

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.

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

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

²Huh (2002), pp. 15–17.

³Refer 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 19th 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

⁴Garner (2003), p. 86.

⁵Baker (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

⁶Garner (2003), at 376.

⁷Arizona 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.

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

⁹Law 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.

¹⁰Huh (2002), at 21.

¹¹U.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 people¹⁴ 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

¹²The 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.

¹⁴Sir 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,

¹⁶Refer to Chap. 1. III.2.

¹⁷The 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).

²⁰Fox 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

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

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

²³Gesetz gegen Wettbewerbsbeschränkungen [GWB][Act against Restricting Competition], at <http://www.bundeskartellamt.de>.

²⁴Bundeskartellamt, *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

²⁵Compare 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.

²⁶Sec. 3(1).

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

²⁸JFTC, *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>.

²⁹English 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

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

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

³²Article 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 Law³⁴ 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.

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

(3) Hard Core Cartel of Organization for Economic Cooperation and Development (OECD)

The recommendation that the OECD adopted in 1998 defines a hard core cartel with four types of cartel activities. Under the OECD Recommendation, a ‘hard core cartel’ is an anticompetitive agreement, concerted practice, or arrangement by competitors to (a) fix prices, (b) make rigged bids (collusive tenders), (c) establish output restrictions or quotas, or (d) share or divide markets by allocating customers, suppliers, territories, or lines of commerce.³⁵ The hard core cartel category, however, does not include agreements, concerted practices or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorized in accordance with those laws. All exclusions and authorizations of what would otherwise be hard core cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives.³⁶

(4) The World Trade Organization (WTO) and the Working Group on the Interaction between Trade and Competition Policy (WGTCP)

The WTO issued a Ministerial Declaration in Doha in Nov. 2001, the Doha Development Agenda (DDA), which launched multilateral negotiations toward legal frameworks regarding agriculture, services, and trade-related issues including a competition policy which had been discussed since the Singapore Ministerial Declaration in 1996. WGTCP which worked for building a multilateral competition legal framework, however, faced a deadlock when the Cancun Ministerial Conference did not reach any consensus on modalities in this area in 2003. The following WTO General Council in 2004 confirmed its failure by deciding that the issue of competition policy would not form a part of the DDA. Therefore, no work toward negotiations on competition policy will take place within the WTO during the DDA.³⁷ To make things worse, the whole DDA collapsed after the Hong Kong Ministerial Conference in 2005 mostly due to the North–South conflict in agriculture negotiations.

The Doha Declaration did not explain the definition of a cartel but mentioned that further works in the WGTCP would focus on the clarification of provisions on hardcore cartels.³⁸ By concentrating on hard core cartels, it is implied that the WTO Group tried to limit the topic of multilateral negotiations to the hard core cartel similar to the OECD Recommendation.

³⁵OECD, *Recommendation of the Council Concerning Effective Action Against Hard Core Cartel*, 921st Sess. C/M(98)7/PROV (Mar. 25, 1998). See Art. I Sec. A. para. 2. subsec. a.

³⁶I. A. 2. b. of the Recommendation.

³⁷WTO, *Competition Policy: History*, available at <http://www.wto.org>.

³⁸Paragraph 25, WT/MIN(01)/DEC/1, available at <http://www.wto.org>.

(5) International Competition Network (ICN)

The ICN was formed by an original proposal from major advanced competition authorities, the US's DOJ and the International Competition Policy Advisory Committee (ICPAC), for consensus-building on procedural and substantive convergence in antitrust enforcement, along with support from competition professionals, and formerly mentioned international organizations, e.g., WTO, OECD, and UNCTAD.³⁹ Its main constituents consist of senior government competition officers in both developed and developing countries while the ICN also includes the participation of private experts. The ICN Working Group on Cartels issued a report in 2005 for the 4th Annual Conference of the ICN, which researched extensively on the definition of a cartel. The report agreed with the definition of a hard core cartel in the OECD Recommendation without substantial suggestions for improvement.⁴⁰ It suggested the following three common elements of a cartel: (i) an agreement, (ii) between competitors, and (iii) to restrict competition. The 'agreement' need not be formal or written,⁴¹ therefore it includes secret conspiracies. The 'competitors' refer to (private) companies at the same level of distribution channels in direct competition with each other to sell goods or provide services, thereby excluding states or national monopolies. 'To restrict competition' means to target at open competition,⁴² whereby placing its focus on the intent or purpose of the agreement.

Further, it categorizes the following four types of conduct commonly identified across jurisdictions: (1) price-fixing, (2) output restrictions, (3) market allocation, and (4) bid-rigging. All four types have the same areas as the OECD Hard Core Cartel Recommendation covers.

(6) Analysis

International law regulating a cartel approaches the consensus that hard core cartel activities with several categories are to be addressed rather than a clear-cut definition of cartel itself. The attitude to derive common denominators from various forms of national cartel laws is not profitable compared to its effort. Some countries adopt a broad provision which applies to vertical restraint as well as horizontal restraint while the other countries treat the former clearly different from the latter. The national cartel laws include exemptions from an anti-cartel provision. The exemptions cover from the one with outweighing competitive effects to the one on the basis of domestic political reason. The standard of analyzing the restraint on competition of a cartel is diverse from the per se rule through quick rule of reason to full rule of reason. Therefore, defining cartel in international competition law

³⁹For background of establishing ICN, see Harry First (2003), pp. 33–38.

⁴⁰ICN Working Group on Cartels, *Defining Hard Core Cartel Conduct, Effective Institutions, and Effective Penalties*, 11–12, at <http://www.internationalcompetitionnetwork.org>.

⁴¹See *id.* 10.

⁴²See *id.*, 9–10.

appears inefficient as it demand much work to harmonize different national laws with less benefit or promise of reaching a consensus. The approach to a hard core cartel with several categories has proved effective to reach a consensus among diverse interests in individual countries as over all international cartel laws adopt.

E. Assessment

(1) Proposal for a Cartel Definition in the International Law Context

It is not easy to reach the international agreement in light of complicated interests from diverse economic situations, legal systems, and cultural backgrounds. The diverse aspects of cartel activities make the reaching of the agreement more difficult.⁴³ Rather than adopting the definition covering a broad aspect of cartels, defining a cartel needs to consider its purpose. This thesis pursues the agenda of international cartel regulation, in light of which, the definition of a cartel should start with a narrowed category, in other words, that of a hard core cartel. Since a binding international cartel regulation as the ultimate goal of this thesis is much difficult to obtain accession from countries due to concern about restricted sovereignty, this thesis will confine its discussion into the narrow definition of a cartel.

In light of the distinction of the cartel with the syndicate and the trust, the following elements of the cartel definition are proposed under the narrow focus;

- (i) as a subject, more than two independent entrepreneurs or undertakings competing in the same level of business,*
- (ii) as to conduct, agree to restrain or do restrain reciprocal business activities, e.g., fix price, allocate market, or limit production, and rig a bid,*
- (iii) as regard to purpose, to prevent competition thereby to secure extra profit.*

(2) Subject: Private Companies Reciprocally Competing

Regarding the element (1), a tight combination of competitors, known as a joint venture, has been treated akin to mergers which shall be under merger regulations and not under cartel regulations. An industrial combination in the vertical level from manufactures to distribution to sales invokes the matters of merger, monopoly, and/or vertical restraint rather than a cartel. Particularly, the U.S. practices with persuasive reasoning have developed separate rules and regulations on mergers, monopolies, and vertical restraint from cartel regulation, which focuses on hard core cartels (HCC).⁴⁴ However, the combination-operating or forming agreement

⁴³Rodger and Macculloch (2000), at 172–173.

⁴⁴While the Sec. 2 of the Sherman Act applies to (attempt) monopoly, Sec. 7 of the Clayton Act, along with merger guidelines and procedural rules applies to merger. The Supreme Court has distinguished a vertical restraint from a cartel. *NYNEX Corp. v. Discon, Inc.* 525 U.S. 128, 136 (1998); *Business Electronics Corp. v. Sharp Electronic Corp.* 485 U.S. 717, 730; 108 S.Ct. 1515, 1523 (1988).

needs to be screened by cartel regulation whether it includes competition-restraining activities, particularly HCC activities.⁴⁵

The issue is whether the ‘independent entrepreneurs’ as member of a cartel include either a country or state-managing company. A country with public interests acts differently from the private company pursuing a profit-interest. A state which receives financial resources from public revenue functions as a market-moderator by taking loss or reducing profit, dissimilar from private companies operating on a maximization principle of profits or market share. Since the U.S. Supreme Court held that the Sherman Act does not apply to a state but persons under Sec. 7⁴⁶ in *Parker v. Brown*,⁴⁷ the U.S. courts have developed state-action doctrine allowing immunity to state legislations involving the market. Besides such exemption from domestic law, the activities of a state in the international level are protected under the sovereignty immunity which does not allow other countries to intervene in its domestic affairs. The Model Law of the UNCTAD confirms the principle as one of its many examples.⁴⁸ In addition, interstate cooperative activities in commodity trade have been acknowledged as legitimate and have been promoted under international commodity laws. The international commodity agreements (ICAs) and intergovernmental producers’ associations (IPAs),⁴⁹ which are distinguished from a private cartel under competition law, have developed unique regulations under international commodity law. In light of the development of international law and political consideration, the ICAs and IPAs may not be under the same rule as the cartel of private companies only due to the economical perspective that countries restrain competition in the international trade.⁵⁰

⁴⁵Consent decree of General Motors/Toyota joint venture case, 103 FTC 374 (1984), includes such orders refraining them from exchanging pivotal non-public information e.g. price, marketing plans.

⁴⁶Section 7 confines the definition of a ‘person’ under the Sherman Act to corporations and associations existing under or authorized by the laws of the U.S. or any state or any foreign country. The same language of the provision is adopted by Sec. 1(a) of the Clayton Act. The state monopolies or inter-state associations can be exempted from the U.S. competition law.

⁴⁷317 U.S. 341, 351 (1943). At the page of 351, it states that there is no suggestion of a purpose to restrain ‘state action’ in the Act’s legislative history and that the sponsor of the Sherman Act declared that it prevented only business combinations.

⁴⁸See Chap. II. Sec. II. para. (c). It stipulates that the Model Law does not apply to the sovereign acts of the state itself, or those of local governments, or to acts of enterprises or natural persons which are compelled or supervised by the State or by the local governments or branches of government acting within their delegated power. Chap. II, Sec. II. para. (c). See UNCTAD (2007), p. 3.

⁴⁹The ICA is an international agreement that restrains competition in international trade of a product or raw material with both consuming and producing countries as members while the IPA is one with producing countries only. Refer to 2.4, A of Chap. 2.

⁵⁰Association of states producing natural resources or setting technical standards will be discussed at 2.4 of Chap. 2.

(3) Conduct and Purpose

In terms of conduct, a cartel shall have agreement for restricting or do restrict reciprocal competitive activities in the market among participating companies which are supposed to compete for the purpose of enjoying extra profits. The purpose of restricting competition may be presumed by the contents of the agreement and the impact of cartelistic activities on markets subsequent to the agreement. However, diverse types of business activities may fall under the category of (b) an illegal cartel in the following picture when their anticompetitive effect outweighs pro-competitive effect. For example, concerted refusals to supply to or deal with a competitor fall on the illegal cartel when the cooperative parties enjoy market power or exclusive access which is essential to effective competition,⁵¹ and when the concerted refusals occur horizontally. The decision regarding anticompetitiveness of concerted refusal depends important factors, including (i) the motive of the denial, (ii) the degree to which access to the standard is critical to effective competition, and (iii) the effect on competition from excluding the rival.⁵² Vertical restraint, which belong (a) vertical restraint of competition law in the picture, occurs between companies which do not compete each other, so it needs different economic analysis from a cartel regulation to determine its anticompetitiveness.⁵³ Price-fixing, production-limitation, market-allocation, and bid-rigging, as major four HCC activities, fall under the category of (c) because they in most cases cause much more severe harm than benefit.

As one of the more ambiguous areas, there exists a standard-setting activity which causes both pro-competitive effect, e.g., efficiency enhancement from integration of standards, and anticompetitive effect, e.g., restriction of competition, in a relevant market. The activity may constitute an illegal cartel when it suppresses more than promotes competition.⁵⁴ Concretely, it violates cartel regulation when the standard works as an agreement among competitors to fix prices or to exclude another competitor,⁵⁵ and when the anticompetitiveness effect should outweigh the efficiency enhancing effect of integration from standard-setting.⁵⁶ Even a pool

⁵¹FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458 (1986). Application of the per se illegal in boycott cases is confined to the case where firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor. Group boycott has been under per se illegal since the U.S. Supreme Court decision, Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207, 79 S.Ct. 705 (1959).

⁵²American Bar Association (ABA) Section of Antitrust Law (2004), p. 65.

⁵³Non-price vertical restraints are rarely opposed by competition authorities. UNCTAD (2007), at 26.

⁵⁴National Society of Profession Engineering (NSPE) v. U.S., 435 U.S. 679, 691 (1978).

⁵⁵See National Macaroni Manufacturers Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. 364 U.S. 656, 659–660 (1961).

⁵⁶In the U.S., courts which had held the activities derived from standard-setting illegal under per se rule, have relaxed the strict approach. The Standards Development Organization Advancement Act of 2004, Pub.L.No. 108-237, confirmed the shift. ABA Sec. of Antitrust Law (2004), at 31–32 and 34–35.

license agreement as to new technology, where competing patents are pooled,⁵⁷ might invoke cartel regulation when anticompetitive effects, e.g., exclusion of non-member competitors or restriction of competition in the area not related to the technology, outweigh pro-competitive benefits, e.g., promotion of R&D.⁵⁸ Decisions regarding membership of standard-setting organizations (SSOs) can violate cartel regulations when anticompetitive effect prevails over legitimate interests.⁵⁹ Neelie Kroes, the EU competition commissioner, warned more strictly that if voting in the standard-setting context is influenced less by technical merits but rather by side agreements, inducements, package deals, reciprocal agreement, the result of voting may fall foul of EU competition rules.⁶⁰ Overall analysis of economic impact and social effect of activities related to SSOs needs complicated studies.⁶¹

Compared to the major four categories of (c) HCC in the picture, the other category of cartels under (b) needs in-detailed analysis in related markets for the decision of pro- or anticompetitiveness. It is because many cooperative arrangements, designed to increase economic efficiency, can enhance competition in related markets.⁶² Although a rule of thumb tells that price-increase and output-reduction actions are mainly evidences of restraining competition, there may be hidden pro-competitive effects, e.g, long-term effects, or outweighing national interests. Each country can place different weights on the national interests or the hidden

⁵⁷ABA (2004), at 73. However, so called blocking patents, in which one party could not practice under its patent without infringing the other party's patents, or complementary patents, which cover different aspects of the same technology, are less likely to be anti-competitive.

