John Sanghyun Lee

Strategies to Achieve a Binding International Agreement on Regulating Cartels

Overcoming Doha Standstill

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John Sanghyun Lee
Global Law Department,
College of Law
Soongsil University
Seoul
Korea (Republic of)

and

Golden Gate University School of Law
San Francisco, CA
USA

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Preface

A cartel, restricting competition among suppliers and getting rid of consumers' welfare, among other things, has been actively regulated mostly by advanced economies. International organizations tried to reach international agreement on competition law and policy, including cartel regulation. In spite of tens of countries in North America and Europe with experiences of serious law enforcement on competition law, such trials have faced hurdles since a multilateral negotiation on Doha Development Agenda (DDA) dropped competition policy from the discussion table in 2003. After dropping the issue, DDA has still produced few, if any, noticeable fruits. A different view between advanced economies and developing countries and its consequential rupture of the discussion are analyzed to be main factors of standstill of DDA.

In order to achieve a binding international agreement on cartels, international community needs to focus on hard core cartel (HHC) activities, narrower than its original definition, because most countries agree with the necessity of regulating such narrowed cartels and because international agreements have been developed with such focuses. Moreover, interstate commodity agreements (ICAs) or intergovernmental producers associations (IPAs) are to be treated differently under the area of international commodity law in light of international law history. Several cases of international cartels, made up of competing private companies, ICAs, and IPAs under suspicion of cartels are to be reviewed with in-depth research.

Four advanced countries, USA, UK, France, and Germany, with experiences of cartel regulations and competition law enforcements are to be addressed in contrast to examples of four developing economies, South Africa, South Korea, People's Republic of China, and Mexico, with less experiences than the four countries. Historic study of international development law and its results will be applied to international agreement on cartel regulation since such study on law sheds light on future international law on cartel regulation reflecting developing countries' interests.

Up until now, international competition law, particularly international agreement on cartels, has grown up centering on soft-law-typed multilateral agreements and binding-powered bilateral agreements. Based upon the observation and research on

international law development, two strategies, short-term and long-term approaches, are suggested for achieving a binding international agreement on cartels. By reducing fear of developing countries that international cartel regulation may seriously interfere with their economic interests, international organizations' efforts to have effective international cartel regulation can increase the probability of success.

Meanwhile, distinctive features of commodity led to international commodity agreements under the agenda of sustainable development, formerly defunct, requiring, for adjustment to current trade law system. The following are to be proposed for the adjustment: ①productivity-focused model and ②multilateral cooperation model to reflect multistakeholders' interests.

Seoul, Korea (Republic of) John Sanghyun Lee

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This book is a work which revised my doctorate thesis originally written in 2008 through reflecting on updated information. A substantial part of the book was influenced by expertise advice from my supervisors, Dr. Sompong Sucharitkul, Prof. Dr. Christian Okeke, Director of SJD International Legal Studies at Golden Gate University School of Law, and Prof. Bart Selden. Professor Sompong had guided me with his wisdom from his rich experience in international law areas until he retired. Professor Okeke encouraged me to pursue this research project, at its initial stage, and suggested several topics for further research. Professor Esq. Selden instructed the foundation of international trade law and business transactions through a series of lectures. This research would have followed a different path without their proper and insightful advice.

I would like to express my thanks to other professors and advisors at GGU. Professor Emeka Duruigbo taught the ways for a young candidate to develop his idea. Professor Michael Daw and Marienne Gerber enriched my research skills through Internet and legal databases. Professor Chris Pagano did not spare her time in giving special advice; she provided me with scholarship when I was admitted at SJD program. Mr. John Pluebell, Senior Academic Advisor, has enabled me to study without being interrupted by any administrative problem. His good works and counsel let me concentrate on researching.

Interacting with good colleagues who have had interest in international law or have sincerely pursued the same degree stimulated me so that I could develop this project seriously and eagerly. Among them, Justin, Nick, Peter, Art Gambell, Huon Thach, Nobert, Franzier Robhert, Joon-Kil Lee, and Patcharang were good friend who shared warm conversation. I would like to express my appreciation to SJD program at Golden Gate University School of Law for the precious opportunity of studying and communicating with students from all over the world.

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Contents

List of Figures

List of Tables

Chapter 1
Introduction

Abstract While competition law and policy has been spread to the international community under the auspice of advanced economies, particularly the U.S. and European Union (EU), there has been obstacles for adopting a binding international law on the area of competition law. A cartel, causing huge loss of consumer welfare, has been rarely under the serious regulatory power of international law. Reasons of such hurdles and delays as to regulate international cartels are to be examined with a clue on standstill of Doha Development Agenda, and research process on their solutions is to be demonstrated.

Keywords Competition law · Cartel · International competition law · International law on cartel · Research process

1.1 Hard Core Cartel Against Competition Law

A free market system based on both freedom of contract and protection of property principles operates challenged by demand and supply. Under the free market system, demand by consumers and supply by producers determine the price and quantity of a product. Competition policy leads suppliers to compete among themselves in sales terms or conditions. Competition toward attracting consumers through lower prices is an important principle for working a free market. Competition law is supposed to protect the functioning of the market.

However, it is against competition law principle for competitors to conspire to fix prices or to limit output. Price-fixing is the artificial setting or maintenance of prices at a certain level, usually higher than the level which would be normal without the price-fixing agreement. Sometimes, the competitors collude to maintain a level of production pre-arranged by themselves. Price-fixing and output restriction are typical to hard core cartels.[1] The hard core cartels cause diverse negative aspects to the economy.

[1] *Refer to* Chap. 2, Sec. 2.2, A for the definition of the 'cartel'.

