTC's corrective orders. Indeed, prior to 1994, Korean firms rarely appealed corrective at the Seoul High Court (the appellate court), but such challenges have significantly increased since then (Lee, 2005: 157).

The leniency policy was implemented in Korea in 1997, and holds that the first firm to report the existence of a cartel be granted immunity from both administrative and criminal sanctions (Kim and Kim, 2010; Choi, 2011). It also makes provisions for the second company to

divulge information on cartel agreements, which gets a 50 percent reduction in fines. Other co-conspirators who cooperate with the KFTC investigation also get various levels of fine reduction. Offering a sliding scale in fine reduction is meant to encourage a "race to confess" among cartel members. Along with the leniency program, there is also a program called the "Amnesty Plus," which is designed to enable an implicated company to gain immunity from penalty if it provides information or evidence on another price-fixing case.

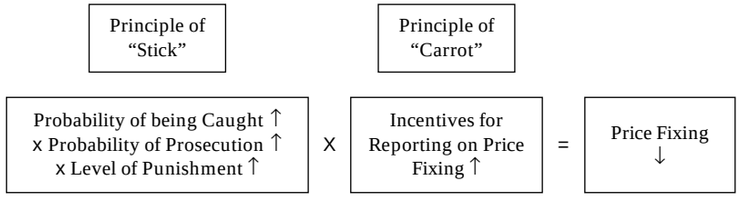
IV. Efficiency in Curtailing Price Fixing in the United States and Korea: A Comparison

This study affirms the work of Kim et al. (2012), who have shown that the United States has more successfully handled the illegal practice of price fixing not necessarily because of a more effective legal framework, but rather because of its more effective enforcement capacity (i.e., exorbitant fines for corporations and prison sentences for individuals). Indeed, what we learn from our analysis is that the simultaneous use of carrots and sticks is much more effectively implemented in the United States than in Korea. In the United States, the court's unforgiving rulings on company executives, the public nature in which price fixing cases are prosecuted, and the utilization of an effective leniency policy have all contributed to the curtailment of cartel activities in the country.

Susan Rose-Ackerman's (1978) work on "expected cost theory," which refers to the conceptualization of ways to eradicate corruption by restructuring legal and institutional frameworks, is useful in capturing the balanced approach of the United States to combat corruption in general and price fixing in particular. Ackerman argues that incidents of corruption will decrease if the cost or risk is too high (i.e., corruption is likely to decrease if the probability of being caught is high); if the probability of prosecution is high for the offender; and if the probability of severe penalty is high. While this theory was generated with the aim of reducing corruption in general, it is equally

applicable to the problem of price fixing. Rose-Ackerman's theory is closer to the principle of using the "stick" to curtail corruption, but the general legal and institutional mechanisms to combat corruption typically employ the "carrot and stick" strategy, as in the American example (see Figure 1).

Figure 1. Approaches to Deterring Price Fixing Activities



Korea has supposedly been striving to strengthen its laws against price fixing, especially since 2000 amid a worldwide movement to deal strictly with corporate cartels (see Kim, 2008; Kim and Chun, 2011). However, Korea's efforts to curb price fixing have been far from successful. Indeed, the number of price-fixing cases has increased over recent years, and even the leading *jaebeol* have been frequently — even repeatedly — involved. The corruption, moreover, affects, a wide array of consumer products and services, so much so that it is believed that cartels have spread to practically all Korean industries, including those considered as basic necessities such as foods and fuel. The fact that the leading culprits of price fixing in Korea are large conglomerates that account for a disproportionately large share of the country's economy makes the issue that much more urgent and compelling. The Korea Fair Trade Commission estimates that the damage from price fixing suffered by consumers between 2006 and July 2010 was about 11.4 trillion won (or about US$ 10 billion) (Kwon et al., 2011: 118).[4]

Price fixing occurs with greater frequency in Korea because of

4. This is based on an OECD standard that stipulates damage amounts to about 15-20 percent of the total revenue gained from price fixing.