⁵⁸U.S. DOJ Antitrust Division, Business Review Letter as to DVD Standards (10 June 1999).

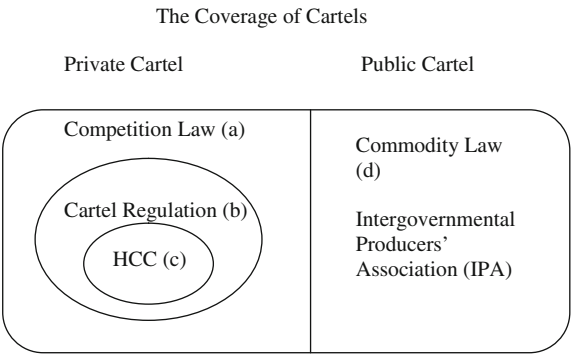
⁵⁹The legitimate interests are proper functioning of the organizations and overall efficiency in related markets. See *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 296 (1985). The decision of a buying cooperative to expel a member would be under the rule of reason unless the cooperative has market power or exclusive access to an element essential to competition. On the other hand, in *Pretz v. Holstein Friesian Ass'n of America*, 698 F. Supp 1531, 1539 (Kan 1988), the court declined to apply the per se rule to the decision of a cattle registry association to exclude a member even when the association had very substantial market power and membership in the association was essential to effective competition.

⁶⁰Nikki Talt, *Kroes warns on open technology standards*, FT, at 2 (11 June 2008). She made the statement at an OpenForum Europe seminar in Brussels.

⁶¹ABA (2004), at 44–46, and 47–79. In evaluating the selection and enforcement of standards, courts consider whether the standard creates or enhance the exercise of market power by the SSO or its members and whether the standard has an anticompetitive purpose or effect. The composition of a SSO may be an evidence of the anti-competitive motive. In addition, the non-discriminatory and consistent application of the standards may be another evidence of it. Some types of distortion of the standard-setting process show the anti-competitive effect or purpose.

⁶²As to the concerted refusal to deal or boycott issue, refer to *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* 441 U.S. at 20; 99 S.Ct. at 1562 and *Northwest Whole Sale Stationeries, v. PSP Co.*, 105 S. Ct. at 2620. The Supreme Court acknowledges the necessity of careful defining of per se illegal group boycott, by quoting Sullivan, *Law of Antitrust*, 229–230 (1977), “there is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine.”

Fig. 2.1 Division of private and public cartels and its respective coverage



effect in light of its unique situation, which works as hurdles to reaching international consensus. The definition of a cartel in this thesis, with the purpose of achieving international cartel law, needs to be confined to the cartel category that clearly causes huge net consumers' loss and market inefficiencies. The narrow definition can conveniently facilitate the achievement of international law on cartels (Fig. 2.1).

(4) The Coverage of the Cartel for International Cartel Law

With the three elements of the cartel, the cartel can be defined as an agreement or a collective action under the agreement to restrain business activities of more than two independent and reciprocally competing entrepreneurs or undertakings so as to restrain competition. The definition matches the (b) plus (c) area in the following picture. The instances of tight business combinations, such as joint venture, do fall on (a) as they are regulated under merger or monopolization regulations within the competition law regime. While the formation of an economic entity with legal personality belongs to merger or monopolization, the formation of a loose combination of companies as an association of competitors to restrict competition falls under the category of a cartel. A vertical restraint can be under the (a) area as it belongs to a different category of regulation.

The IPAs have states or state-monopolies as their members. They are beyond the coverage of competition law but under the commodity law area. However, some usages of a cartel, particularly what is reported on the internet, e.g., [dictionary.law.com](http://en.wikipedia.org/wiki/Dictionary.Law) and Wikipedia,⁶³ include an interstate cartel under the definition of a cartel with the focus on the economic impact of IPAs similar to a private cartel. It neglects the development of commodity law. Commodity laws regulating international commodity transaction (d) have been developed with the unique characteristics of a commodity.⁶⁴ ICAs, although having consuming countries and producing countries as members, have played almost the same roles in the markets as the IPAs. With the

⁶³See <http://en.wikipedia.org/wiki/Dictionary.Law> (visited on 27th Feb 2008).
⁶⁴Refer to Chap. 1. IV. and Chap. 2. IV for IPAs and ICAs.

only difference being membership, the ICAs and the IPAs are treated the same way in this thesis. The discussions as to interstate cartels apply to both.

Particularly, for the purpose of achieving an international cartel regulation, the definition of a cartel should have explicit several categories of behaviors with net anticompetitive effects so that they may reduce ambiguity on the effect of the behaviors on competition and reach international consensus for regulation conveniently. The HCC under (c) falls on a representative example. The definition is similar to the OECD HCC recommendation, but narrower than the UN Set, which includes other concerted behaviors such as refusal to deal with a certain partner(s) matching the (b) area. It is noteworthy that the U.S. antitrust law, which has played as the leading competition law in the world, narrowed the (b) area to such a way that its cartel regulation may concentrate on (c) hard core cartel activities. The anticompetitive activities under the (b) have been regulated under the title of horizontal collusive behaviors distinguished from cartel regulation.⁶⁵ The reason for such a division comes from a different standard of legitimacy. While a cartel is investigated and prosecuted under a per se illegal rule by the DOJ, other categories are treated under the rule of reason by the Federal Trade Commission. Recent international laws on cartels, particularly from OECD and WTO, have focused on (c) HCC and individual countries have tried to comply with the international laws. Therefore, for the international law perspective, rather than a broad category of cartels with net pro-competitive impact under (b) + (c) or (a) + (b) + (c), the narrow definition of a cartel with four categories of HHC under (c) is more beneficial to reach further international agreement.

2.3 Discussions: Advantage and Disadvantage of Cartels

There are still opinions arguing that some cartels with beneficial effects on the economy should be exempted under the regulations or allowed temporarily. In addition, the public does not know in-detail the damages that cartels cause. After considering the advantages and the disadvantages that cartels arguably have, the alleged exemptions are worthy examining.

A. Advantages of Cartels

(1) Restraining Destructive Competition

The need of using cartels is clearly demonstrated by the ‘brown field economy’ situation where an over-invested facility or capital does not reap as much profit as investors expected but rather goes to chronic deficit due to less demand and decreasing prices. It happens when many competitors participate in the market, who invested a lot of money as a fixed cost, but when the slackened demand cannot raise price. At the moment, an individual entrepreneur in the competitive market cannot

⁶⁵Fox et al. (2004).

help but lower the prices so as to reap profit by increasing sales volume. However, with the other competitors trying to compensate their costs by reducing prices and increasing sales, the entrepreneur ends up with setting prices much below the average cost. This is the situation called ‘destructive competition’.⁶⁶

The damage through destructive competition may be quite a large amount of money considering the total investment of the overall number of entrepreneurs in the market. The damage can exacerbate the level of efficiency in society, which competition law tries to protect. The situation needs to be improved with the cooperation among the competitors. A depression cartel is to be facilitated for a temporary period necessary to rescue an industry seriously hurt by an economic depression.

The governments in advanced as well as developing countries have approved this type of cartel in severe economic depressions. Quite a few governments used to operate compulsory cartels under such political pressure as the struggle for existence might wipe out the weak industry. Even the U.S. Supreme Court, in *the Appalachian Coals Incorporation* case, during the Great Depression, acknowledged the coal output limitation cartel without violating Section 1 of the Sherman Act.⁶⁷ The Roosevelt Administration used public cartels in several industries.⁶⁸ EU member countries have looked for ‘cartels’ more than once to solve a destructive competition situation.⁶⁹ Japan approves depression cartels for one year or less through a specific government agency. Furthermore, Sec. 25 of the Presidential Decree of Korea’s Monopoly Restraint Fair Trade Act (MRFTA) has an exceptional approval provision for a cartel aiming to overcome the depression with strict conditions.⁷⁰ The Model Law of the UNCTAD is interpreted to allow a cartel in this context since it allows cartels to be authorized by member states when the cartel members demonstrate a ‘net public benefit’.⁷¹

(2) Securing Large-Scale Investment Capital

Joint sponsorship for a project, which costs too much for individual entrepreneurs to take but which is substantially beneficial to all the participants in the

⁶⁶Bower and Rhenman (1985).

⁶⁷*Appalachian Coals Inc. v. United States*, 288 U.S. 344 (1933).

⁶⁸Eatwell et al. (1998), at 373. The National Industrial Recovery Act permitted industries to formulate ‘codes of fair competition’, which was ruled unconstitutional by the Supreme Court in 1935. However, the U.S. continued to maintain cartels in coal mining, oil production, interstate transportation, and agriculture.

⁶⁹Bower and Rhenman (1985).

⁷⁰Korea’s Fair Trade Commission (KFTC) has authority to approve collective behaviors of entrepreneurs when (1) it is clearly expected that demand for a product or a service would continue to decrease and supply would far exceed demand for substantial period, (2) price of the product or service is below average cost for substantial period, (3) substantial number of companies in the industry face possibility of discontinuing their business due to depression, and (4) rationalization of the company can not be a method of overcoming (1) through (3) situation. Huh (2002), 290.

⁷¹Model Law, Art. 3, paragraph 2.

markets is argued to be another area where cartels can play roles. A research joint venture is a popular phenomenon which academic researchers have analyzed as beneficial.⁷² Unless the sharing of information limits the incentive for R&D investment or leads horizontal competitors to engage in monopolistic behaviors, a technology consortium or a technology-exchange agreement produce net consumer welfare benefit.⁷³ Such cooperation helps innovation efforts of small companies. In Germany and the Scandinavian countries, industrial associations have long helped small companies protect their interests by sharing expenses and promoting technological innovations from larger competitors.⁷⁴ Para. 30 and 31 of Chap. IV of Schedule 13 in the U.K. 1998 Competition Act allow joint arrangement between competitors regarding the efficient development and production of petroleum resources.⁷⁵ Moreover, Sec. 24-3 of the Presidential Decree of Korea's MRFTA approves a cartel for research and technology development, as an exception to the prohibition of collusive behaviors with restricted conditions.⁷⁶

Developing countries, where companies do not have sufficient financial systems to invest much in research and development (R&D), have more necessity of collecting money for R&D investment than advanced countries. For example, the Colombian legislation, the Lithuanian law, Ukrainian law, and the Hungarian legislation exempt R&D cartels or the agreement that improve investment or technical or economic progress.⁷⁷

(3) Voluntary Regulation by Industry or Professional Associations

When the public requests its government to regulate an industry, autonomous regulation by the industry members before an anticipated government control can be another usage of a cartel. U.S. chemical industries recognized complex problems caused by the toxicity of their products in 1974. Facing public scrutiny of the industry along with the extreme cost of testing the products as well as a scarcely trained workforce, the industry constituted the Chemical Industry Institute of Toxicology to develop the technical strength to win the respect of the government and businesses.⁷⁸ Besides health or environmental concerns, voluntary regulation has been used in ethical norms of professional organizations to offer honest and good-quality services by suppressing excessive competition within the professions.

⁷²Baumol (2001), at 729–731.

⁷³*Id.* at 732.

⁷⁴Bower and Rhenman (1985), 126.

⁷⁵Rodger and Macculloch, at 195.

⁷⁶KFTC approves the cartel when (1) the R&D is necessary for increasing industrial competition power and the effect of the R&D on the market is significant, (2) investment for the R&D cost too much to be provided by one company, (3) the cartel is necessary for distributing risk of uncertain result of the R&D, and (4) the effect of R&D outweighs that of restraining competition. Sec. 24-3 of presidential decree of MRFTA.

⁷⁷UNCTAD (2007), at 32–33.

⁷⁸Bower and Rhenman (1985).

Sometimes the ethical standard includes price-fixing⁷⁹ or its variations such as a ban on competitive bidding⁸⁰ or a maximum medical fee agreement for insurance payment⁸¹ or a boycott to raise fees⁸² or a ban on professional advertisements about price and quality.⁸³ However, the U.S. Supreme Court held per se illegal for all the former cases except the ban on professional advertisement about price and quality. Meanwhile, the U.K. Competition Act allows professional rules, designated and reviewed by the Secretary of State, to be excluded from Chap. I prohibition, cartel regulation.⁸⁴ Self-regulating bodies operating under other laws are also excluded from the Chap. I prohibition.⁸⁵

(4) Reducing Price Fluctuation

Cartels are argued to prevent price fluctuations due to its independence from cost and its agreement on fixed prices. The International Coffee Organization (ICoO), arguably functioning as one of the international commodity agreements (ICAs),⁸⁶ has set the market share of major global markets and has collected price information

⁷⁹Goldfarb et. ux. v. Virginia State Bar et al. 423 U.S. 886, 96 S.Ct. 162 (1975). The Supreme Court held, minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by Virginia State Bar is price-fixing and per se illegal under Sec. 1 of the Sherman Act.

⁸⁰National Society of Professional Engineers v. U.S., 435 U.S. 679 (1978). The Supreme Court granted certiorari for the district court to decide the factual basis of justification and affirmed the trial courts' decision that the ethical rules of the Society violated Sec. 1 of the SA which prohibited members' competitive bidding before an engineer was selected for a specific project by a prospective client.