J.S. Lee, *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, DOI 10.1007/978-981-10-2756-7_1

The hard core cartels take away consumers' benefits that competition among suppliers would have otherwise produced. Consumers in the normal markets purchase products by paying the price set by market mechanisms through the competition of suppliers. However, in a market where the sellers have agreed to set the price or the quantity of the product, consumers cannot avoid paying the higher price than in a market without the collusion.

In addition, cartels cause price-inflexibility regardless of a change in economic circumstances, thereby leading to malfunctions in a free market system. Such malfunction is due to restraining competition among suppliers as an essential element of the free market mechanism.

1.2 Spreading Competition Laws to the International Community

The U.S., as a leader in competition law enforcing countries,[2] has developed sophisticated jurisprudence in competition law since 1890 when it adopted the Sherman Act, the first modern competition law in the world. Price-fixing or output restriction has been treated as illegal under the application of the Sherman Act since *United States v. Trans-Missouri Freight Association* (1897).[3] Through accumulated cases,[4] the judicial branch in the U.S. has developed per se approach to hard core cartels without allowing reasonable justifications for the type of cartel. In addition, in the late twentieth century, especially since the 1990s, the U.S. has pursued the strongest antitrust penalty regime by punishing individuals as well as enterprises with heavy fines and even imprisonment. Moreover, the strict penalty has been strengthened with civil actions under Sec. 4 of the Clayton Act, which provide treble damages for recovery of victimized consumers of the cartels.

The European Union (EU), although some member countries have developed their own competition laws,[5] had not enforced competition law seriously until the Treaty establishing the European Community (EC) adopted a chapter regarding competition law in the late 1950s. EU devoted significant input to its enforcement, which turned out successful. Recently, the Competition Commission of the EU has

[2]Competition law is the law regulating the behaviors of competing corporations in a free market.

[3]166 U.S. 290 (1897).

[4]*Id.* at 333. *Joint Traffic Ass'n v. U.S.,* 171 U.S. 505, 560, 565 (1898); *Socony-Vacuum Oil Co. v. U.S.*, 310 U.S. 150, 60 S.Ct. 811(1940); *U.S. v. Paramount Pictures*, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260 (1948); *Northern Pac. R. Co. v. U.S.*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958); *U.S. v. General Motors*, 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); *Int' Ass'n of Machinists and Aerospace Workers v. OPEC*, 477 F.Supp. 553, 558 (1979).

[5]The United Kingdom created a major competition law principle, rule of reason, in the eighteenth century. Germany also adopted cartel regulations in the late nineteenth century. France also had competition law provisions. But their legislations grew loose or ineffective, so they did not evolve into so sophisticated law principle as the U.S. law. Refer to Chap. 3 for in-detail.

actively investigated cartels, both domestic and international, with the threat of severe punishment.[6] Member states in the EU also have operated effective competition laws, including cartel regulations, under the influence of rigorous EU enforcement.

Other countries, facing domestic and international challenges, have developed competition laws reflecting their respective economic and political situations. More than a hundred countries have antitrust statutes as of 2008.[7]

However, not all the countries with competition laws enforce the laws as seriously as the U.S. or EU. Only eight countries[8] provided criminal liability for both individuals and enterprises as of 2005. Moreover, even these countries had indicated a very short history of major prosecution in numerous cartel cases. Even the EU revealed, there has been no jail sentence against individuals.[9]

In spite of this situation, there has been strong pressure toward widespread regulation against cartels in the international community. The United Nations Conference on Trade and Development (UNCTAD) has held conferences on international competition law since 1980 when the United Nations (UN) passed a recommendation regarding the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the UN Set). On the other hand, the Organization for Economic Co-operation and Development (OECD) recommended that its member countries should adopt criminal sanctions in order to create a deterrent against future cartels and to provide an incentive for cartel participants to cooperate with cartel investigations under the so-called amnesty program.[10] In addition to the OECD recommendation, International Competition Network (ICN) has held regular conferences to discuss diverse topics among which the topic of effective enforcement of criminal penalty against cartels is a heated issue. Moreover, at the 1996 Singapore World Trade Organization (WTO) Ministerial Conference, competition policy was adopted among four main issues[11] that a multilateral agreement should include besides goods and services. The Doha Development Agenda (DDA) has around 20 subjects to negotiate, although now trying to overcome its deadlock after the Hong Kong Ministerial

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[6] *Refer to* the international vitamin and graphite electrodes cartel cases under Chap. 2.

[7] International Competition Network has a contact list of 100 competition authorities as of 2008, *at* http://www.internationalcompetitionnetwork.org/pdf/ICN_Contact_List.pdf (visited on Sep. 4, 2008). *See also* Statement by Germany, United Nations Conference on Trade and Development (2005), *available at* http://www.unctad.org.

[8] Austria, U.K, Canada, Ireland, Israel, Japan, Korea, and Norway. *See id*. Baker mentioned only seven countries in 2001. The United Kingdom was added in 2005. Hammond (2006) p. 2.

[9] Baker (2001), at 710; Competition Committee Survey of OECD (2003), at 29; Hammond (2006), at 5.

[10] OECD, *Hard Core Cartel*, 2000 Report by OECD Competition Committee 46, *available at* http://www.oecd.org/competition: OECD, *Recommendation of the Council concerning Effective Action against Hard Core Cartel* (Mar 25 1998), *available at* http://www.oecd.org/competition.

[11] The four Singapore issues are investment, competition, transparency in government procurement, and trade facilitation. *See* 3D/FORUM-ASIA, Practical Guide to the WTO 32, *at* http://www.3dthree.org/en/complement.php?IDcomplement=36.