corporate governance and lax laws. Of foremost importance is the fact that, in contrast to the United States, the Korean economy is led and dominated by conglomerates. What this means is that the watchdog in Korea is pressured by the central government and even the media not to impose overly burdensome fines against big corporations said to be the "engines" of the Korean economy based on the presumption that this would impede their performance in and outside of Korea. Perhaps it is because of this that conglomerates believe they are "too big" for the government agency to impose heavy penalties on, allowing them to continue to engage in price-fixing activities. As a report by the Citizens' Coalition for Economic Justice (2010) demonstrates, the extent to which Korean conglomerates have engaged in cartel activities is worrisome, accounting for about 75 percent of fines levied against firms for cartel activities, and for about 65 percent of all damages suffered by consumers. Korean laws against collusion are also egregiously lenient because of the government's persisting "economic growth first and foremost" policy. Given the differential in success, perhaps the Korean government should pay closer attention to what happened in the United States more than a century ago. The Sherman Act came into being as early as the 1880s because the federal government realized how its big business growth policies began to threaten the country's business climate. Corporate holding companies in the form of trusts developed into unbridled power, consolidating an enormously large share of manufacturing and mining industries into virtual nationwide monopolies thereby undermining free market competition. The United States model could work for Korea, since large conglomerates, which are the culprits in most significant cases of price fixing, similarly dominate the Korean economy.

A second reason for the difference between the two countries in regard to the greater pervasiveness of price fixing in Korea pertains to the characteristics of their economies. The United States boasts an economy that has actively pursued a policy of deregulation. Korea, on the other hand, has relatively more regulations and restrictions when it comes to economic activities. To get around the barriers that corporations perceive as unnecessary or counterproductive, Korean firms

seem to engage in price fixing.

Lax laws against price fixing also contribute to the persistence of the illegal activity in Korea. Simply put, penalties and fines levied against firms involved in cartel agreements are too lenient. Indeed, price fixing occurs much more frequently in Korea precisely because charges against price fixing are rare, chances of actual prosecution are even more rare, and for those cases that are prosecuted, the level of punishment is much less severe in Korea compared to the United States. A part of the reason is that KFTC is reportedly not wholly free from pressure of the economy-related ministries not to levy overly burdensome fines against cartel members, a large majority of which have been conglomerates. Cartel agreements thus persist in Korea because the financial gain from them is much greater than the cost of penalty or punishment. Fines levied against the penalized firms themselves are low, but the actual amount paid by these companies is even lower, because they settle for far less in fines through negotiations and lawsuits. Fines against the cartel members are so low that they become repeat offenders. One clear example of this is the aforementioned 2012 case involving Samsung Electronics and LG Electronics. It was the third violation for these companies over four years: in 2010 the two companies were levied fines when they were found to have fixed the prices of air conditioners and televisions sold to government offices; then in 2008 they were involved in price fixing over laptop and television products. The fact that the two electronics giants currently dominate the local electronics market and hold a combined market share of more than 90 percent of washing machine and flat panel TV sales and 58 percent of laptop computer sales reflects how deep-seated price rigging practices are among Korean conglomerates.

Another reason cartel activities continue unabated in Korea is that the individual who engages in cartel agreements on behalf of a firm is practically never punished. Cartel cases are handled by KFTC, but it prefers administrative sanctions over criminal sanctions, meaning that corporations and their agents who engage in cartel agreements are not likely to face criminal sanctions.

Two additional factors must be taken into account when pinpointing the cause of Koreans' proclivity to engage in anticompetitive practices: cultural practices and structural issues. Kwon (2003: 4) argues that Korean culture, strongly influenced by Confucianism, has traditionally emphasized harmony and cooperation as well as mutual help and benefit over competition. Thus even in its earliest days, Korean society had relatively little experience with the positive function of competition. Kwon (2003: 4) argues that for competition to become the norm in Korea, Korean society has to become more individualistic in orientation, democracy needs to be more consolidated, and its economy has to become fully industrialized. Kwon (2003: 5) further surmises that collusion persists in Korea because Korean people and corporations are still relatively inexperienced with the system of free and fair market competition. Additionally, Korean society has long emphasized inter-competition (i.e. competition with the outside world, especially industrialized nations) over intra-competition (i.e., competition among Korean firms within Korea). One opinion has become prominent over recent years, which holds that Korean firms need to cooperate to compete effectively against the external "enemy," namely non-Korean multinational corporations.

So, what can be done to alleviate the widespread persistence of price fixing in Korea? Oh (2012) argues that it is necessary to amend the Monopoly Regulation and Fair Trade Act and suggests several measures that could be implemented to help deter price-fixing activities. First, consumers who become victims of price fixing should be allowed to file class action lawsuits against cartels, as is the case in the United States. Second, the overall penalty against cartels should be greatly increased by incorporating punitive damages into administrative sanctions, so that the fines can amount to three times the total of real damages. Third, as of now only the KFTC has the power of discretion to file a criminal referral against corporations suspected of engaging in price fixing. That is, corporations can be prosecuted only if KFTC files a criminal referral to prosecutors, who do not have the power to initiate a criminal investigation on their own. Such exclusive authority of the KFTC should be abolished, so that prosecutors are also granted the authority to initiate investigations into suspected

cases of collusion. Finally, the leniency program should be amended so that even the first company to report collusion is not wholly immune from paying a fine. Korea must join the ranks of economically advanced nations where the penalties for price fixing are so great that violating companies can suffer losses that significantly damage their ability to continue business. The KFTC should also drastically increase the penalties against repeat offenders. Imposing criminal punishment — in the form of prison sentence and fines — on indicted individuals should also be an available measure in the process of rooting out price fixing.