⁸¹Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982). The Court held, the maximum fee schedule is per se illegal price-fixing because (1) strict application of rule of reason standard cost significant money, (2) judges do not have much expertise understanding in the industry and its market structure, (3) a decision of a specific case with different background gives almost no certainty or standard for legitimacy of customs. Per se rule saves courts from the dilemma, and the Court has endured nullity of some customs that would prove to be reasonable if total review is to be done so as to secure procedural economy and conviction of the industry.

⁸²FTC v. Superior Court Trial Lawyers Association, 493 U.S. 411 (1990). The Court held, the boycott for raising fee for trial lawyers' representing criminal defendants in Washington D.C. was also price-fixing cartel and illegal per se.

⁸³California Dental Association v. FTC, 526 U.S. 756 (1999). The Court held, the association's ban on professional advertising about price and quality requires looking into the circumstances, details and logic of a restraint rather than a quick look analysis for rule of reason.

⁸⁴Schedule 4 exempts designated professional rules. Rodger and Macculloch (2000), at 192–193.

⁸⁵See Schedule 2 of the 1998 Act. *Refer to id.* at 193.

⁸⁶The ICoO membership consists of 45 coffee importing countries as well as 32 exporting ones. Under the strict meaning, a cartel is arrangement among producers. The ICoO is not the cartel under the definition. However, it functions to restrain excessive competition in global coffee market and to maintain stable production and price of coffee through allocating market. Refer to ICoO, Rules on Statistics Indicator Price, at 13, Annex I, EB3776/01 Rev.1 (2001), available at <http://dev.ico.org/documents/eb3776r1e.pdf> (last visited on 23 Oct. 2007).

for more than 40 years. The International Tin Agreement (ITA) played a role similar to a cartel by placing a ceiling and a floor price and export quotas.⁸⁷ The ICoO and ITA are evaluated high in a point that they achieved price stability during its effective era compared to its demising era.⁸⁸ Stable commodity price enables exporting countries, particularly commodity-dependent developing countries (CDDC) to have financial basis for purchasing food for the producers of the raw material and further promoting economic development. Meanwhile, importing countries can enjoy the benefit of predictability from stable price trends, if the price maintains to a reasonable level, regardless of external circumstances such as weather.⁸⁹

B. Disadvantages that Cartels Cause

(1) Inefficiency in Production

Efficiency with low cost and high production quantity can be achieved through a free market mechanism as a result of an individualized rational decision of market participants. However, cartels replace market participants' free exercise of business decisions with a cartel agreement, thereby restricting the free market mechanism or competition. Restraint of the free market mechanism inevitably produces inefficiency of production resources, thereby leading to comparatively a 'high price' and 'low production' because cartels prevent destruction of relatively inefficient high-cost enterprises.⁹⁰ The reduced pressure to reduce cost through innovation, although difficult to measure, generates harm to productive efficiency.⁹¹ The inefficient production with high prices directly results in detriments to the consumers.⁹²

As to price, the wide margins between costs and high prices caused by cartels were illustrated in the 1930s in the U.S., so called the Great Depression era. In the rubber industry, the international rubber regulation committee was able to maintain prices, yielding a gross profit margin from 50 to 100 % above costs of productions

⁸⁷McFadden (1986), pp. 815–817. The predecessor of ITA was the Int' Tin Committee which had functioned as a producers' cartel with its membership limited to producers from '20s to 40s. The ITA is an outgrowth of the Int' Tin Study Group of 1948–1956, which produced a draft of tin agreement for ITA including consumer states as well as producers in the era of postwar cooperation.

⁸⁸LeClair (2000), pp. 59–61 and Table 3.2. Price variation during ICA functioning period (1976–1986) was from 0.161 to 0.198 while it during non-functioning period (1989–1996) increased up to 0.303. See McFadden (1986), at 819. From the initial Int' Tin Control Scheme in 1931 until the 1985 collapse, the ITA confined price fluctuations to a much narrower range than those in unregulated periods.

⁸⁹Chapter I. Art.1 (2) of International Coffee Agreement 2001, available at <http://dev.ico.org/documents/agreeme.pdf> (last visited on 23 Oct. 2007).

⁹⁰In the nitrogen cartel agreement of 1930, high cost enterprises were actually given larger relative quotas than low cost enterprises. Edwards (1976), p. 40.

⁹¹OECD (2002), p. 6.

⁹²Edwards (1976), p. 41. It illustrates aluminium manufacturers' cartel involving the Aluminium Corporation of America [Alcoa]. The cartel caused damage to efficiency in the market by price-increase and output reduction.

around its critical shortage period of the 1930s. The copper cartel maintained the price to almost the same level for 20 years while technological improvements of copper production reduced the cost to half during the 1920s and 30s. In addition, methanol price trends in the U.S. from 1926 to 1941, when cartelization of territorial allocation had been progressed in the methanol market by Union Carbide and Carbon, indicated that the synthetic methanol price decreased by only 59 % while output increased by more than 740 %. The Union Carbide and Carbon, the biggest producer of domestic synthetic methanol, did not make much of an effort to reduce the price in loose competition with only output-decreasing wood methanol without other competitors of synthetic methanol.⁹³

On the other hand, the limitation of output by a cartel does not necessarily lead to low level of production or high profit. The copper cartel after WWI tried to liquidate the surplus stock, ending up with double the excess stock by the end of 1920. Moreover, after General Electric (GE)'s geographical-market allocation cartel with Krupp Steel Works of Germany in the world tungsten carbide market from 1928 up to 1936, GE's annual sales of the same material with an 800 % price increase was outnumbered by Krupp's monthly sales due to GE's output and demand reduction from the price sky-rocketing. Furthermore, when the Organization of Petroleum Export Countries (OPEC) succeeded in raising oil price per barrel from US\$ 2.80 in 1972 to \$ 36.68 in 1979, the consumers put effort into substitution and conservation initiatives. The high oil price provoked new producers, e.g., China, to enter the market and non-OPEC producers, e.g., Mexico, to expand their production while the high price caused covert cheating within the organization. The extreme increase of the oil prices turned out to cause severe holdback of sales of OPEC members.⁹⁴ All the responses can lead to substantial lessening of pricing power of the OPEC in the long run.

(2) Unfair Treatment: Price-Discrimination

As a cartel agreement has characteristics of exclusiveness against free market mechanisms, it can easily create discriminatory pricing depending on the territory or cartel-affiliation. In a cartel agreement involving the Dow Chemical Company and Alcoa in the magnesium market, Dow provided Alcoa with a discount, averaging 30 to 40 % lower than those quoted to Dow's other domestic customers from 1927 to 1931. Although the price differential between Alcoa and other domestic customers decreased to an average of 28 % from 1931 to spring of 1942 when an antitrust decree broke up the cartel, the price-discrimination was maintained during the time. After the dissolution of the cartel, Alcoa purchased its metal from Dow under price regulations at an average of 5 % below the regular price.⁹⁵

⁹³Stockings and Watkins (1948), 116–122, 124–125 and 130.

⁹⁴*Id.* at 129–134. LeClair (2000), 14–15 and 67–71. OPEC's share in the world oil market continued to decline from 55.4 % in 1973 to 28.5 % in 1985. The average price per barrel dropped to US\$ 14.23 in 1986.

⁹⁵Stocking and Watkins (1948), 138–141.

(3) Inflexibility of Price with Entry Barriers

Cartel prices are not flexible because it does not reflect changing business conditions through the market system. Rather, in most cases, a cartel agreement aims to raise prices and hold it as high as possible without paying much attention to supply and demand in the markets.⁹⁶ Some cartels, with their forecasts, fix, and adhere to prices high enough to assure substantial profits to their members, including less efficient companies, even with the minimum output in recession. On the other hand, most cartels advance prices under a prosperous condition up to the point that the reduced quantity of sales may limit profit.⁹⁷

However, although the high-fixed price with maximized profits attract new competitors in the market, new comers do not easily participate in the market because various entry barriers established by cartels create hurdles. The cartels need to bloc entry of new competitors into the industry to enjoy long-term control over price. The major barriers are illustrated as exclusively concerted behaviors, a line of discriminatory distribution, which may be in a collaborated manner among cartel members, unfriendly or even opposed against new comers,⁹⁸ technology armed with pooled patents, and a heavy level of fixed capital.

(4) Malfunction of Market Economy Mechanism

Even though it might sound economically sensible in exceptional circumstances to raise prices to improve profits in a distressed industry, the principle applies to limitedly rare cases.⁹⁹ Even though the exceptional cases have positive effects on the economy, it is important not to make the exception a main principle to justify the economic harms that most cartels bring about. Noticeably, even in the exceptional cases, cartels might do harm by aggravating the evil circulation of under-investments, under-employment, and decreasing demand power for other products with less incentive to invest.¹⁰⁰

Rather, imperfect competition, a concept currently popular among modern economists, makes an issue out of the weakness of competition, not the severity of it. They argue that the gentlemanly restraint and mutual deference among competitors rather than competition prevailed in many industries.¹⁰¹

Moreover, even though cartel proponents argue that cartels help to restore balanced markets in some fields where overproduction progresses, a temporary restriction of oversupply to take away the current surplus may bring about an expansion of extra-capacity through nonmembers or members' additional and surreptitious investments. The sustained high price sooner or later leads to even more oversupply. On the other hand, the increased price suppresses demand in

⁹⁶Mcfadden (1986), 823–824.

⁹⁷*Id.* at 136. Edwards (1976), 40.

⁹⁸Stocking and Watkins (1948), 136–138. LeClair (2000), 59–60.

⁹⁹Stocking and Watkins (1948), 104–106.

¹⁰⁰*Id.* at 216–240.

¹⁰¹*Id.* at 108.

conflict with a cartel's original goal of securing future consumption. It promotes consumers' substituting efforts with other complementary goods.¹⁰² In the long run, it leads to reducing cartel power. Therefore, cartels can not resolve the initial overproduction problem due to oversupply or reduced demand.¹⁰³

(5) Consumers' Damage

Cartels cause large damages to consumers through fixed prices. Total harm to consumers consists of consumers' loss and consumers' damages. Consumers who would pay the price determined by market mechanism of price-competition will face higher prices in the market where suppliers collude to set price or quantity. Economists agreed that, unless consumers have market power to decrease the price, consumers' collective decisions to purchase less of the product at the cartel-determined higher price means an overall loss of consumers' welfare. As the loss is not easy to calculate, the following concept is used as the basis of calculating consumers' damage.¹⁰⁴

The consumers' damage (CD) is the sum of expenditure that individual consumers pay additionally beyond the normal price, which amount to unlawful gains of cartel members.¹⁰⁵ In most price-fixing cases, the sum is not easy to quantify since it would require comparing the actual price in the manipulated market to the normal price in a hypothetical competitive market. Moreover, as competition law usually does not require its calculation, it is hard to find out the exact amount of CD. For the research purpose of demonstrating an estimate CD, it is calculated as 'consumed quantity [Qc]' multiplied by the gap between the high fixed price [Pf] and the normal price [Pn] that consumers will pay if there is no price-fixing agreement in the market. The consumers, in other words, are cheated by price-fixing and deprived of the consumer benefit quantified below.

$$CD = Qc * (Pf - Pn)$$

The amount of CD varies case by case, but usually is large enough to cover the whole scope of a market in light of cartel members' market power. If the suppliers who agreed with the higher price do not have power to affect the market price, consumers can purchase the same product from other suppliers with no higher price, then, the cartel would be ineffective. Individual suppliers are not willing to participate in an agreement when they estimate that a cartel has insufficient market power to affect the market condition. Therefore, once a cartel is formed and has been operated, CD is quite large in light of the scope of the market and the cartel members' power on the market.

¹⁰²McFadden (1986), 825 and 830.

¹⁰³Stocking and Watkins (1948), 108–109 and footnote 10; LeClair (2000), 13–14 and 58–61.

¹⁰⁴Consumers' damage (CD) is used for persuading consumers and policy makers to implement strict policy against cartels, to redress to consumers and to measure appropriate sanctions. OECD (2002), 6.

¹⁰⁵*Id.*

OECD's survey states that the affected global commerce of just sixteen large cartel cases out of one hundred nineteen cases, revealed from 1996 to 2000, exceeded US\$ 55 billion. Considering the insufficient data of cartels' damages, the difficulties of learning about cartel agreements, and under-enforcement in each country, the magnitude of the harm from the cartels will be tens to hundreds billion dollars annually.¹⁰⁶ In the U.S., an international vitamin cartel case reached a US \$ 2.4 billion-amount settlement with direct U.S. purchasers in the class action suit, which is estimated as a little more than the total harm that the cartel actually caused. On the other hand, KFTC indicates that while a price-fixing and bid-rigging case among major three school-uniform producers in Korea turned out to cause around US\$ 50 million of annual damage for two-and-a-half years,¹⁰⁷ the international electronic-graphite cartel case caused around US\$ 37 million of annual damage for 5 years in Korea's market.¹⁰⁸ In light of the fact that the global market scope is around twenty five times larger than Korea's, the annual damage by an international cartel may reach US\$ 0.93–1.23 billion. It is noteworthy that, when KFTC and the judicial body of Korea estimated total damages of price-fixing cases, they used the concept of CD, estimated by the total sales of conspirators multiplied by a gap between the fixed price and average price of normal bids.¹⁰⁹

(6) Loss of Faith in Social Integrity and Honesty

Besides economic harm, a cartel has a negative influence on social justice.¹¹⁰ When such an agreement as usually secret among competitors brings huge profits to themselves, enterprisers tend to be more concerned about their competitors rather than about their consumers' interests. Social respect toward successful enterprisers and faith in their honesty will be reduced when the public, usually consumers, realizes their cartelistic behaviors, which has the effect of transferring the welfare of

¹⁰⁶OECD, *Policy Brief: Hard Core Cartel—Harm and Effective Sanctions*, May 2002, available at <http://www.oecd.org/> (visited on 10 Jul. 2008).