Conference of 2005, and included competition policy as a major subject to discuss. Still, the WTO has focused on restrictions on cross-border cartels under its directions, one of which proposed to discuss further a multilateral agreement in competition policy.[12]

1.3 Hurdles to Leveling Cartel Regulations up to International Laws

The rigorous approach from the international community leaves much room to be desired. For example, regulatory authorities in South Korea, such as the Korea Fair Trade Commission (KFTC) and public prosecutors, do not frequently apply criminal penalties against cartels although the penalties are available for punishing both individuals and enterprises. The KFTC has treated cartels, in most cases, with imposing administrative fines or surcharges rather than with filing complaints to public prosecutors.[13] Concretely, only 3.6 % of all the cartel cases that KFTC has treated since its establishment are referred to the public prosecutor's office with a KFTC criminal report. The other 96.4 % of cases have been treated under the KFTC with corrective orders, surcharges, recommendations, and warnings.[14] Moreover, officers working for competition-regulating authorities in developing countries, whom the author met during 2006 annual meeting of American Bar Association Section of Antitrust Law, revealed their policies with focus on regulating the monopolization of markets rather than on punishing cartel activity.[15]

Furthermore, competition policy was the first dropped topic out of the four Singapore issues in the DDA multilateral negotiation at the 2003 Cancun Ministerial Conference. Negotiation on the whole DDA discontinued after the 2005 Hong Kong Ministerial Conference due to a disagreement between developing countries and industrialized countries.[16] The different positions reflecting diverse economic situations, such as fears of developing countries that their industries might be negatively affected and hesitancies of industrialized countries to persuade developing countries due to complex internal problems, have barred further negotiations in the competition policy.

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[12]Dayaratna Banda and Whalley (2005, p. 14).

[13]Without filing the complaint, public prosecutors in South Korea can not prosecute enterprises and their members who violated competition law under Article 71 of the Monopoly Restraint and Fair Trade Act (MRFTA) in South Korea.

[14]KFTC (2004, p. 551).

[15]The author attended 2006 annual conference of antitrust law provided by American Bar Association (ABA), and met officers who worked for competition authorities in developing countries, such as South Africa, Nigeria, Vietnam, etc. They told to me that they had been focusing on regulating monopolization rather than cartels.

[16]Alan Beattie and Frances Williams, *U.S. blamed as trade talks end in acrimony*, Fin. Times (FT), July 25, 2006, at 1.

1.4 Topic Question and Hypothesis of the Research

This dissertation will suggest a solution to the challenges of reaching a binding international cartel regulation, which is currently in a standstill. The book started with a question of why competition policy was dropped in WTO DDA negotiation which would be the important chance to adopt binding international law as to cartels. Extending application of cartel regulations in industrialized countries, current extraterritorial application notwithstanding conflict with the comity principle, does and will not satisfy the necessity to regulate international cartels in developing countries as the application undermines cooperation between the North and the South, and does not provide compensation to consumers in the South. Although international organizations achieved soft international laws and cooperation regimes of competition law practices mostly among industrialized countries, efforts to reach binding international cartel regulations have failed.

The reason why efforts have failed is presumably because developing countries, consisting of a majority of most international organizations, did not have the intent to focus on the efficiency-oriented cartel regulation scheme and competition law but focused rather on their economic development. The group of developing countries has endured insufficient financial resource and immature skills and experiences for effective competition policy, let alone the public consensus of damages of the cartels. In order to enjoy rich financial resources and to operate sophisticated institutions, the group of developing countries placed their utmost concern toward economic development rather than creating a competition regime.

After reviewing different positions on cartels of the South, this study suggests that building effective cartel regulations in the South should be the important ground to construct a binding international cartel regulation. With effective domestic cartel enforcement, the multilateral negotiations will have firm basis to obtain an international cartel regulation. By assisting their enforcements, international community can approach with non-treaty agreement an international cartel law. Extending current bilateral or regional agreement can connect the soft law to a binding plurilateral agreement which need to reflect development concern of the South. The plurilateral agreement can have two strategies: narrow focus on hard core cartel in the short term, and cartel regulation under competition regime in the long term.

Since the characteristics of cartels consisting of private companies (private cartels) are different from those of sovereign states (intergovernmental agreement for commodity), the study distinguishes private cartel regulations from intergovernmental agreement for commodity and reviews the development of international commodity law. Such distinction is justified by the fact that developing countries have derived the major impetus for economic development from their major commodities. It is suggested a strategy of differentiated products with high-quality standards to balance market mechanisms with economic development in the South.

The consensus building in the South as to cartel regulations will be achieved through effective enforcements of the cartel regulations supported by international

cooperation and assistance from the North. The increased public awareness can reach international cartel regulations as to private cartels while intergovernmental agreements for commodity are left under the different rule.

1.5 Structure of the Book

The book consists of a total of six chapters to answer the research question as the following Fig. 1.1 describes.