The mechanisms that United States has crafted to deter price fixing could also offer an important lesson for Korea. In the United States, antitrust practices are discouraged using many mechanisms, the most important of which is the availability of maximum penalties for such behavior. This came about especially with the 2004 signing of a legislation by the then President George W. Bush that drastically raised the maximum penalties against white-collar crime, particularly those affecting consumers. Under the new law, maximum corporate fines were increased ten-fold and possible prison sentences and fines for individuals were tripled. Enforcement of such penalties has equally been stern. In some cases, moreover, the Department of Justice has required indicted firms to make public apologies via printed media. It is because of these austere mechanisms that companies are encouraged to take advantage of the leniency program, because the failure to do so can have grave consequences. However, even the leniency policy in the United States is more efficient than its Korean counterpart, since only one party can qualify for leniency, while in Korea the first two parties to report cartel activities benefit, as illustrated by the 2008 LG and Samsung case. Even in cases involving multiple cartel members, the KFTC has measures to reduce fines. The leniency policy in the United States rightly embraces the prisoner's dilemma as an either-or scenario, where only one party can benefit from cooperation with the watchdog agency, thereby destroying trust among cartel members and discouraging repeated offenses. The U.S. model ultimately encourages corporations and individuals to report on their cartel activities, because only the first one to do so gains all the benefits while all others in collusion face grave consequences, including exorbitant fines and prison sentences. In Korea, on the other hand, meager fines and penalties against price fixing have failed to send a strong message of deterrence. Unless the potential negative consequences of collusion do not greatly outweigh the potential benefits of collusion, firms have very little reason not to engage in price fixing, as is the case in Korea. Therefore, if the Korean government is serious about eradicating price fixing, it must begin by levying penalties that are so great that violating companies suffer losses that can significantly damage their ability to continue their business.

V. Conclusion

Price fixing ultimately impacts not only consumers but also businesses, economies and the nation. As prices increase under corruption, fair competition is undermined, choice reduced, democracy weakened, and society-wide mistrust generated. As this paper has shown, price fixing in Korea is widespread, and affects a broad range of products and services, especially those of conglomerates. The biggest factor in the continued expansive violation of antitrust legislation in Korea has been the lack of severe penalties. What the United States government does against price fixing provides a good model for Korea, since it addresses many of the problems the nation faces. It is because the United States, albeit its reputation as a country with an excellent business-friendly environment, takes the idea of free market competition seriously. That is why the country hands out severe penalties against perpetrators of price fixing. Individuals in the U.S. involved in cartel agreements have been routinely sent to prison, and corporations have faced fines reaching hundreds of millions of dollars. The message is unequivocal: it does not pay to engage in price fixing, for the company loses much more than it gains. Between legal fees, fines, and compensation to consumers, prosecution often puts a company in danger of bankruptcy. For the individuals tasked with

arranging a cartel agreement, the prospect of spending time locked up in prison sends a very powerful message. Very few individuals, if any, would be willing to risk all for their companies.

In contrast to the United States, Korean laws against collusion are egregiously lenient. Such leniency is caused in no small part by the Korean government's business-friendly policy and persisting focus on "economic growth first and foremost." Its leniency policy is abused, and during investigations into suspected price fixing, corporations involved in collusion — perhaps based on a tip by an insider — can take advantage of the program by immediately reporting their anti-competitive practices to authorities. Given the fact that the same corporations are sometimes investigated repeatedly, it is believed that they take turns to be the first to report their cartel practices to authorities. The first whistleblower, of course, walks away with full immunity, free from any type of prosecution, including fines. Even for other partners, heavy fines are seldom levied. Moreover, no matter what the fines are, corporations end up paying substantially less through negotiations and lawsuits. So, what is the unintended message in Korea? It pays to engage in price fixing.

References

Ashenfelter, Orley C. and Kathryn Graddy, "Anatomy of the Rise and Fall of a Price-Fixing Conspiracy: Auctions at Sotheby's and Christie's," *Journal of Competition Law and Economics*, Vol. 1, No. 1 (2005).