¹⁰⁷Korea's Won 50 billion (the exchange rate is calculated as KW 1000 equal to US \$1 in this thesis for its convenience). The school-uniform price-fixing had maintained from the end of 1998 until 2001 for two-and-a-half year, thereby causing 2.5 million students \$ 125 million, or \$ 50 per purchaser. KFTC, press release: KW 11.5 billion (US \$ 11.5 million) surcharge and criminal reference to four corporations and seven individuals involved in price-fixing and interference in consumers' bid (including bid-rigging) among school-uniform producers and distributors [교복제조 유통업체들의 가격담합 및 공동구매 방해 등에 대해 총 115억원 과징금 부과, 법인 4개 및 사업자 7인을 형사고발], 4. para.1 (May 2001), available at <http://www.kftc.go.kr> (visited on 10 July 2008).

¹⁰⁸The damage calculated by KFTC is KW 183.7 billion for the 5 years which amount to around US \$ 184 million.

¹⁰⁹KFTC (2004). See also Ye-Rang Hwang, Seoul District Court Decided that price-fixing damages, US\$ 58, should be compensated to individual purchaser [교복값 담합 5만8천원씩 배상하라], The Hankyoreh, 20 June 2005, available at <http://www.hani.co.kr> (visited on 29 Jan 2007).

¹¹⁰OECD (2002), 6.

consumers to enterprisers. The sneer attitude toward businessmen might result in the loss of faith in the integrity and honesty of the whole society.

C. Assessment

Although a cartel is effective to prevent the waste of precious resources and the collective destruction of a local economy in a temporary case, it demonstrates that the results of diverse cartels is not good for efficiency but can interfere with a free market mechanism. High or rigidly maintained prices independent from cost or market conditions support producers, especially inefficient suppliers, at the expense of both consumers and new competitors facing entry barriers caused by cartel members. Some examples even indicate the demise of cartels due to oversupply by either non-members or members who cheat by ignoring any restraint of a cartel in response to the high price. In short, the artificial restraint to price or output through a cartel causes conflict with free market mechanism and subsequent inefficiency. The restraint can not maintain its effect in the long run.

However, there are still dubious areas where cartels arguably have some positive effects outweighing their negative effects under certain extreme circumstances during a temporary period. Precedent research have already indicated, notably, in light of the long-term effects, even in the arguably justified cases, that price manipulation eventually turned back to or aggravated the initial problematic situation. As proponents of cartels try to exaggerate very limited advantages of cartels, it is beneficial to investigate exceptional situations with such limited advantages and to find out whether a cartel is justifiable in the context.

(1) Crisis Cartel

First, in destructive competition situations, competitors tend to collude and fix prices or sometimes output levels so that the price level may be maintained. Otherwise, they would compete with each other by lowering prices, thereby ending up with the survival of companies with large financial resources enough to endure price competition regardless of their merit in quality. This result is in conflict with the ideals that competition laws pursue. Although free market mechanisms should allow free entry to and exit from the markets, in the special economic situations, such as severe depression, destructive practices lead to competition not based on merit, quality, or price, but on financial ability to sustain businesses.

Fostering competition needs to be encouraged to maintain 'merit-based competition' in a market under an extreme situation. Small- or mid-sized firms with less financial resources but with high quality products should be able to survive the situation. Therefore, lenient approaches against cartels in severe depression may be adopted on the conditions that participants do not have power to control the whole market, and the agreement aims at eliminating destructive practices under a voluntary basis, and not restraining competition. In the Great Depression Era, the U.S. Supreme Court approved *Appalachia Coals Inc.*, established by 137 bituminous coal producers, as an exclusive agent for the sale of all the coal that they

produce.¹¹¹ In the Sugar Institute case,¹¹² the U.S. Supreme Court acknowledged that the Institute which used unfair methods of competition was worth not to be dissolved in a depression situation involving destructive practices as well as overcapacity although the methods should be enjoined. The case implied that the Institute was useful, in spite of its anticompetitive practices, and should continue competition in the economic situation. The case further implied that a voluntary agreement among the competitors in the industry could be exempted in light of economic circumstances.¹¹³

(2) Interstate Cartel or State-Operating Cartel

Second, competition that cartel regulations aim at is supposed to be among private entities, either individuals or enterprises, not a public entity, e.g., state. Regarding interstate or state-operating commodity cartels, the cartel regulation which applies to usual private cartels does not apply in light of unique characteristics of commodities and sovereignty principle. Price fluctuation in commodities, more often than not, is related to poverty, or at least economic development of developing countries. Reduction of poverty, and economic development have been acknowledged as duties of the states in international law with more weight than competition in markets. In addition, excessive exploitation of natural resources from competition intervene with conservation of the natural resources under the states' permanent rights over natural resource and environment protection. The sovereignty of states does not want international regulations over activities of interstate association or the state itself. Developing countries with newly adopted competition laws exclude agricultural commodity and natural resources from their coverages.¹¹⁴

Although existent cartel regulations exempt public cartels from their application, such commodity cartels should not totally disregard the competition perspective. Historical inability of cartels to control price or production of natural resources in the long-term proves that cartels do not provide as many advantages as their original intent except in some cases.¹¹⁵ Cartels usually ended up with generating high price, thereby pushing consumers to alternative source or reducing demand.¹¹⁶

¹¹¹ *Appalachian Coals, Inc. et al. v. United States*, 288 U.S.344, 53 S.Ct. 471 (1933).

¹¹² *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936), *aff'ing* 15 F.Supp. 817.

¹¹³ Rudolph (1996), pp. 136–139.

¹¹⁴ Jamil Anderlini, *Foreign investors fear China law to curb monopolies*, FIN. TIMES at 5 (31 Aug. 2007). In keeping with the government's commitment to improving the livelihood of more than 800 million rural citizens, China's first anti-monopoly law does not cover the agricultural sector, allowing farms to form cooperatives, such as cartel, that can market their products. The government protects many state-own monopolies by separate regulations in areas including petrochemicals, coal, and power.

¹¹⁵ LeClair (2000), 81–83. The exceptions are bauxite and petroleum.

¹¹⁶ International Coffee Agreement (ICA) which specified a price range through export quotas for reducing price and supply fluctuations but ended up with high price lost price control by exporters supplying the excess production over the limit to nonmember countries with cheap price. *Id.* at 58–61. International Cocoa Agreement failed to either stabilize or raise prices due to oversupply of non-participants and entry of new producers. *See id.* at 63–67. Organization of Petroleum

In the interstate commodity cartel, a voluntary guideline without sanction on non-complier need to be acknowledged for output and maximum price fluctuation in the light of special circumstances of producing countries.

On the other hand, as to arrangements or associations of private companies or individuals regarding natural resources, output restriction, or price maintenance can be the object of cartel regulations under competition law. Unless a state drives a public cartel policy with an appropriate legislation, private entities are not under such a duty unlike the states. Private entities can not justify the result that consumers are cheated by the increased price, or the reduced production of a cartel.

(3) Cartels for Research and Development

Third, as to joint research, companies with insufficient financial sources to invest into research or technological innovations in an industry, e.g., small-or mid-sized companies, sometimes need to get together under an arrangement. Benefits from the investment will go directly to consumers if the joint research succeeds in creating a high-quality product with a relatively low price. On the other hand, participants have the high chance of competition-restricting activities, e.g. price-fixing or the suppression of innovation-outlays, increasing because the participants spending a lot of time and money have the same interest in the research.¹¹⁷

In light of the conflicting points, a cartel authority may have power to regulate the anticompetitive behaviors of their research in a case where anticompetitive effect outweighs efficiency. Concretely, in exchange of approval, the authority may request that the participating companies should not, during or after their collective research period, conspire or implement an agreement which restrain competition in a market.

However, in light of the characteristics of technology consortia in practice, the possibility of the perversion is low. The negotiation of the arrangements is strictly bilateral rather than multi-lateral convenient for a cartel conspiracy.¹¹⁸ In addition, the incentives built in a technology consortium lead to the increase of R&D investment. In other words, as a firm only with sufficient technology information may participate in the exchange agreement, the firm needs further R&D investment to maintain the consortium.¹¹⁹

(4) Cartels by Professional Organizations

As to the voluntary restraints by a professional organization, there are some necessities for ethical rules of professional services. However, the agreement

(Footnote 116 continued)

Exporting Countries (OPEC) is thought to lose its significant price control back in 70s due to conservation efforts of industrialized countries. Shift to alternative energy sources such as natural gas and coal and the increased number of non-member countries with expanding their output as well as new producers. *Id.* at 67–71.

¹¹⁷Baumol (2001), 732.

¹¹⁸*Id.*

¹¹⁹*Id.* at 732–733.

regarding service fees among member entrepreneurs should not be allowed. Even though the service-fee restraint may lead to competition with more focus on high quality of service by prohibiting fee-decreasing competition, the restriction can not satisfy consumers' desires to have a wide range of services. Although autonomous service quality control is an appropriate policy for professional organizations, price-fixing is never a good method for quality control but is the very measure to restrict a free competition mechanism. Although professional practices have a public-service characteristic, the service is offered to consumers in exchange for money, which falls on commerce. Moreover, the activities of professionals have played an important part in commercial transactions. As a result, their anticompetitive practices impose a restraint on commerce. Since the U.S. Supreme Court in *Goldfarb et al. v. Virginia State Bar et al.* case (1975) held that the fee prescribed by a minimum fee schedule issued from the State Bar and County Bar Association fell on price-fixing against Sec.1 of the Sherman Act,¹²⁰ the Supreme Court has affirmed a violation of Sec.1 in most cases involving professional organizations' restriction of price competition.¹²¹ Recently, the Omnibus Cartel Repeal Act in South Korea adopted the strict application of cartel regulations against a fee-settlement by nine professional organizations including lawyers, certified public accountants, patent lawyers, customs officers, etc.¹²²

2.4 Intergovernmental Agreement for a Commodity Distinctive from a Private Cartel

A. International Commodity Agreement (ICA)

(1) The Meaning

International Commodity Agreement (ICA) is an agreement between governments of both producing and consuming countries to regulate the terms of

¹²⁰Lewis H. Goldfarb et al. v. Virginia State Bar et al. 421 U.S. 773, 95 S.Ct. 2004 (1975).

¹²¹Price-fixing or its variation restraining price-competition is per se illegal. *Goldfarb et al. v. Virginia State Bar et al.* 421 U.S. 733 (1975), *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982), *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). In an exceptional case, the Supreme Court requires in-detailed examination under the rule of reason standard for *California Dental Association's* ban on price advertising. *California Dental Association v. FTC*, 526 U.S. 756 (1999).

¹²²Korea's Omnibus Cartel Repeal Act: Regulating Undue Concerted Activities Exempt from the Application of the Monopoly Regulation and Fair Trade Act (hereinafter OCRA), Law No. 5815 (5 Feb. 1999).

international trade in a specific commodity.^{123,124} It is a type of treaty in international law, which provides regulatory measures for the stabilization of prices and supply. It establishes an international organization with an international personality.¹²⁵

(2) Relationship with Intergovernmental Producers' Association (IPA)

The ICA is different from the intergovernmental producers' association (IPA). The IPA includes only producing countries while the ICA needs to admit consuming countries as well as producing countries with an open membership. The ICA is seen as more effective than the IPA in terms of screening the deviation from cooperative measures, e.g., export or production quota, as it requires producing countries to report regular statistics of production and export and consuming countries to limit imports.¹²⁶

The ICA has a similar economic impact on international commodity trade to the IPA. The moderation of price fluctuation of the ICA in a commodity market prevents excessive price changes through market interventions by countries with substantial market power. Free price-setting mechanism of a market is under the control of the agreement. The concrete ways of operation of the ICA include almost the same measures as the IPA. The current demise of ICAs implies that the ICA is not favored by particularly consuming countries. Benefits to consuming countries such as stable prices and participation in commodity policies were considered small while costs to them, e.g., helping DCs under nontransparent artificial market control, were evaluated large.¹²⁷ This analysis explains recent resurgences of the IPA.¹²⁸ Although the ICA has a bi-partisan membership structure, it has revealed characteristics close to IPA in economic functions in markets. The following characteristics of commodity production apply to both IGA as well as ICAs. In this thesis, ICA is going to be discussed with IGA as there are not big differences between ICA and IGA in terms of its economic impact.

¹²³A commodity in the ICAs means a primary commodity, any product of farm, forest, or fishery or any mineral in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade. See Art. 56 para. 1. of the Havana Charter.

¹²⁴Christopher Gilbert, *International Commodity Agreements*, p. 2 (14 Jan. 2005), available at http://grade.unin.it/people/gilbert/file/Attachment_10.pdf (visited on 10 Jul. 2008).

¹²⁵Kabir-ur-Rahman (1982), p. 9.

¹²⁶Gilbert (2005), at 14.

¹²⁷*Id.* at 13–14.

¹²⁸Recently a proposal for the organization of natural gas producing countries, led by Russia, was seriously discussed among major exporting countries. Meanwhile, OPEC demonstrated an increasing influence on global crude oil market. Refer to 2(3).

B. Unique Characteristics of Commodity Production

(1) Economic Perspectives

1) Significant Importance to Domestic Economies of Commodity Dependent Developing Countries (CDDCs)

The interstate commodity cartels have been acknowledged and supported financially by the international community to sustain economic development of developing countries, or the South, and to provide stable and reliable financial resources for the food supplies.¹²⁹ In less diversified economies, commodity exports occupy substantial parts of their national income and constitute valuable financial sources to provide foods and other necessities to the public. Particularly, the Least Developed Countries (LDCs), which belong to the CDDCs¹³⁰ by Common Fund for Commodities (CFC), have their economic foundations on commodity production. A group of the DCs with specialties in exporting certain demand-increasing commodities do not belong to the CDDCs as they have land-abundant infrastructures and capitals and enjoy a large market share in international trade, most of which have outgrown the level of economic development and simple economic structure of CDDCs.¹³¹ On the other hand, the CDDCs are the other group of the DCs where the export of a commodity facing falling or stagnant demand occupies a significant portion of national income. The commodity export from the CDDCs has stagnant market shares due to poor infrastructure or high-risk investments or low-sized farms. A large part of population in the CDDCs consists of small producers working on a few commodities under less diversified economic structure. The price changes in their major production affect more severely their domestic economies and the poor population than other countries and classes.