1.5.1 Structure of this Book

After Chap. 1 with statement of research purpose, Chap. 2 examines the definition of a cartel, discussion the effects of a cartel, and international agreement for

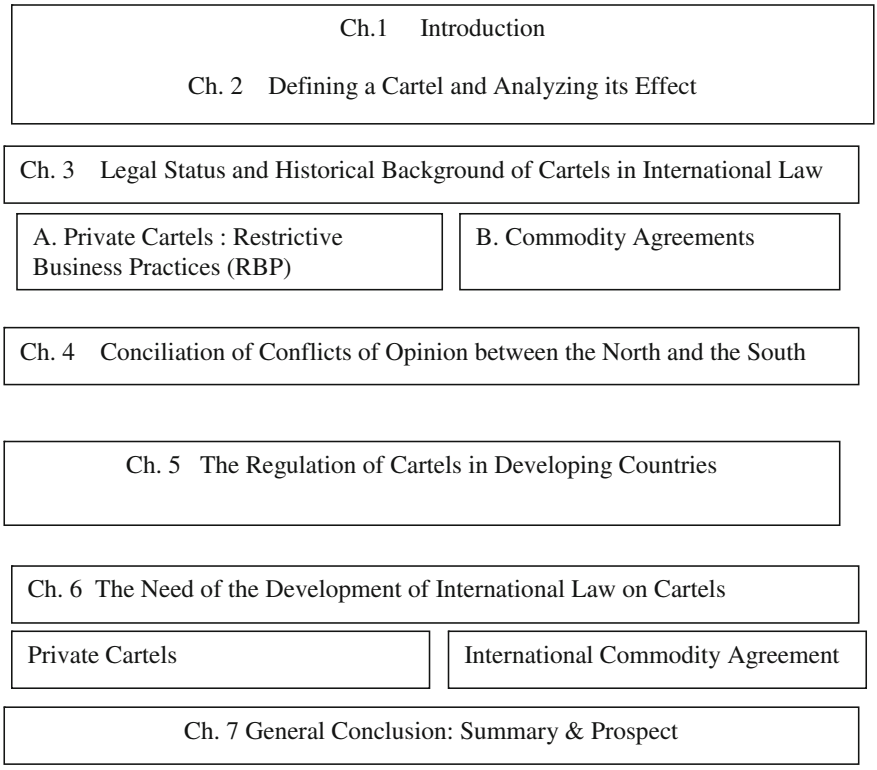

Fig. 1.1 Structure of this Book

commodity distinctive from private cartel, and introduces aspects of international cartels and major exemplary cases from the comparative analysis.

Chapter 3 researches the legal status of international cartels in international law by investigating such international organizations under the doubt of being a cartel. The chapter goes into development of domestic cartel law and of international agreement of commodity. Under the private cartel regulation, trials for achieving multilateral agreements by international organizations and the possibility of extending current bilateral and regional trade agreements including competition law are to be examined.

Chapter 4 analyzes North–South conflicts as hurdles to achieve international cartel regulations. After examining the failure of recent WTO DDA negotiation to adopt cartel law under competition policy, the necessity of cartel regulations in the developing countries is to be asserted with persuasive reasons. The positions of competition policy in developing countries in comparison to advanced countries are to be investigated. The international cartel law reflecting the perspective of international development law is to be considered. The roadmap toward binding cartel law will be proposed.

Chapter 5 starts with a comparative analysis of cartel law in both advanced and developing countries with promising competition law practices. After different types of cartel laws in both the North and South are investigated, consensus-building for active cartel regulations in the South is to be highlighted. Concrete suggestions shall be followed to make efficient institutions with sound foundations in developing countries. Cooperative measures with developed competition authorities shall be suggested as the effective ways to build capacities in developing countries.

Chapter 6 concentrates on suggesting strategies for achieving binding multilateral agreements and advanced models of international agreements for commodities. After looking over current international cartel regulations, the chapter examines the limitation of bilateral agreements as leading measures of international cartel law. It further analyzes the hurdles in binding multilateral agreements. The chapter also proposes a strategy for binding multilateral agreements for cartels, and discusses the possibility of international economic crime. Moreover, reform measures for international commodity agreements will be addressed in light of past failures. Market-related policies, such as price-risk-management, structural policy for economic development, two models reflecting the cause of sustainable development, and eco-label system as a cooperative model between private and public sectors, will be suggested.

Finally, Chap. 7 summarizes all the discussed arguments and summarizes overall assessments and interim conclusions. Then, the future prospect will be added that international competition law and international commodity agreements will have some relationship in the area of international economic law.

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Chapter 2
Defining a Cartel and Analyzing Its Effects

Abstract A cartel is an agreement or a collective action to restrain reciprocal business activities among plural independent entrepreneurs competing in the same level of a business industry to prevent competition thereby securing extra profit. In order to achieve international law on cartels, the international community needs to focus on hard core cartel (HHC) activities with several types of categories, narrower than the definition, because most countries agree with the necessity of regulating such narrowed cartels and because international agreements have been developed with such focuses. Cartels cause more harms than benefits in markets and societies either domestic or global, so there needs regulations on cartels. Meanwhile, interstate commodity cartels need to be exempted from such cartel regulation so that they may reduce extreme price fluctuations. The Intergovernmental producers association (IPA) needs to be under international commodity laws different from the law for typical private cartels. To utilize international support for cartel regulations, international cartel law should focus on private cartels with priority since there have been growing research studies on the cartels sufficient enough to reach a consensus among countries.

Keywords Cartel · Hard core cartel · Commodity cartel · Cartel regulation · Intergovernmental producers' association (IPA) · A binding international agreement · International commodity agreement (ICA)

2.1 A Cartel in Its Historical Context

Although a cartel sounds like a recent problem due to the semantics of its language, the phenomenon that it covers dates back to the ancient times when our forefathers earned money by trade and competed so as to have more profits. Competition-restraint measures by suppliers have been maintained with the development of trade throughout human-being's history.

J.S. Lee, *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, DOI 10.1007/978-981-10-2756-7_2

However, modern legislations toward promoting competition based on judicial and economic reasons were not seriously enforced until the 1980s even in industrialized countries. Specifically, up until the 1990s or even the 2000s, there is hardly any anticipation to establish an international organization dealing with competition law issues.