BBC News, "BA's Price-Fix Fine Reaches £270m," August 1, 2007 ([http://news.bbc.co.uk/2/hi/business/6925397.stm]).

Choi, Yun Jeong, "An Empirical Analysis of the Corporate Leniency Program in Korea: Its Amendments in 2005," *Hangukgyeongjehakbo*, Vol. 18, No. 2 (2011).

Citizens' Coalition for Economic Justice, Press Release, October 19, 2010.

Connor, John M., *Global Price Fixing* (New York: Springer, 2008).

Dong-A Ilbo, "Ramyeon Gagyeok Damhap Anhae … Hal Iyudo eopda" [Nongshim: We Didn't Engage in Price-Fixing … There is No Reason for It], March 22, 2012.

Freyer, Tony A., *Antitrust and Global Capitalism, 1930-2004* (Cambridge: Cambridge University Press, 2006).

Gift, Paul, "Price Fixing and Minimum Resale Price Restrictions Are Two Different Animals," *Graziadio Business Review*, Vol. 12, No. 2 (2009).

Golub, Alla, Joshua Detre, and John M. Connor, "The Profitability of Price Fixing: Have Stronger Antitrust Sanctions Deterred?" Paper presented at the International Industrial Organization Conference 3, Atlanta, GA, April 8-9, 2005.

Greenberg, Brad A., "The News Deal: How Price-Fixing and Collusion Can Save the Newspaper Industry—and Why Congress Should Promote It," *UCLA Law Review*, Vol. 59 (2011).

High, Jack C. and Wayne E. Gable (eds.), *A Century of the Sherman Act: American Economic Opinion, 1890-1990* (New York: University Publication Association, 1992).

Hur, Sun and Hwang Lee, "Requirements for Determining Illegality of Price Fixing and Hard Cartel: Focusing on the Deliberation by The Fair Trade Commission Regarding the Limitation of Competition," *Journal of Competition*, No. 117 (2005).

Hylton, Keith N., *Antitrust Law: Economic Theory and Common Law Evolution* (New York: Cambridge University Press, 2003).

Jones, Bryce J. and James R. Turner, "The Fall of the Per Se Vertical Price Fixing Rule," *Journal of Legal, Ethical and Regulatory Issues*, Vol. 13, No. 2 (2010).

Kaplow, Louis, *Competition Policy and Price Fixing* (Princeton: Princeton University Press, 2013).

Kim, Andrew Eungi, Ben A. Sommers, and April Kim, "Price Fixing in the United States and Korea: A Comparison of Legal Frameworks, Punishment, and Impact," *Journal of the Corruption Studies Association of Korea*, Vol. 17, No. 4 (2012).

Kim, Doo Jin, "Gongjeonggeoraebeop Jiphangui Iwonhwareul tonghan Hyoyulseong Ganghwa Bangan" [Improving Efficiency

through Antitrust Dual Enforcement], *Beopjo*, Vol. 57, No. 11 (2008).

Kim, Hyeonsoo and Jae Nam, "Cartel Jajinsingoja Gammyeonjedoui Juyo Jaengjeomgwa Hyogwa Bunseok" [Several Topics in Cartel Leniency Program Implementation], *Eungyonggyeongje*, Vol. 12, No. 2 (2010).

Kim Iljoong and Soomin Chun, "Gongjeonggeoraebeopgwa Hyeongsa cheobeol: Hyeongsagobal Gyeoljeongyoinui Siljeungbunseok" [Fair Trade Law and Criminal Punishment: An Empirical Investigation on the Determinants of Criminal Accusation in Korea], *Hyeongsajeongchaek Yeongu*, Vol. 22, No. 3 (2011).

Kim, Na Young and Yung San Kim, "Jajinsingoja Gammyeonjedoui Hyogwawa Geu Gyeoljeongyoindeul" [The Determinants of Leniency Program Application and Its Effects on Antitrust Enforcement], *Saneopjojik Yeongu*, Vol. 18, No. 4 (2010).

Kim, Nam-su, "Gagyeokdamhapgwa Sobijapihaeguje Silhyoseong Jegobangan" [Study of Price-Collusion and Consumer Remedial Scheme], Unpublished Report (Seoul: Korea Consumer Agency, 2007).