2) Instability of Price in relation to Inelasticity of Production

In spite of the close relationship between commodity production and poverty, the actual terms of trade indicated high volatility of the commodity prices. The deteriorating prices of most commodities during the past and recent price surges in food commodities and oil have revealed a wide range of economic impacts on the

¹²⁹Common Fund for Commodities (CFC), a UN special agency for financing and supporting commodity trade, was established for supporting commodity development projects, one of which include commodity market risk management or price-management for reliability of supply. See CFC, *Current Trends and the New Development Role of Commodities*, 7–8 (Nov. 2006), available at <http://www.common-fund.org/download/actualiteit/CT06jelle.pdf> (visited on 10 July 2008) and Fig. 3, section of the Decision I of the Governing Council of the Common Fund at its Seventh Meeting in Dec. 1995, Decision I (VII/ 1995). See *id.*, at 24, para. 8 of U.N. General Assembly (GA) Resolution A/57/236 (Dec. 2002).

¹³⁰According to CFC, the CDDCs are defined as the developing countries for which 50 % or more of all merchandise exports are made up of non-oil commodities. Oil is omitted for the following reasonable grounds; (1) most oil exporter meet a qualitatively different challenge from CDDCs and (2) the unique high value of oil can distort export composition. CFC (2006), at 10.

¹³¹For example, Argentina, Brazil, Thailand, Malaysia and recently Vietnam belong to such Commodity Developers group. *Id.* at 8.

global market. The fluctuation and the deterioration of the prices not only led to lower profits from the international trade of the commodities but also exacerbated the poverty level in the countries that focused on the commodity export.

The sensitivity of the commodity price and its severe impact on the economy is exacerbated by inflexible adjustability of the commodity production to price change. Commodities' outputs respond slowly to increased prices, but once expanded, they are extremely difficult to contract.¹³² In addition, a commodity production requires large fixed costs compared to small variable costs for production. As a result, the production tends to be either much larger or smaller than economic equilibrium. As a solution to the insensitivity to market price shifts, a buffer stock, however, requires huge capital to operate in the price-moderating way,¹³³ which as one major reason led to collapse of the Tin Agreement in 1985.

Meanwhile, agricultural or meat products need a relatively long time from several months to even a decade, to grow up and be processed enough to become commercial products in the market.¹³⁴ The storability of agricultural products are limited due to natural decays and consequential cost increase.¹³⁵

(2) Political and Legal Perspectives: State-Involvement

In most cases, states themselves are producers of commodities, particularly natural resources including minerals, or the states are involved in agricultural commodity production with in governmental policies, e.g., subsidies or export quota. The sovereignty issue and public interest from such state-involvements and subsequent rights and obligations is distinguished from the individual entrepreneurs working on the private interest without any public duty or privilege in international law.¹³⁶ A state with sovereignty has their unique privileges or duties as a major subject under international law while a private company does not. A government in itself has the right to exploit natural resources as national properties under international law.¹³⁷ Even in some cases private companies participate in such productions, as recently growing phenomena, a type of national license or authorization and subsequent government restrictions are needed. The governmental restrictions have the characteristic of sovereign acts, which are protected under international law unless there is a norm of *jus cogens*, or customary international law, or an international treaty to which the state accedes. It is not easy work

¹³²See Scherer (1994), p. 54.

¹³³Edward (1994), 22 Denv. J. Int'l L. & Pol'y 530.

¹³⁴*Id.* at 530. Production cycles limit the ability of an international commodity agreement to control supply. For instance, coffee plants require 10 years to reach full maturity.

¹³⁵*Id.* at 529–530.

¹³⁶Refer to II. 8. of this Chapter.

¹³⁷The right is acknowledged in UN GA Resolution on Permanent Sovereignty over Natural Resources, Art. 31, 33 and 34 of Charter of Economic Rights and Duties of States, Declaration and Program of Action on the Establishment of a NIEO, and UN Conference on New & Renewable Sources of Energy. The economic development of the resource-producing countries has been protected as the principle of UN Charter. Refer to Chap. 3. NIEO.

to persuade a multitude of governments to reach an international agreement for restraining their sovereign powers, which provide a lot of economic benefits to their revenues. For example, governments have provided subsidies to their agricultural producers by supporting their productions while maintaining low prices. Currently, multilateral negotiations for curtailing governmental subsidies under the WTO Doha Round did not create an international agreement due to internal political conflicts. Placing international competition in commodity trades, by cutting subsidies, let the government face risks to deal with strong protests from many laborers who depend on incomes proportionate to the price of their productions.

State interests in intergovernmental cooperation lead states to gather together to manage total production or price level of the commodity and to establish international organizations or associations for the purpose of controlling a respective commodity trade. For instance, developing countries that have significant importance in national commodities launched the Common Fund for Commodities (CFC) which has supported works of individual international commodity bodies.¹³⁸ The number of international commodity bodies (ICBs) under the patronage of CFC amount to 25.¹³⁹ A recent proposal for the organization of natural gas producing countries as a new IPA, led by Russia, was seriously discussed among major exporting countries.¹⁴⁰ Since the works of such organizations include the management or the setting of the prices or production quantities of commodities, they have similar characteristics to a private cartel.

(3) Different Legal Principles from Private Cartels

The ICA is an international organization with legal personality. It is different from a conventional cartel with nothing but an agreement to restrict competition. The ICA is shielded under the sovereign immunity principle. Additionally, the point that its members are sovereign states enables the ICA to be protected from responsibility through the act of state doctrine in international law. The cooperative behaviors of independent sovereign states do not change their characteristics by gathering together.

International law, moreover, has developed different rules under international commodity law from cartel rules under competition law. Development, right to food, and environmental protection under sustainable development are concerns

¹³⁸CFC provided financial support, around total US \$ 3.5 million, to price risk managements of cocoa, coffee, cotton and pilot cotton in six cases in 2001. See *id.* at 16, 17, 20, and 21.

¹³⁹International Commodity Bodies (ICBs) are intergovernmental organizations which concentrate on specific commodities through consultations between consumers and producers, and analyses of market developments. Annex IV provides 25 ICBs. See *id.* 7 and 30–31.

¹⁴⁰Andrew England, *Gas exporters launch pricing study*, FIN. TIMES, April 10, 2007, at 2. Russia, Algeria, and Qatar, responsible of 60 % of the world gas exports, reached the decision to operate a committee to study gas pricing policy of the Gas Exporting Countries Forum (GECF). See also Russia, *Qatar eye OPEC-style natural gas cartel: Reserves rich countries seek ways to influence global market*, Associated Press (12 Feb 2007), available at <http://www.msnbc.msn.com/id/17116262/>.

that the international commodity law needs to address in distinction with competition law. Article XX of the General Agreement on Tariffs and Trade 1994 (1994 GATT) exempts from its general obligations the governmental measures pursuant to the intergovernmental commodity agreement, which is open to participation by both exporting and importing states, and are designed to assure the availability of supplies adequate to meet demand at stable prices.¹⁴¹

In addition, the UNCTAD's eleventh session (UNCTAD XI) in 2004 adopted the Sao Paulo Consensus. Para. 74 of the Consensus stipulates that a concerted focus should be directed toward CDDCs, and that efforts by the countries to strengthen the competitiveness of their commodity sectors should be supported by the provision of enhanced market access on a secure and predictable basis and the strengthening of capacity and institutions in both the public and private sectors.¹⁴² The provision placed a legal foundation for an international commodity-managing organization. The subsequent sentence that existing compensatory financing schemes should be reviewed and combined with modern risk management and risk-sharing instruments¹⁴³ approves CFC's assistance to ICAs' activities, e.g., quota or buffer system. Moreover, the International Ministerial Conference of Landlocked and Transit Developing Countries, and Donor Countries and International Financial and Development Institutions on Transit Transport Cooperation in Almaty, Kazakhstan, in 2003 (2003 Almaty Conference) urged, for commodity issues, concerted efforts by the landlocked and transit developing countries along with development partners, international organizations, and other relevant regional and subregional organizations.¹⁴⁴

C. Necessity of Different Regulations in International Commodity Markets

As rapid-increases of the oil price and food price threaten global economies, particularly fuel-importing countries, and less developed countries which need financial resources to purchase food, there are arguments that the currently operating international commodity agreements shall be regulated similarly with private cartel regulations.¹⁴⁵ However, such distinctions of primary commodities as mentioned above necessitate independent regulation under the international commodity law. The following arguments support the independence of commodity law with in-detailed reasonings.

¹⁴¹Sub-para. (h). Ad Art. XX subpara. (h) extends the exception to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30 (IV) of 28 March 1947. However, the exception, although it opened a large loophole, made little practical effects because such agreements were hard to make. Only wheat and sugar agreements had been made effective. Bronz (1956), 69 Harvard L. Rev. 440, pp. 466–467.

¹⁴²CFC (2006), 27.

¹⁴³See *id.*

¹⁴⁴para. 42 of 2003 Almaty Conference.

¹⁴⁵Raphael Minder and Joe Leahy, *Asia battles with surging food costs*, FIN TIMES, at 9 (10 Jan 2008); U.N. General Assembly, Report of the Secretary-General, International trade and development, para. 4 A/62/266 (62nd sess.) (16 Aug. 2007).

(1) Limitations of the Competitive Market Approach

First, the adoption of competition in commodity market can threaten overall economies and economic development of CDDCs. Commodity price competition may suppress stable maintenance of export revenues in most DCs which depend on commodity production for a large part of their economic export. Some countries will prohibit exports of their major commodities at low prices. A research by CFC analyses the distribution of wealth among agricultural-commodity-producing countries through the price-increase of agricultural commodities, thereby distinguishing Commodity Developers¹⁴⁶ from the CDDCs. The research states that the beneficiaries of the increasing demand are Commodity Developers with an economy of scope rather than the CDDCs and that only six commodities out of sixteen agricultural commodities show strong unit price increases.¹⁴⁷

Second, as commodity price surges throw out the hunger issue,¹⁴⁸ commodity price collapse exacerbate many people's lives in CDDCs where productions and exports of small-farm-produced low-quality commodities occupy a substantial part of national income. The CFC's researches pointed out price-decreases in many traditional agricultural products which the CDDCs depends on while prices surge in some agricultural products. In the CDDCs, the increase of foreign exchange revenues through export growth is unlikely to come true under current situations. Robert Zoellick, the World Bank president, confirmed such difficulties of the CDDCs and states, 'along with high food and energy price, global economic turbulence starting from credit crunch in the U.S. and western Europe poses difficulties to a group of poor countries, mostly in Africa, thereby undermining their recently-built fundamentals for growth and worsening hunger and malnutrition in the poorest sector'.¹⁴⁹

Third, the rising price addresses the global concern for development of the countries under negative impacts. Countries where the economic structure largely depends on low-quality demand-stagnant commodities need international assistance for profitable agricultural productions and policy guides, which have been provided by international organizations, e.g., the Food and Agricultural Organization (FAO) and the CFC, and industrialized countries, e.g., United States Agency for International Development (USAID).

¹⁴⁶A few developing countries, so-called emerging markets, fall on the Commodity Developers (CDs). They are leading exporters of higher value commodities for which demand is expanding. See CFC (2006), p. 8.

¹⁴⁷*Id.*, at 7. The unit price of commodities from CDDCs had been lower during 2003–2005 than the average world unit price for 12 out of 16 commodities. The reason of such low prices is inferred due to lower quality products. See also *id.* at 10.

¹⁴⁸FAO Newsroom, *Crop Prospects mixed for low-income food-deficit countries in 2007: 28 countries face food shortages*, available at <http://www.fao.org/newsroom/en/news/2007/1000628/index.html>.

¹⁴⁹Krishna Guha and James Politi, *Zoellick calls for fight against hunger to be global priority*, FIN TIMES, 5 (24 Jan. 2008).

Fourth, environmental issues matter when exploitation of natural resources goes competitive. Natural resources shall not be traded without any fetter of environmental protection because excessive exploitation of the natural resources limits the usability of future generations. Under natural resource managements, an increasing number of legislations are reflecting the necessities of agricultural cooperatives and tradable fishing quotas.

(2) Balance of Interests: Bipartisan Membership within the ICA

To effectively work continuously, an ICA should pursue the policy objectives that a majority of the constituents desire.¹⁵⁰ Finding an objective for an organization is important so that the organization may work continuously in a market. Since an ICA is an organization operating in the global market, it needs to obtain correct objectives, which come from resolving conflicting interests among members. Therefore, the ICA needs a political process. If an organization targets an objective, not desired by a powerful faction of the organization, it may lead to its malfunction or destruction.¹⁵¹

The conflicting interests within an ICA come from bipartisan membership with different perspectives. First, the conflicting interests within ICAs are the heterogeneous interests of producers and consumers. The producers have more power in most ICAs than consumers as the focus of the organizations is toward production management including a quota. It is noted that some ICAs collapsed due to the difficulty of reconciling two opposite positions between producers and consumers. Second, its members can be divided into two groups, large- and mid-sized economies and small economies. The Commodity Developers (CDs) belong to the former group while the Commodity Dependent Developing Countries (CDDCs) belong to the latter group. As the CDDCs, compared to the CDs, lack an economy of scope, information or techniques for high productivity and high quality, products from the CDDCs tend to be low-quality commodities. Since an ICA needs active participation from large producers, mostly CDs, its objective cannot avoid reflecting the large producers' interests or a reconciliation between large consumers and producers, thereby overlooking the interests of small-scale producers, particularly from the CDDCs.

The proper objective for ICAs is negotiation among different groups and distribution of their interests. Consumers' concerns about food price increases can be negotiated with producers, particularly, in terms of reducing hunger and malnutrition. Particularly, for food commodity agreements, moderation of severe price fluctuation through production management on the basis of output level forecast or increase of productivity of good quality food may be a good objective. However,

¹⁵⁰Edward (1994), 532.