This chapter initiates its exposition through searching the meaning of the term 'cartel' within the context of modern development of its regulatory regimes, either international or domestic. It explores the coverage of cartels by categorizing them. Studying the damages and benefits of the cartels with their effects on the economy, politics, and society helps reduce conflicting views between the countries with strong cartel regulations and those with hesitancy or less skills to investigate the cartels. Examining the possibility of benevolent cartels is an opportunity to investigate arguments of developing countries that do not want to adopt cartel regulations related to international trade negotiations.

2.2 Definition

A. Origin of the Cartel and the Current Meaning

A 'cartel' is thought to come from the **Latin** *charta*, meaning a writing, a paper, or a letter. Before the word was used for a trade jargon, it was used for representing a military agreement between belligerent nations, e.g., the exchange of prisoners.[1] As markets grew expanded and competition became severe among entrepreneurs dealing with the same products, the word arguably changed its usage to the trade term of an agreement for the exchange of sales information, including price or other conditions.[2]

Currently, a cartel is defined as 'an arrangement among supposedly independent corporations or *national monopolies* in the same industrial or resource development field organized to control distribution, set prices, reduce competition and sometimes share technical expertise',[3] or 'a combination of producers or sellers that join together to control a product's production or price' or 'an association of firms with

[1]Stocking and Watkins (1948), p. 3 and footnote 1; Eatwell et al. (1998), p. 372.

[2]Huh (2002), pp. 15–17.

[3]*Refer to* http://dictionary.law.com. Dictionary in the other academic areas includes the public cartel in the similar way to the Law Dictionary. The Britannica Encyclopedia also includes state-monopoly or inter-state cartel, e.g. OPEC. Encyclopaedia Britannica (2007), p. 908. With focus on the element of 'agreement', Friedman (2007), p. 89 explains that a cartel is a group of independent suppliers, which *agree* to restrict trade to their mutual benefit. On the other hand, Greenwald ed. (1994), pp. 136–138 states, with focus on 'anti-competitive acts' rather than the agreement, that a cartel is a group of producers who *coordinate price and output decisions* to increase combined and individual output. If all producers of a good combine, the cartel may seek to imitate the behavior of a monopoly supplier, however, commonly, a fringe of small producers will operate outside the cartel.

common interests, seeking to prevent extreme or unfair competition, allocate market or share knowledge'.[4] All of the definitions have at least two common elements, (i) the gathering of companies and (ii) the purpose of controlling transaction term(s) related to competition.

Compared to its origin, the cartel concept have evolved, under the influence of accumulated economics, to include a type of association consisting of competing entrepreneurs which controls sales or productions or shares knowledge with the purpose of preventing competition. National competition laws and international law have developed regulations of cartel activities which cause severe harm to markets and consumers. Particularly, the laws designated several types of cartel activities, so-called hard core cartels, illegitimate. The cartels are made up of only private companies which are supposed to compete each other. Meanwhile, international law has separated interstate cartels from the coverage of international competition law and thereby placed the public cartel or international commodity agreement under international commodity law. With the increasing number of cartel cases, the concept of a cartel has distinguished itself from the other concepts of business combinations. After reviewing similar concepts and cartel regulations, this research will propose a definition of a cartel distinguished from other concepts.

B. Similar Concepts: Trust, Joint Venture, Syndicate, and Konzern

Competition law in the United States, starting with enacting the Sherman Act in 1890, originally pointed out a trust as the major object of its application since Sec. 1 of the Sherman Act adopted the language, 'every contract in the form of trust or otherwise'. However, a trust is a legal concept different from a cartel. A trust creates binding legal rights that are enforceable in equity for the beneficial enjoyment of a property, the legal title of which a trust settler (settler) transfers to another person (trustee) for the third party (beneficiary)'s benefit.[5] While a cartel is formed among competitors, a trust is created between a settler and a trustee and generates no relationship among competitors. The common law legal tool was used so as to create a strong business combination aiming at restraining competition in the U.S. markets in the late 19t century. Competing companies in the same market, for the purpose of getting rid of competition, transferred their stocks to the third company, which would decide the level of price or production or allocate geographical markets and distribute its profits to the settler companies, usually in proportion of the value of the stocks. The third company controlled the national market with its trustee position while the competing companies, which entrusted their stocks to trustee, took positions of both the settlers, and the beneficiaries. Such trust represented one of legal measures which restricted competition, and Sec. 1 of the Sherman Act explicitly included the trust as one of its targets. Since the competition law in the U.S. is originally designed to prevent anticompetitive business practices, represented by the trust, it has been called an 'anti-trust law' even though the

[4]Garner (2003), p. 86.

[5]Baker (2001), p. 710.

'anti-trust' law covers other aspects of trade restraint such as monopolies, price-discrimination, or anticompetitive mergers.

A joint venture is different from a cartel in terms of the level of business and legal integration and competitive effect. A joint venture is one business undertaking by plural persons engaged in a single project.[6] It has a common purpose but not the one for restricting competition. The U.S. Supreme Court has distinguished a joint venture which set a price from a hard core cartel which fixes a price.[7] As a joint venture in most cases generates pro-competitive effect in markets through cooperation, the pro-competitive effect should be considered for a decision of substantially reducing competition. Meanwhile, a hard core cartel with price-fixing has been treated under per se illegal.[8]

Meanwhile, a syndicate is defined as 'a joint venture among individuals and/or corporations to accomplish a particular business objective, e.g., the purchase, development and sale of a tract of real property, followed by division of the profits, after the completion of which it will dissolve'.[9] Usually, a syndicate means a common sales company established through the common investment by companies in an industry.[10] The syndicate is distinguished from the cartel where independent companies do not establish a common sales company or an association to carry out a transaction but agree to control reciprocal business activities for restraining competition. In the U.S., tight joint ventures including syndicates fall under the merger regulation under Sec. 7 of the Clayton Act and the Celler–Kefauver Amendment.[11]

On the other hand, there were Kozerns or Concerns during World War II in Germany and Japan. The Kozerns were financial combinations of companies that are legally independent. They differ from the cartel which requires no financial

[6]Garner (2003), at 376.