Korea Fair Trade Commission, *2013nyeondo Tonggyeyeonbo* [2013 Yearbook] (Seoul: Korea Fair Trade Commission, 2013)

Kwon, Ohseung, "Urineun Wae Gyeonjaengeul Haeyahaneunga?" [Why Should We Compete?], *Gyeongjebeopyeongu*, Vol. 9 (2003).

Kwon, Soo-jin, Young-su Shin, Ho-ki Kim, and Munsook Choi, "Damhaphangwie daehan Hyeongsabeopjeok Daeeung Bangan" [Criminal Sanctions against Cartels], Unpublished Report (Seoul: Korean Institute of Criminology, 2011).

Lee, Min Ho, "Recent Developments in the Treatment of Collusion by Korean Courts," *Journal of Korean Law*, Vol. 4, No. 2 (2005).

Letwin, William, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1981).

Levenstein, Margaret C. and Valerie Y. Suslow, "What Determines Cartel Success?" *Journal of Economic Literature*, Vol. 64 (2006).

Mann, Richard A. and Barry S. Roberts, *Essentials of Business Law*, 8th Edition (Mason: Thomson / South-Western West, 2004).

Marshall, Robert C. and Leslie M. Marx, *The Economics of Collusion: Cartels and Bidding Rings* (Cambridge: The MIT Press, 2012).

McMurray, Nathan, "Losing Face. The North Face Hit with a Huge Fine for Retail Price Fixing," *Korea Law Today*, May 8, 2012.

Ministry of Legislation, Republic of Korea, *Monopoly Regulation and Fair Trade Act* (2002).

Office of Fair Trading, *Agreements and Concerted Practices: Understanding Competition Law* (December 2004).

Oh, Young-Jung, "Choegeun Gieop Damhaphangwiui Teukseonggwa Eokjebangane daehan Yeongu" [Study of Characteristics of Recent Cartels and Its Restraint Way], *Ingwongwa Jeongui*, Vol. 426 (2012).

Osborne, Dale K., "Cartel Problems," *American Economic Review*, Vol. 66, No. 5 (1976).

People's Solidarity for Participatory Democracy, "Jinanhae Bugwadoen Damhap Gwajinggeum, Maechulaekui 2%e Bulgwahae" [Fines Levied against Price Fixing Last Year Amounts to Only 2% of the Revenue], Press Release, March 26, 2012.

Posner, Richard A., *Antitrust Law*, 2nd Edition (Chicago: University of Chicago Press, 2002).

Rose-Ackerman, Susan, *Corruption: A Study in Political Economy* (New York: Academic Press, 1978).

Seul, Min Soo, "Gyujewanhwawa Gongjeong Georaebeopui Jeokyong: Haengjeongjidoga Gaeipdoen Gagyeokdamhapeul Jungsimeuro" [Deregulation and Application of Anti-Trust Law: Focusing on the Price-Fixing Involved with the Administrative Guidance], *Justice*, Vol. 118 (August 2010).

Sprigman, Christopher, "Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels," *The University of Chicago Law Review*, Vol. 72, No. 1 (2005).

Stigler, George J., "A Theory of Oligopoly," *Journal of Political Economy*, Vol. 72 (1964).

Sullivan, E. Thomas, *The Political Economy of the Sherman Act: The First One Hundred Years* (New York: Oxford University Press, 1991).

The Korea Herald, "Samsung, LG Fined for Fixing Prices of Home Appliances," January 12, 2012.

_____, "Insurers Fined W365b for Price-Fixing," October 14, 2011.

The Korea Times, "Conglomerates Fined 2.4 Tril, Won for Int'l Price Rigging," February 28, 2012.

_____, "Cable Firms Fined for Collusion," February 15, 2011.

_____, "Lotte Chilsung Fined for Collusion," August 16, 2009.

The New York Times, "Taiwan Company Fined $ 500 Million for Price-Fixing," September 20, 2012 [http://www.nytimes.com/2012/09/21/business/au-optronics-fined-500-million-in-us-price-fixing-case.html?_r=0].

U.S. Department of Justice, "DENSO Corporation Executive Agrees to Plead Guilty to Automobile Parts Price-Fixing and Bid-Rigging Conspiracy: Executive Agrees to Serve 14 Months in U.S. Prison," Press Release, April 26, 2012.

_____, "Korean Company Pays Second Largest Criminal Antitrust Fine in U.S. History," Press Release, October 13, 2005.

Wells, Wyatt C., *Antitrust and the Formation of the Postwar World* (New York: Columbia University Press, 2002).

Zingales, Nicole, "European and American Leniency Programmes: Two Models towards Convergence?" *The Competition Law Review*, Vol. 5, No. 1(2008).