¹⁵¹*Id.* at 531–532. Quill illustrates the collapse of the Int' Tin Agreement (ITA). The ITA was under a severe dispute between consumers from the North, including the U.S. as the biggest consumer, and producers from the South by changing its objective from moderating price-fluctuation and developing efficient production method to a remunerative return to producers. *See id.* at 515–518.

small-size consuming countries or producing countries will still face difficulties in effectively representing their interests on the negotiation table as their contribution to the agreement is less than large economies. The special interests in small economies, particularly CDDCs, e.g., poverty, food shortage, need to be addressed with supplemental law or policy.

(3) Necessity of Supplemental Measures

1) Special and Differential Treatment of International Trade Law

International commodity agreements, prevalent in the 1970s, grew less effective in the 1980s and 1990s when market liberalization policy dominated international commodity trades. Under this liberalization approach, the less competitive low-quality products from the CDDCs faced a reduction of exports under harsh competition, thereby threatening the lives of small-sized producers in the CDDCs. Meanwhile, advanced countries reduced their assistance in ICAs as trade liberalization dominated commodity trades.

One way to solve the problem of less competitive products in less developing countries (less DCs)¹⁵² is for them to learn from trades with advanced countries to produce and develop for themselves.¹⁵³ The trade principle of reciprocity, however, as currently illustrated, impedes promotion of international trade between DC groups and advanced countries. Peter Mandelson, the EU Commissioner for Trade, recently stated that the EU could not offer access to the African Caribbean and Pacific (ACP) group unilaterally but on a reciprocal basis under WTO rules.¹⁵⁴ The special treatment of products from the ACP countries in the EU under the Cotonou Agreement (the former Lome Convention) is no longer permitted under the WTO regime. The ACP states cannot help but concede reciprocal trade preferences to the EU in order to have access to the biggest market in the world.¹⁵⁵

The most-favored-nation (MFN) principle under the WTO regime invokes concerns with less developing countries (less DCs). The less DCs have to offer reciprocal concessions to regionally integrated markets, to which preferential treatment with any trading partner in the future shall be applied equally under the principle, so that the integrated markets may sell their products under the preferential conditions. Out of the concern, Namibia and South Africa refused to sign new

¹⁵²Less DCs are distinguished from the least developed countries (LDCs) designated by the UN. The less DCs are mostly middle-income and low-income developing countries including LDCs. The major petroleum-exporting countries, major exporters of manufacturers and high-income developing countries are excluded from the less DCs. The less DCs are made up of the ACP group. Refer to Chap. 3. III. 1. for the category of countries.

¹⁵³Brown (1994), pp. 369–370. He cites the statement of the former Secretary of State, G. Shultz, in Rio de Janeiro at a conference sponsored by Brazilian business groups.

¹⁵⁴Mandelson, *Brussels cannot offer ACP unilateral trade access*, FT (12 Dec. 2007).

¹⁵⁵Andres Bounds and Laura Dixon, *EU to dilute trade deals to avert crisis*, FT (19 Nov. 2007). The literature on preferences highlight.

trade agreements with the EU because they are required to allow future preferential treatments under the MFN principle.¹⁵⁶

Growing regional market integrations in advanced countries can work against the less DCs as they place more opportunities with products from their member states than the ones from the less DCs.¹⁵⁷ Economic cooperation within the DCs, in response to economic blocs of industrialized countries, has brought less benefits than the cooperation with the blocs because the low level of economic structure in many DCs could not support reciprocal economic development effectively.¹⁵⁸

The strict application of current international trade law principles, between the less DCs or CDDCs and the advanced regionally integrated markets, neglects the unequal bargaining positions of each group of countries. Supplemental measures for promoting trades between LDCs or CDDCs and advanced countries are in need and thereby necessitate the development of international commodity laws independent from international competition law.

Although the GATT system offered nondiscriminatory quantitative restrictions to further economic reconstruction with strict conditions, which require the prior approval of the contracting parties, the quantitative restrictions have not been used widely to the benefits of CDDCs. Only the Generalized System of Preferences (GSP) under GATT has at least been used in favor of less-skillful products from DCs¹⁵⁹ as the GSP provides permission to have duty-free treatment or non-reciprocal tariff preferences. The point that the GSP operates on a permissive standard rather than on a mandatory one weakens its effectiveness. The CFC has already recognized such practical limitations of currently valid preferential treatments to DC groups.¹⁶⁰

2) Policy Assistance for Economic Development

Economic development, important for the growth of DCs, does not automatically grow through the trading of commodities which are abundant in DCs. For example, countries where a lot of crude oil exists have achieved less economic growth than expected with profit through their oil-trading and have rarely reached the level of advanced market economy. Economic development requires high-skilled labor forces, diversified economic structures, efficient market systems, transparent financial systems, and competitive manufacturing industries. Neither a

¹⁵⁶Bounds, *Two African nations refuse to join EU trade deal*, FT (4 Dec. 2007).

¹⁵⁷Edward (1994), 536; Brown (1994), 396. Brown classifies DCs into Newly Industrialized Countries (NICs) and the least developed Fourth World of Asia and Africa, which falls on the LDCs in this thesis. He foresees that, while NICs may join with Japan under a Asian trading bloc, the Fourth World states will be more isolated than ever.

¹⁵⁸Brown (1994), 169.

¹⁵⁹Brown (1994), at 362. UNCTAD have been less than satisfied with the scope of the GSP as well as with its ultimate benefit because not all DCs are covered and each advanced country provides too different and complicated schemes to evaluate the closeness to its original goal.

¹⁶⁰CFC (2006), p. 11.

competitive international market nor the OPEC has provided effective economic development to oil-exporting countries.

3) Concern About Environmental Protection

Commodity production can generate environmental problems. Although economic development through producing commodities requires exploiting natural resources and transforming environments at the cost of future generation's usage, economic development pays more attention to cost reduction than environmental protection. Such market system is difficult to consider environmental issues as an economic analysis of production's effect on the environment remains in the primitive level. For instance, the issue of water shortage is deeply related to the increase in the agricultural production for biofuel, or ethanol which requires a large water supply. The fishery industry can cause derivative killings of marine mammals as the WTO Tuna-Dolphin case illustrates.

A competitive-market-based approach to such environmental issues, however, is short of considerations for future generation. Transformation of an environment takes a very long time to be restored to their original state and, in quite a few cases, they can not be restored at all. The future generation, which does not have a chance to participate in the decision to interfere or alter environment, has to inherit the undesired results and endure the heavy burden of restoration.

International responses sometimes bring about some conflicts with national sovereignty of, particularly, the developing countries which are heavily focused on economic development. The lack of sufficient green technologies and limited economic resources in the developing countries results in another market barrier of 'green protectionism'¹⁶¹ under the pretext of environment protection. On the other hand, so-called 'eco-imperialism' has something to do with the more direct type of sovereignty intervention. The argument matters when the jurisdiction of a state as to domestic environmental law extends to the territory of another state. For example, the 1972 Marine Mammal Protection Act (MMPA)¹⁶² in the U.S. brought a dispute of fishery trade with Mexico in the Tuna-Dolphin case under the GATT.¹⁶³ The MMPA and supplemental regulations placed strict limits on the number of dolphins which can be killed by persons and vessels subject to U.S. jurisdictions,¹⁶⁴

¹⁶¹Brown (1994), p. 382. See also Alan Beattie, *Green Barricade*, FT 7 (24 Jan. 2008). The border tax for carbon emission might play the useful role of bargaining strategy in trade negotiation table while the imposition of actual direct tax on imports from under-regulated countries is difficult to be implemented fully due to complexities of global manufacturing system and local regulations in the light of WTO rule.

¹⁶²Marine Mammal Protection Act of 1972 (MMPA), Pub. L. No. 92-522, 86 Stat. 1027 (21 Oct. 1972). Sec.101(a)(2) stated that the incidental kill or serious injury of marine mammals permitted in the course of commercial fishing be reduced to insignificant levels approaching a zero rate.

¹⁶³In the eastern tropical Pacific Ocean where dolphins and tuna are known to swim very closely together and dolphins are encircled with purse-seine nets to catch the tuna underneath, when the nets are withdrawn, dolphins are ensnared in them and/or trapped below the surface where they suffocate.

¹⁶⁴§ 102(a)(1) of the MMPA.

provided penalties including forfeiture of cargoes,¹⁶⁵ and banned importation of commercial fish, which cause incidental kills or serious injuries of ocean mammals in excess of the U.S. standard.¹⁶⁶ Even the MMPA prohibited the importation of yellowfin tuna from the East-tropical Pacific Ocean (ETP) unless the Secretary of Commerce found that the harvesting country had a program regulating the taking of mammals comparable to the U.S.¹⁶⁷ Mexico argued that the extraterritorial application of the MMPA falls on eco-imperialism. Indonesia in this case argued that the MMPA exploited sympathy for marine mammals to protect the U.S. tuna producers, thereby falling on green protectionism. The GATT panel held that unilateral national legislation, e.g., the MMPA, threatened to undermine the multilateral trading framework of the GATT, and was inconsistent with Art. XI.1.¹⁶⁸ Although the penal decision explicitly declared that basic trade rules are not neglected in the environmental issue of international trade, subsequent environmental critics against the decision implied that the environmental protection issue is an area which multi-dimensional approaches under researches are better to address rather than international trade law. As commodity production is deeply involved with environmental protection, specific regulations for its production and trade are in need. ICAs can be places to discuss the issue of preventing environmental destruction when development-oriented approach is moderated by reflecting the economic evaluation of environmental effect of commodity production. The proclamation of a 'sustainable development' agenda by the international community, which will be discussed in Chap. 6, addresses the necessity for specific regulations.

D. Focus of the International Cartel Law: Private International Cartel

International cartels mostly operating with state-involvement include complicated interests. The member countries of the Organization of Petroleum Exporting Countries (OPEC), currently the most powerful IPA, have argued for sovereign powers to manage the natural resources which have been acknowledged by such international law as the United Nations (UN) General Assembly Resolution on Permanent Sovereignty over Natural Resources, Art. 31, 33, and 34 of the Charter of Economic Rights and Duties of States, the Declaration and Program of Action on the Establishment of New International Economic Order (NIEO), and the UN Conference on New and Renewable Sources of Energy. Independent right to economic development of the OPEC countries has been protected as a principle of the UN Charter. In light of such rights to natural resources, the OPEC member countries will object to any international regulation over OPEC. Even the non-member countries hesitate to accept international regulation regarding interstate cartels with the fear that their sovereign power to produce other natural resources

¹⁶⁵§ 106(a).

¹⁶⁶§ 102(a)(2)(B).

¹⁶⁷§ 101(a)(2)(B).

¹⁶⁸GATT Dispute Panel Report, *U.S.-Restriction on Imports of Tuna*, DS21/R, 5.18 (16 Aug. 1991).

may be intervened by the regulation. This thesis, which tries to make a possible international regulation against cartels, places major focus on cartels consisting of private corporations by distinguishing them from IPAs. Countries, free from fear of restriction to their sovereign powers, succeeded in reaching a consensus in regulating cartels of private companies, such as the 1980 UN Set or the 1998 OECD Hard Core Cartel Recommendation. To make binding international law on cartels, it is convenient to root firm international consensus through active practices in the area. Private cartels are to be discussed with priority. As IPAs and ICAs have more weight on economic development and poverty rescue than competition consideration, they need to be regulated under separate laws, and not in the same coverage as private cartels.

2.5 International Cartels and Their Representatives

A. Domestic Cartels versus International Cartels

It is a cartel working across borders rather than the one within a domestic market that quite a few international cartel regulations target. Some cartel conspiracies taking place in one country may affect another country, which belongs to the latter category, the cross-border cartel. The cross-border cartel is defined as an international cartel in this thesis. On the other hand, a cartel conspiracy taking place and affecting one country is defined as a domestic cartel. While the thesis does not neglect the importance of regulating domestic cartels as a basis of consensus-building for international regulation, this thesis plans to devote itself to regulating international cartels with which majority of international agreements deal.

B. Emergence of International Cartels

The phenomena of international cartels took place in the late nineteenth century in Europe where economic trade across national territories had been most in progress in the world. The German–Swiss dyestuffs cartel established in 1880s was one of original international cartels.¹⁶⁹ It set predatory price against competing, usually small, producers from other countries so as to secure dominance over Western European markets. According to a research, no less than 40 international cartels, either public or private, worked in Europe in 1897.¹⁷⁰

From the occurrence of WWI to the Great Depression, international cartels in the prewar stage were dismantled. When European states tried to recover the broken economy under new frameworks of treaty of Versailles and World Economic Conference in Geneva, one of the objectives of the Conference was to restore economic integration and protect stable equilibrium between production and

¹⁶⁹Connor (2003), p. 1.

¹⁷⁰Resch (2005), p. 3.

consumption through international industrial agreements including public and private cartels.¹⁷¹ However, the Conference reached only a statement requiring close attention to such industrial agreements due to conflicting opinions. The interwar cartels were reestablished in line with agreements on a national level as states did not prohibit cartels.¹⁷² Particularly, an international steel cartel led by France and Germany's steel industries controlled the entire steel production of members under a quota system with penalty payments for excess production. Starting from the international steel cartel, followed by the European Rail Manufacturers' Association (ERMA) in steel industries, international cartels came out in markets of magnesite, carbide, glue, explosives, electric bulbs, bottles, aluminum, and copper. During the Depression, however, most international cartels dissolved.

Although the efforts to achieve market control through international industrial agreements failed, most states did not forsake measures of national intervention, including a public cartel,¹⁷³ in disintegrated economies of the Depression era. As quite a few nations adopted favorable or at least accepting legislative attitudes toward cartels, international cartels had prospered supported by the tolerating legislative approaches. International cartels in tin, aluminium, nitrogen, dyestuff, and enamel goods were established with support of national governments through international treaties. The cartels enjoyed their heyday during the 1930s, and affected 40–50 % of world trade with monopolistic pricing.¹⁷⁴ Meanwhile, the U.S. took strict investigations against cartels, thereby causing American companies to be hesitant to participate in international cartels.¹⁷⁵ However, as international cartels covered the American market as well as the European market, the affected commerce in the U.S. during the times amounted to significant rates.¹⁷⁶

C. Aspects of International Cartels

Although international private cartels appeared in the late nineteenth century and grew popular in the interwar era,¹⁷⁷ the ones uncovered since 1995 are different from the previous ones in terms of scale, multicultural pluralism, refined operational technique, and longevity.¹⁷⁸ Currently discovered international cartels cover

¹⁷¹See *id.* p. 6.