[7]Arizona v. Maricopa County Medical Society, 457 U.S. 332, 356 (1982); Texaco Inc. v. Dagher, 547 U.S. 1, 3; 126 S.Ct. 1276, 1277 (2006). In the Maricopa case, the Court held that the Medical Society was a foundation which did not sell different products but fixed price for medical services, and that it is not analogous to partnership or joint venture. In the Texaco case, the Supreme Court held that it is not per se illegal under Sherman Act § 1 for lawful, economically integrated joint venture to set prices at which it sells its products.

[8]*See* Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

[9]Law dictionary, available at http://dictionary.law.com. *See* Garner(2003) at 687. The Black's Law Dictionary by Garner defines the syndicate as a group organized for a common purpose, especially an association formed to promote a common interest and carry out a particular business transaction. See also Friedman (2007), p. 655. It defines the syndicate similarly as a group of individuals or companies who have formed a joint venture to undertake a project that the individuals would be unable or unwilling to pursue alone.

[10]Huh (2002), at 21.

[11]U.S. v. Penn-Olin Chemical Co., 378 U.S. 158, 168; 84 S.Ct. 1710, 1715 (1964). The Penn-Olin Chemical Co. case applied Sec. 7 of the Clayton Act, a merger regulation, to the formation by two corporations of a joint venture for production of sodium chlorate and dissolved the joint venture which may substantially reduce competition in a market.

combination or financial dependence but requires the agreement to restrain competition with legal and financial independence.

C. Cartel Definitions from Individual Countries

(1) The United States (U.S.)

The U.S. antitrust law practice has paid little attention to the definition of cartel but developed a per se illegal rule, which determines several types of typical cartel practices as illegal without an analysis of their economic impact on competition.[12] As the main legal foundation to regulate a cartel, Sec. 1 of the Sherman Act does not state a definition of a cartel but states a broad prohibition that 'every 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'.This provision has been used to prevent cartel activities. The U.S. Supreme Court has pronounced the cartel aspects as per se illegal under Sec. 1 of the Act, such as agreements for price-fixing, output restrictions, and market allocations among competitors without using the 'cartel' term. The per se illegal rule is distinguished from the rule of reason standard, which determines the anticompetitiveness of the other competition-restraining activities including vertical restraint or other horizontal collusions, e.g., concerted refusal to deal.[13]

The U.S. Supreme Court did not define the concept of a cartel with its own term, but defined the concept of a cartel, in *the U.S. v. National Lead Co.* et al, through the testimony of two people[14] in front of a subcommittee of the U.S. Senate. They stated 'a cartel is, with a protean form, a combination of producers for the purpose of regulating production and, frequently, prices, and an association by agreement of companies or sections of companies having common interests so as to prevent extreme or unfair competition'.[15] Regarding the 'common interests,' one of the testators added that the common interests covers from preventing extreme or unfair competition or allocating markets to interchanging R&D knowledge, exchanging patent rights, standardizing products, and so on. The cited statement, however, does

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[12]The Supreme Court explained activities violating Sec. 1 under per se illegal rule as *'agreement or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry* as to the precise harm which they have caused or the business excuse for their use.' 356 U. S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).

[13]Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co, 472 U.S. 284, 296 (1985). The case applied rule of reason standard regarding a cooperative activity involving exclusion as a type of concerted refusal to deal.

[14]Sir Mond was the organizer of the Imperial Chemical Industries (ICI) which consolidated competitors in the UK. As the other testator, Sir Pole was the chairman of the Associated Electrical Industries (AEI), a British company which produced and sold light bulbs.

[15]United States v. National Lead Co. et al., 332 U.S. 319, 340; 67 S.Ct. 1634, 1644; 91 L.Ed. 2077, 2096 (1947). The case is as regards the market division agreement of major titanium product manufacturers in the world by providing licenses to each other. It cites Monograph No. 1, Subcommittee on War Mobilization of the Committee on Military Affairs, U.S. Senate, 78th Cong., 2d Sess., Part I, p.1. Quoted also in U.S. v. National Lead Co., 63 F.Supp. 513, 523, note 5.

not address well the anticompetitive effect of a cartel but rather implies its positive effects. It is confirmed by a testimony of the testators that competition is not eliminated but regulated. However, a cartel does not just regulate competition but restrict it, thereby causing a huge inefficiency to the overall economy.[16] The unilateral testimony of the two testifiers come from two testators' background that they were respectively an organizer and a chairman of companies involved in international cartels regarding chemical industry and light bulb manufacturing.[17]

Rather, it is beneficial to look at the categorized types of cartel activities through U.S. cartel-hostile practices in order to have clear understanding of a cartel. The Supreme Court has pronounced the price-fixing, output-restraining, market-allocation cartel as illegal under Sec. 1 of the Sherman Act without inquiring into the reasonableness of the cartel since the middle of the twentieth century under the per se illegal rule.[18] The judicial categorizing of several restrictive business practices into a per se illegal rule has been made under considerable experiences with the RBPs.[19] The judicial body, experiencing a lot of cases with broad business areas, faced an implicit conclusion that typical cartel activities cause severe harm outweighing small benevolent effect and that the judiciary does not need to consider economic impact of the activities. The courts have rarely played roles to justify the typical cartel agreements. Whatever form the agreement or business practice takes, collusive price-rising or output-restriction among competitors has been deemed to violate Sec. 1 of the Sherman Act in the U.S. antitrust practices.[20]

In short, the U.S. Judicial body did not devote effort to define a cartel although Sec. 1 of the Sherman Act has broad language to cover diverse RBPs. However, judicial decisions have distinguished some aspects of a cartel, e.g., price-fixing,

[16]Refer to Chap. 1. III.2.

[17]The ICI had been involved in 800 competition-restraining agreements with Du Pont, its American rival company. The 800 agreements ended in 1948 before U.S. antitrust suit regarding its anti-competitiveness produced its result. ICI Plc—Company Profile, Information, Business Description, History, Background Information on Imperial Chemical Industries Plc, available at http://www.referenceforbusiness.com/history2/19/Imperial-Chemical-Industries-Plc.html (visited on 24 Feb. 2008). Meanwhile, the AEI had been a member of the Phoebus cartel consisting of seven competing light bulb companies. The cartel controlled the manufacture and sale of light bulbs for almost 20 years (in 1920s and 30s). It started to be weakened when a Swedish-Danish-Norwegian union of companies launched an independent manufacturing center and sold lamps at a much lower price than Phoebus in spite of economic and legal threats by Phoebus. Phoebus Cartel, available at http://en.wikipedia.org/wiki/Phoebus_cartel (visited on 24 Feb. 2008).

[18]U.S. v. Trenton Potteries Co. 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); Chicago Professional Sports LP and WGN Continental Broadcasting Co. v. National Basketball Association, 961 F.2d 667, 674 (Ct of App. 7th Cir. 1992).

[19]Broadcast Music, Inc. et al. v. Columbia Broadcasting System, Inc. et al., 441 U.S. 10, 99 S.Ct. 1551 (1979).

[20]Fox et al. (2004), p. 78.

output-restriction, market-allocation, from the other RBPs by treating them as illegal without looking into its reasonableness. It is because the significant harms of the hard core cartel activities and they have paid little attention to further economic analyses for arguable pro-competitive effects.

(2) United Kingdom (UK)

The Office of Fair Trading (OFT) defines a cartel, using the simple terms, as an agreement, usually secret, verbal and often informal, between businesses not to compete with each other.[21] Section 2(1) of the 1998 Competition Act, by adopting the same language as Art. 81(1) of the EC Treaty, prohibits agreements between undertakings, which, among other things, have as their object or effect the prevention, restriction, or distortion of competition within the UK. Moreover, Sec. 2 (2), parallel to paragraphs of Art. 81(1) of the EC Treaty, enumerated typical activities of a cartel such as agreement to fix prices or other trading conditions (price-fixing), limit production, markets, technical development, or investment (output limitation), share markets or sources of supply (market-allocation), apply discriminatory conditions to other trading parties (discrimination), and make the conclusion of contracts subject to acceptance of irrelevant obligations by the other parties. A cartel enables business people to enjoy higher prices with less effort to offer competitive products or services, which leaves little choice for consumers.[22] As a result, it causes huge damage to consumers and creates inefficiency in the whole economy.

(3) Germany's Federal Cartel Office (Bundeskartellamt)

Article 1 of the Act against the Restraint of Competition (ARC) as the regulation of cartels states, 'agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition, shall be prohibited.'[23] The amendment of the ARC for improving compatibility to the European competition regime was made recently which will lead to the identification of five hard core cartel behaviors such as price-fixing, market sharing, production or sales quotas, allocation of customers, and bid-rigging.[24] The hard core cartels are not criminalized but fined under the Administrative Offences Act and the Code of Criminal Procedure.

There are some exemptions from the cartel regulation under ARC although the hard core cartels do not meet the criteria of the exemption. The exemption includes

[21]OFT, *What is cartel*, http://www.oft.gov.uk/advice_and_resources/resource_base/cartels/what-cartel. Visited on 24 Feb. 2008.

[22]OFT, *Cartels and the Competition Act 1998: a guide for purchasers*, 3 (2005), *at* http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_mini_guides/oft435.pdf, visited on the same day.

[23]Gesetz gegen Wettbewerbsbeschraenkungen [GWB][Act against Restricting Competition], *at* http://www.bundeskartellamt.de.

[24]Bundeskartellamt, *A Report to ICN Anti-cartel Enforcement*, *at* http://www.bundeskartellamt.de.

the very similar language as Article 101 paragraph 3 of the EU Treaty of Lisbon.[25] Under Sec 2(1), such agreements are exempted from application of ARC as contributes to (i) improving the production or distribution of goods, or (ii) promoting technical or economic progress (iii) without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives, and (iv) without affording such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Additionally, the agreements for the rationalization of economic activities when competition on the market is not substantially impaired and when the agreement improve the competitiveness of small-or middle-sized enterprises are exempted.[26]

(4) Japan Fair Trade Commission (JFTC)

A report to the Asian Pacific Economic Conference (APEC) by the JFTC states that a cartel is a horizontal agreement between competitors to avoid competition.[27] Concretely, a cartel means express or tacit conventions, promises, or agreements among firms to fix the price or limit the volume of production and sales, or select trading partners. Similar to definition of a hard core cartel in the ICN and OECD, they are classified in terms by the object of restriction into four categories: price cartels, volume cartels, market allocation cartels, and bid-riggings.[28]

(5) The Monopoly Restraint Fair Trade Act (MRFTA) of South Korea

Article 19 s. 1 of the MRFTA defines 'improper concerted acts' as certain behaviors which unfairly restrain competition with the other entrepreneurs by agreement, contract, resolution through another method. Not every competition-restraining behavior falls into the category. Article 19 has enumerated eight kinds of improper concerted acts: (i) price-managing, (ii) condition-setting for transactions of goods or services, (iii) restricting production or delivery or transaction, (iv) limiting the territory of trade or customers, (v) restricting the establishment of facilities or necessary equipments, (vi) restricting the specifications of goods or services, (vii) co-managing the main parts of a business or establishing a joint-company, and (viii) any practice that substantially lessens competition in a particular business area.[29]

The Art. 19 adopted so broad a coverage of anti-cartel regulation as the subpara. Seven includes the concept of the syndicate under the improper concerted acts, and the subpara. Eight has a general provision without concrete description of the

[25]Compare Sec. 2(1) of ARC to the article of the EU Treaty. Refer to Chap. 2. 4(1) in this book. Although it adopts the almost same language, Sec. 2(2) states that Art. 101 (3) of the Treaty is applicable.