¹⁷²Resch, *id.* p. 4; Connor and Helmers (2007).

¹⁷³However, the public cartels were treated by different rules from private cartels under international law. The inter-governmental producers' associations (IPAs) in a clearer term belongs to the public cartel.

¹⁷⁴Resch (2008), p. 14.

¹⁷⁵Connor and Helmers (2007).

¹⁷⁶Stocking and Watkins (1946), pp. 4–5. The tentative results of their research revealed that 87 % by value of mineral products sold in the U.S. in 1939, 60 % of agricultural products, and 42 % of manufactured products were cartelized.

¹⁷⁷Connor and Helmers (2007), at 48. Hundreds of international cartels operated in the interwar period, affecting nearly 50 % of international merchandise trade.

¹⁷⁸See *id.* at 1. The 40 international cartels were only the ones involved by Germany. Great Britain was involved in 22 of them.

markets in more no less than two continents, and diverse participants from not only European countries but also Asian countries. They lasted for more than 6 years on average while they worked secretly.

Generally, an international cartel tends to be formed among a few companies competing with a homogeneous product in a high concentrated market where high barriers to market entry block new competitors¹⁷⁹ or an industry trade association exists.¹⁸⁰ Low buyer concentration prevents purchasers from countervailing against the market power of the sellers in the cartelized market. According to a study, the organic chemical industry had the highest percentage of 283 cartels discovered since 1990, a majority of which are chemicals for food or animal-feed ingredients.¹⁸¹ The organic chemical market is an area where several conditions for an international cartel are met.

The number of international cartels uncovered and investigated is not large, but they generate enormous damage to not only commerce and consumers' welfare but also to social integrity and industrial efficiency.¹⁸² In terms of commerce, the size of the affected sales is, although not direct, proportionate to the market scope and duration of the investigated international cartel.¹⁸³ Compared to domestic cartels, the former research of 283 international cartels demonstrated that global cartels had the highest median sales, \$ 2.64 billion while median sales affected by 37 domestic cartels, active in one nation of Western Europe, is \$ 1.5 billion larger than domestic cartels in North America.¹⁸⁴ While the average duration of cartels with foreign members was 6.4 years, global cartels last much longer than localized ones.¹⁸⁵ In terms of overcharge, while median overcharges are from 24 to 29 % depending on the geographical area, global cartels have the highest rate at 29 %.¹⁸⁶ This result

¹⁷⁹*Id.* at 6–8.

¹⁸⁰OECD (2002), at 7.

¹⁸¹Connor (2003), at 10–11. *See* Connor and Helmers (2007), p. 8. Connor and Helmer revealed 22 % of total international cartels came out in the area. *See also* Connor (2003), at 4 and 11. Although Connor defines an 'international cartel' as the cartel of which members include foreign nationality or foreign headquarter while 'global' means that effect of the cartel covers more than one continent. Connor and Helmers mentioned that 40 North American cartels' median affected sales including those operating in both U.S. and Canada were \$ 0.9 billion (900 million). *Id.* at 14–15. On the other hand, Connor's prior research of 55 international cartels indicated, at 11, that the international cartels affected at least 211 billion, thereby causing \$ 3.65 billion per cartel in Table 5. *See id.* at 5.

¹⁸²*Refer to supra* 2.2 B. Disadvantage of Cartels.

¹⁸³Connor and Helmers (2007), at 12–13. Cartels working in global and West European area occupies 76 % (respectively 37.5) of 40 biggest cartels. The U.S. cartels have 20 %. While none was active only in Asia, 2 cartels were in South America and Oceania respectively.

¹⁸⁴*See id.* at 3–4. 'International cartel' means a cartel consisting of a member with foreign nationality or foreign headquarter while 'global' means that effect of the cartel covers more than one continent. Connor and Helmers mentioned that 40 North American cartels' median affected sales including those operating in both U.S. and Canada were \$ 0.9 billion (900 million). *Id.* at 14–15. On the other hand, Connor's prior research of 55 international cartels indicated, at 11, that the international cartels affected at least 211 billion, thereby causing \$ 3.65 billion per cartel in Table 5. *See id.* at 5.

¹⁸⁵*Id.* at 13. Global cartels lasts for the longest year (6.0 median years), followed by EU-wide cartels (5.5), single nation in EU (3.5). *See id.* at 11.

¹⁸⁶*Id.* at 21.

nearly matches other research studies.¹⁸⁷ With calculation of Consumers' Damage [CD] under this thesis,¹⁸⁸ median CD of the global cartel is around US \$ 770 million ($\$ 2.64 \text{ billion} * 29 \% = \$ 765.6 \text{ million}$).¹⁸⁹

The global cartels invoked severe sanctions through major competition agencies, particularly U.S. DOJ. The level of enforcement in developing countries is less developed than that in major industrialized countries with strict attitudes. The OECD report, a survey of eighteen nonmembers' anti-cartel enforcements, demonstrates that only four states imposed fines on price-fixing or bid-rigging. Since the report includes domestic cartels, enforcements against, particularly, international cartels, from the developing world would be much trivial in light of the fact that an investigation against an international cartel faces many hurdles.¹⁹⁰ The following is the analysis of representative international cartel cases investigated by several competition authorities.

(1) Graphite Electrodes Cartel

1) Summary of Fact

The UCAR International Inc. (UCAR U.S.) with several subsidiary companies is one of the largest manufactures of graphite electrodes¹⁹¹ in the world with each subsidiary incorporated under the law of its principal place of business. SGL Carbon Aktiengesellschaft (SGL AG) with many subsidiaries, a corporation of Germany, is also one of the world leaders in manufacturing and trading graphite electrodes. The other significant participants in the manufacture, and trade of graphite electrodes are Showa Denko, Tokai, Nippon Carbon Co., SEC Co. (Japan), VAW Carbon GmbH (Germany), and the Carbide Graphite Group (USA). The global market for supplying graphite electrodes is concentrated in light of the facts that around fifty areas produced approximately one million tons in the global estimate, and that the UCAR, SGL, and the other companies supplied 80 % of the global need.¹⁹²

Representatives of SGL, UCAR, and other significant manufactures met and reached an agreement to restrict production capacity, to allocate the sales volume

¹⁸⁷*Id.* See Connor (2003), at 11. Average overcharge in 32 cases with accurate information was around 30 % of sales. Similarly, the average overcharge of 98 international cartels with incomplete data, was 28 % of affected sales. Meanwhile, median overcharges for cartels, both domestic and international, are between 15 and 20 % since a domestic cartel places less overcharge than an international one. See also OECD Global Forum on Competition (GFC) (2003), pp. 4-7.

¹⁸⁸See Chap. 2. 2. B(5).

¹⁸⁹Multiplying affected sales by overcharge rate is CD of a global cartel(s).

¹⁹⁰See OECD GFC (2003), 7 and Annex C at 27-28. China (6500), Estonia (639), Latvia (0.7 % of annual turnover), and Peru (1800 per each respondent and 900) specified the amount of imposed fines (EUR). For in-detail hurdles, refer to III. 3. (3).

¹⁹¹Graphite electrodes are ceramic-moulded columns of graphite used in the production of steel in electric arc furnaces through conducting electric current into a furnace accompanied with high temperature.

¹⁹²The total production is based on 1998 statistics. The market share data comes from the in-house report of SGL in Nov. 1996. KFTC, 심결 [Decision], 1.나.(2)(가)(2002국협0250) (Apr. 4, 2002).

with exports to the graphite electrodes market in each participant's country, to divide the global market, to provide neither rebate nor discount, and to fix prices in the global and regional markets in May, 1992. Since that time until June 1997, meetings among the representatives of the manufacturers continued to convene to discuss in-detail issues and monitoring the enforcement. During the cartel-operating period, the prices of graphite electrodes increased 48.9 % in South Korea,¹⁹³ 50 % in the EU,¹⁹⁴ 50–60 % in the U.S.¹⁹⁵ and around 100 % in Canada.¹⁹⁶

2) Penalty

The cartel was uncovered and prosecuted in the U.S. The investigation was much facilitated by information submitted under its leniency program. The U.S. Department of Justice (DOJ) imposed a fine in the total amount of US \$ 290.8 million on seven corporate defendants during the indictment procedure under Sec. 1 of the Sherman Act. The defendants plead guilty and consented to pay the fines, which a court approved. The DOJ indicted former employees of UCAR International, and the president of SGL Carbon, and most of them plead guilty and agreed with the individual fines and jail time.¹⁹⁷ The judicial body approved the guilty pleas.

The EU Competition Commission treated the cartel as a serious infringement of the EC competition rules, and imposed a total of US\$ 275.8 million (euro 195.7)¹⁹⁸ fines under Art. 81 of the EC-Treaty and Art. 53 of the EEA-Agreement.

Canada's Court of Justice agreed with imposing a total of US \$ 24.95 (Canadian Dollar[CD]\$24.95) million on the defendants who pleaded guilty.¹⁹⁹ Two former executives of UCAR International were fined after guilty pleas.²⁰⁰ The penalties were based on a violation of Sec. 46 (1) of the Competition Act of

¹⁹³See *id.*, 2.7].(3).

¹⁹⁴Europa, *Press Release: Commission Fines Eight Companies in Graphite Electrode Cartel* (July 18, 2001), available at <http://europa.eu/rapid> (visited on 1 Apr. 2008).

¹⁹⁵OECD, *Hard Core Cartels*, pp. 35–36 (2003).

¹⁹⁶Canada Competition Bureau (CB), *New Release: Mitsubishi Fined \$1,000,000 for Aiding and Abetting Graphite Electrode Cartel* (12 May 2005), available at <http://www.competitionbureau.gc.ca> (visited on 25 Sep. 2007).

¹⁹⁷Followings are in-detail sentences: former president with US\$ 1.25 million and 17 month jail, former employee with \$ 1 million and 9 month jail, and president of SGL Carbon with \$10 million. KFTC (2004), 1.ㄷ. <Table 3>.

¹⁹⁸Total fine of European Court of Justice was Euro 195.7. Europa, *Press release: Competition: Commission welcomes judgments of the Court of Justice in SGL Carbon and Showa Denko Cases (Graphite Electrodes cartel) MEMO/06/258* (29 June 2006). Exchange rate of US\$ 1.00 equals to Euro 0.7095 as of 24 Sep. 2007.

¹⁹⁹KFTC (2004), Table 3; Industry Canada, *News Release: Nippon Carbon Pleads Guilty to Participating in International Graphite Electrodes Cartel* (8 Dec 2005), available at <http://www.ic.gc.ca> (last visited on Sep. 25, 2007); Canada CB (2005). Exchange rate of currency of US\$ 1.00 as of 24 Sep. 2007 is CD\$ 1.0002, which is almost the same value.

²⁰⁰Two individuals were with no jail sentence but fine of a total CD\$ 0.12 million. Canada CB (2005).

Table 2.1 The graphite electrodes cartel investigation of countries

	Scope of market (US\$ million: from May 1992 to 1997) (ratio to the world market)	Total corporate fines (US\$ million)	Individual fines and jails (US\$ million/ months)
U.S.		290.8 (48.4 %)	12.25/17 and 9 each
EU		275.8 (45.9 %)	N/A
Canada	440 (high power) (3.9 %)	24.95 (4.2 %)	N/A
S. Korea	450 (ultra high power) (4 %) ^a	9.58 (1.6 %)	N/A
		601.13	

^aIn order to have correct comparison, the work period of the cartel is confined from May, '92 to '97. KFTC-issued data from '92 to '98 was US\$ 553 million, but import in '98 was excluded. The cartel-caused harm from '92 to '98 is estimated to be around US\$ 139 million, around 25% of the total import. KFTC (2004), 3.

Canada.²⁰¹ Private actions in damages were also filed, one of which ended up with a payment of CD\$ 29 million to Canadian steel companies.

The Japan Fair Trade Commission did not impose a fine but issued warnings to four companies that were suspected of violating the Antimonopoly Act of Japan. Meanwhile, the Korea Fair Trade Commission (KFTC) imposed a total of around US \$ 9.57 million on six defendants in 2002.²⁰² The cartelistic activities fall on the violation of MRFTA Art. 19 Sec. 1 para. 1 which prohibits competitors from collusively fixing, maintaining, and changing a price (Table 2.1).

3) Assessment

An analysis of the results reveals that the U.S. has strict enforcement records while S. Korea, although its commerce under the influence of the cartel is similar to that of Canada, has a more lenient anti-cartel penalty record than Canada. Korea's under-enforcement against the international cartel is affirmed by the fact that the level of penalty in the graphite electrodes cartel is still the highest among international cartel enforcements in S. Korea during its quarter-century competition law history.

S. Korea, however, hit the international graphite electrodes cartel with a much stronger penalty than any other developing country under the influence of the cartel. It was the global market which the international cartel targeted at through allocating the market and sales volume, restricting production capacities, fixing price, and preventing each member from giving a rebate or discount. The vast majority of the markets in the world did not even know or at least attempt to punish the international cartel after a few advanced countries revealed the conspiracy. Korea, as one of the developing countries, did not notice the cartelistic activities until the competition law enforcement in the advanced countries was announced in public. KFTC could enjoy unprecedented extraterritorial application of MRFTA thanks to

²⁰¹The Attorney General of Canada, Statement of Allegations by the Attorney General of Canada, para. 23 (2005).

²⁰²KRW 8,812 million equals to US \$ 9,567,861 dollar at currency exchange rate (US\$ 1 = KRW 921) as of 24 Sep. 2007.

wisely-planned investigation, consensus within the organization, and leadership of KFTC chief.²⁰³

S. Korea, one of the countries with a relatively short competition law history, found difficulty in dealing with procedural obstacles of an international cartel investigation. It is through international law that international cooperation for reducing the obstacles can be secured. In order to achieve an international law, participation of advanced competition authorities in the creation of a legal frame for international cooperation is very important.