[26]Sec. 3(1).

[27]Japan Fair Trade Commission (JFTC) (2002), p. 1.

[28]JFTC, *What Practices are Subject to Control by the Antimonopoly Act?* (Sec. 3-1, How Does this Apply to Cartels?), *available from* http://www2.jftc.go.jp/e-page/aboutjftc/role/q-3.htm.

[29]English version of Monopoly Regulation and Fair Trade Act (MRFTA) of KOREA is available at http://ftc.go.kr/eng/.

restrictive business practices (RBPs). The subpara. Two (condition-setting), Five (restriction of establishment of facilities), and six (restriction of goods specification) do not fall on the hard core cartel of major international organizations, but can fall on a cartel as they may restrain competition in markets. Korea Fair Trade Commission (KFTC) enjoys discretion to authorize certain collusive behaviors which generate more efficiency-progress than competition-restraint.

D. Cartels in International Law

(1) The EC Treaty

Under the glossary of terms used in the EU Competition Policy, a cartel is defined as 'an arrangement between competing firms designed to limit or eliminate competition between them, with the objective of increasing prices and profits of the participating companies and without producing any objective countervailing benefits.'[30]

For the statute language, Article 101 paragraph 1 of the Treaty of Lisbon prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States, and which have as the object or effect of such agreements the prevention, restriction, or distortion of competition within the common market. Particularly, Art. 101(1) considers the following five categories of cartels as anticompetitive: (a) price-fixing, (b) output limitation, (c) market division, (d) discriminatory treatment to equivalent transactions, and (e) making the conclusion of contracts subject to acceptance by the other parties of irrelevant supplementary obligation.[31] However, a cartel is considered as legitimate when such agreement, decision, or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does neither (a) impose on the undertakings the concerted restrictions which are not indispensable to the attainment of these objectives, nor (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.[32] Cartels with net efficiency balance are treated as legitimate and valid.[33]

(2) UN Set and Model Law

The Resolution of the General Assembly of United Nations (UN) to adopt the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices in 1980 (the UN Set) and the Model Law that the

[30]European Commission, *Glossary of Terms used in EU Competition Policy*, 8 (Brussels 2002), *available at* http://europa.eu.int/comm/competition/publications/glossary_en.pdf.

[31]For in-detail statute languages, refer to 1998 Competition Act Sec. 2(2) in the UK., this Chap. II. 3.(2).

[32]Artiicle 101.

[33]*Id.*

UNCTAD drafted for adopting international competition law confine the definition into the agreements to unduly restrain competition among rivals.

The UN Set, using 'restrictive business practices' instead of cartel, states that enterprises, except when dealing with each other in the context of an economic entity wherein they are under a common control, should refrain from the such practices as limit access to markets or otherwise unduly restrain competition through formal, informal, written or unwritten agreements or arrangements with possible adverse effects on international trade and economic development particularly of developing countries. The concrete acts are (a) agreements fixing prices, including as to exports and imports, (b) collusive tendering (bid-rigging), (c) market or customer allocation arrangements, (d) allocation by quota as to sales and production, (e) collective action to enforce arrangements, e.g., by concerted refusals to deal, (f) concerted refusal of supplies to potential importers, (g) collective denial of access to an arrangement, or association, which is crucial to competition. Besides the coverage of the hard core cartel of OECD, the UN Set includes three types of concerted act illustrating from (e) to (g).

Chapter 3 of the Model Law[34] prohibits restrictive agreements or arrangements between rival or potentially rival firms. The restrictive agreements are, almost the same as the UN Set, (a) agreements fixing prices or other terms of sale, including in international trade, (b) collusive tendering, (c) market allocation, (d) restraints on production or sale, including by quota, (e) concerted refusals to purchase, (f) concerted refusal to supply, (g) collective denial of access to an arrangement, or association which is crucial to competition. The Model Law almost follows the UN Set's seven categories although para. 1 of the Model Law added 'other terms of sale' thereby extending its coverage. The illustrated seven examples of RBPs are cartel activities as the agreement among rivals to control reciprocal business activities so as to restrain competition.

The UN Set excludes, from the coverage of its cartel regulation, an economic entity in which the enterprises are under the common control including one through common ownership or otherwise not able to act independently of each other. Commentaries in Chap. 3 of the Model Law confirms the exclusion of one economic entity from the cartel regulation by noting that a prevailing number of jurisdictions have ruled that firms under common ownership or control are not rival or potentially rival firms.

Although the establishment of a common business entity to control independent competitors' behaviors may restrain competition and violate competition law, constructing the common business entity is not under the cartel provision of the Model Law. Establishing a common entity among competitors may be an issue of merger regulation in Sec. I and II of Chap. VI of the Model Law. When it brings about the possibility of lessening competition substantially, it will be prevented or undone under para. 3 Sec. III of the merger regulation.

[34]The Model Law is formally named as The Substantive Possible Elements for articles for a Competition Law.