(2) Vitamin Cartel

1) Summary of Fact

Bulk vitamins are used for manufacturing animal feeds, medicine, foods, and cosmetics. In 1989, four major companies dominating the world's bulk vitamin market agreed to allocate the market among themselves, and follow the price increase announced by a cartel member. The producers, through regular meetings, developed a cartel conspiracy and made an in-detail plan. The participants tried to maintain allocated market share by exchanging sales information and managing the quantity of their sales. The meetings progressed with four levels—the top level, heads of marketing, global product marketing level, and regional product marketing level—joined by the remaining seven companies. The arrangement had continued until 1998 when the members noticed the US DOJ investigations starting a year in advance against themselves. In 2 years after the notice, the increased price during the cartel period dropped below the 1989 level.²⁰⁴

2) Penalty

The U.S. DOJ prosecuted eleven companies under the violation of Sec.1 of the Sherman Act and imposed an US\$ 910.5 million fine with a guilty plea. The judiciary body approved it. Subsequently, the private action from direct purchasers of the vitamin in the U.S. was settled with US\$ 2.4 billion.²⁰⁵

The EU Competition Commission imposed US\$ 1205.4 (Euro 855.2) million on eight companies on the basis that they violated Art. 81 of the Maastricht Treaty on European Union(EU)—currently Art.101 of the Treaty of Lisbon, and Art. 53 of the EEA agreement.

Meanwhile, the DOJ of Canada indicted 12 companies for their collusion under Art. 45 of the Competition Act of Canada. All the companies pleaded guilty and accepted around US\$ 96.8 (CD\$ 96.8) million in fines.

²⁰³See *id.* at 5.

²⁰⁴For example, import price of vitamin E in South Korea increased up by 46 % from 1989 until 1998, but dropped by 52 % to below the original price of 1989. KFTC, *Press Release: KFTC imposing surcharges on international vitamin cartel* [보도자료: 공정위 비타민 국제카르텔에 과징금부과], at 8 (2003).

²⁰⁵The private action of foreign direct purchasers was, however, dismissed on the lack of jurisdiction because Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) could not give rise to a claim from foreign injury. *Hoffman-La Roche LTC et al. v. Empagran et al.*, 124 S.Ct. 2359 (2004).

Table 2.2 Comparison of penalties in each country (US\$ million)

	Public Penalty (ratio)	Private action	Total (ratio)
U.S.	910.5 (41 %)	2400	3310.5 (71 %)
EU	1205.4 (54 %)	N/A	1205.4 (26 %)
Canada	96.8 (4 %)	0.58	97.38 (2.1 %)
Australia	22.5 (1 %)	N/A	22.5 (0.5 %)
Japan	N/A	N/A	0.0
Swiss	N/A	N/A	0.0
S. Korea	3.7 (0.2 %)	N/A	3.7 (0.08 %)
Total	2238.9 ^a		4639.48

^aOECD revealed that annual worldwide turnover of the vitamin products during the conspiracy period was US\$ 3.3 billion. Agreements on some of the products, not all, lasted as long as 10 years. In considering the fact that not all products were under the conspiracy, total affected commerce is less than \$ 33 billion. If conservatively presumed, 50 %, 16.5 million, is affected, total fine, around 2.24 billion, is 13.6 % of the affected commerce. Since the median cartel mark-up in 14 cases ranged from 15 to 20 %, the conservative presumption, 13.6 %, indicated that total public penalty is a little less than harm. *See id.*, n.13

The Australian Competition Committee prosecuted three companies for price-fixing and market-allocation of animal-feeding vitamins. All the defendants plead guilty and received a fine of US\$ 22.5 (AU\$ 26) million. For cases of other developed countries, Japan issued a warning without a penalty while Switzerland rendered a consent order without a fine.²⁰⁶

3) Developing Countries' Enforcement

The KFTC, after hearing of the advanced countries competition law enforcements, launched an investigation against the cartel with the presumption that the cartel affected the market in S. Korea in 2002. With data shared by the advanced competition enforcers, the KFTC revealed the effect of the cartel on Korea's market and imposed a total of US\$ 3.73 (KRW 3433) million in fines against six companies under Art. 19. 1. para. 1 of the MRFTA. The following table compares the ratio of vitamin sales and monetary penalties against the cartel (Table 2.2).

The under-enforcement of a monetary penalty against cartels in South Korea is demonstrated by the comparison of the ratio of the scope between Korea's market and the global market. As Table 2.3 indicates, the ratio of the vitamin market in South Korea to the global market and the ratio of cartel members' profits in S. Korea to their profits in the global market are around 1.5 %. Meanwhile, the ratios of penalties between S.Korea and the other advanced countries are 0.2 % in criminal (including administrative) fines and 0.08 % in monetary sanctions including private actions. Provided the damages of the cartel accrue in proportion to the ratio of market scope or profits, the penalty remains much below the ratio of

²⁰⁶OECD (2002), 35.

Table 2.3 Comparison of market scope: global and Korean Markets (US\$ million)

	All defendants' total profits for 10 years of the cartel operation	Their sales of cartelized vitamins (A, E, D3 and AD 3) in 1998
The whole markets in the world	18,000	1687
South Korean market	185	26.5
Ratio (S. Korean/Global)	1.5 %	1.5 %

See Brief for Certain Professors of Economics as Amici Curiae Supporting Respondents, *Hoffmann-La Roche Ltd. v. Empargran*, 542 U.S. 155 (2004) (No. 03-724), 2003 U.S. BRIEFS 724, 9–11. Compare it to KFTC Decision, 제 2003—098호 [case number 2003-098] (2003 국협 0396), 2003년 4월 29일 [April 29, 2003], Korean version at <http://www.ftc.go.kr>. When the numbers on the second line are divided by those on the first line, the ratio is around 1.5 % which reveals the scope of Korea's market to the global market

harms. It means that penalty regimes, both public and private, are less active in South Korea than advanced countries.

The other developing countries, except Brazil, did not even launch an investigation or seriously punish the cartel participants even though the cartel had a negative impact on their countries.²⁰⁷ Procedural hurdles, which the developing countries might experience in investigating foreign companies with no branches in the countries as well as their immature capacities, contributed to the barren results.²⁰⁸ International cooperation to support competition law enforcement in the developing countries, as well as their own efforts to entrench in a competition culture, is necessary to balance the level of anti-cartel law enforcement with the cartel-causing damages.

2.6 Conclusion

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. Domestic competition laws have adopted this definition under their cartel regulations. However, the coverage of this definition is less appropriate in achieving effective international cartel regulation because some cartels in the definition cause more

²⁰⁷The Brazilian eight-year-long investigation under the hardship of gathering information led to the imposition of fine, total US\$ 4.3 million or 15 million Brazilian reais. Although the conspiracies affected many regional markets in the world, the penalties were issued mostly from developed countries. OECD (2003), at 37–38.

²⁰⁸*Id.* at 34–35.

pro-competitive effects than anticompetitive ones and individual nations have developed different rules on cartels with hybrid effects. 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 cartels and because international agreements have been developed with a narrow focus. Recent activities of regulating cartels in the OECD and ICN have concentrated on cartels under the narrow HHC definition.

Cartels function to control competition in the markets, which brings inefficiencies to whole industries, harm to consumers, a loss of consumers' surpluses, and undermines both the trust in social integrity and sincere entrepreneurship.

On the other hand, cartels can save the waste of financial and personal resources through harsh competition. Severe competition in an economic depression era could not save the related industry or economy in light of past experiences of even advanced market economies. According to economic analyses, mass unemployment and bankruptcies of companies during an extreme financial crisis came from an ineffective financial system, which did not produce sufficient funds, rather than from productive inefficiencies which a competition law aims at eliminating through cartel regulations. Particularly, in economic depressions, emerging or developing economies under an immature financial system have resorted to industrial policies, instead of newly adopted or young competition policies. In an extremely severe economic depression period, it is unexpected for young economies to apply cartel regulations to the same level under normal situations. In order to gather wide participation from emerging markets or developing countries, the international cartel regulation needs to exempt so-called crisis cartels. Even the industrialized countries with an advanced competition law system have approved this type of cartel in their histories.

In addition, although collecting money for investments is necessary in developing market economies, the developing countries usually face insufficient funds for investment. There is a greater chance to raise enough money for innovation and investment when so-called investment cartels are exempted with strict screening procedures.

Moreover, interstate commodity cartels need to be exempted from 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. The ICAs under bipartisan membership of consuming countries as well as producing countries operate similar to the IPA under a unilateral membership of producing countries. Except membership and its derivative rules, placing both IPAs and ICAs under the same regulation does not interfere with the development of international commodity law. The IPAs and ICAs share a common concern between them that certain developing countries, particularly CDDCs, have heavily relied on commodities production in exchange of which small-sized producers may manage to earn money for food. International law has developed independent commodity laws for the IPAs and ICAs.

International private cartels, which have prevailed since the 1990s, generate bigger average damages, US\$ 2.64 billion per cartel, than average damages of domestic ones, \$ 1.5 billion per cartel. The international cartels are formed in a highly concentrated market with a few companies with a homogenous product where entry barriers exist. The graphite electrodes cartel and the vitamin cartel are main examples of international private cartels. In a comparison of anti-cartel enforcements in the industrialized countries under the Table 2.1, South Korea as well as other developing countries demonstrated much lower level of public and private enforcements against two cartels. Such under-enforcements are due to less experience, insufficient support, and procedural hurdles. The international support for cartel regulation enforcement needs to be promoted.

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.

References

Book

- American Bar Association (ABA) (2004) Section of Antitrust Law, Handbook on the antitrust aspect of standard setting
- Competition Committee Survey of OECD (2003) Hard Core cartels: recent progress and challenges ahead. OECD
- Connor JM (2003) Private International Cartels: effectiveness, welfare & antitrust enforcement. Purdue Univ
- Encyclopaedia Britannica (2007) The New Encyclopaedia Britannica, vol 2 Micropaedia, 15th ed. Encyclopaedia Britannica Inc
- Edwards CD (1976) Economic and political aspects of international cartels. Arno Press, A New York Times Company, New York
- Eatwell J, Milgate M, Newman P (1998) The new palgrave: a dictionary of economics, vol 1. Stockton Press Ltd., Houndmills
- Friedman J (2007) Dictionary of business terms, Barron's, 4th ed
- Fox E, Sullivan L, Peritz R (2004) Cases & materials on U.S. Antitrust in Global Context, 2nd ed. West Pub., New York
- Garner BA (2003) Black's Law Dictionary, 2nd pocket ed
- Greenwald D (ed) (1994) The McGraw-Hill encyclopedia of economics, 2nd ed. R.R. Donnelley & Sons Co., Chicago
- Harry First (2003) Evolving toward What? The Development of International Antitrust. In: Drexl J (ed) The future of transnational antitrust-from comparative to common competition law. Kluwer Law Int'l, Alphen aan den Rijn, pp 33–38
- Huh C-H (2002) Korea's Monopoly Restraint and Fair Trade Act [MRFTA] & Cartel Regulation [공정거래법과 카르텔규제], Bi-Bong Pub, Seoul, Korea
- Kabir-ur-Rahman K (1982) The Law & The organization of international commodity agreements. Martinus Nijhoff Pub., Leiden
- Korea Fair Trade Commission (KFTC) (2004) Whitepaper [공정거래백서], KFTC
- LeClair MS (2000) International commodity market and the roles of cartels. M.E. Sharpe Inc., Armonk

- Rodger B, Macculloch A (eds) (2000) The UK competition act, at 172–173. In: Rodger, Macculloch (eds) Hart Pub., The Rocks
- Rudolph JRP (1996) Competition policy in America, history, rhetoric, law, rev. ed. Oxford Univ. Press, Oxford
- Scherer FM (1994) Competition policies for an integrated world economy. Brookings Inst., Washington
- Stocking GW, Watkins MW (1948) Cartels or competition? The Twentieth Century Fund
- Stocking GW, Watkins MW (1946) Cartels in Action, The Twentieth Century Fund
- UNCTAD (2007) Model law on competition. United Nations

Thesis, Papers

- Baker DI (2001) The use of criminal law remedies to Deter and Punish Cartels and Bid-rigging, 69 Geo. Wash. L. Rev. 693 (2001)
- Baumol W (2001) When is inter-firm coordination beneficial? The case of innovation. In: 19 International journal of industrial organization, p 727
- Brown B (1994) Developing countries in the international trade order. 14 N.Ill.U.L.Rev. 347:369–370
- Bower JL, Rhenman EA (2003) Benevolent Cartels, 63. Harvard Bus Rev 4:124–132
- Bronz G (1956) An international trade organization: the second attempt. 69 Harvard L Rev 440:466–467
- Connor J, Helmers G (2007) Statistics on modern private international cartels: 1990–2005. The American Antitrust Institute (AAI) Working Paper No. 07-01
- CFC (2006) Current Trends & the New Development Role of Commodities, Nov. 2006, available at <http://www.common-fund.org/download/actualiteit/CT06jelle.pdf>. Visited on 10 Jul. 2008
- Edward Q (1994) The failure of international commodity agreements: forms, functions, and implications, 22 Denv. J Int Law Policy 530
- Gilbert C (2005) International Commodity Agreements, Jan. 14, 2005, available at http://grade.unitn.it/people/gilbert/file/Attachment_10.pdf. Visited on 10 Jul. 2008
- JFTC (2002) Capacity building to Combat Cartels in Japan, at <http://www.jftc.go.jp/eacpf/05/APECTrainingProgram2002/Japan1.pdf>. Visited on 25 Feb. 2008
- McFadden EJ (1986) The collapse of tin: restructuring a failed commodity agreement, 80 A J I L 811:815
- OECD (2002) Report on the Nature and Impact of Hard Core Cartel and Sanctions against Cartels under National Competition Laws, DAF/COMP(2002)7
- OECD Global Forum on Competition (2003) How enforcement against private anti-competitive conduct has contributed to economic development, CCNM/GF/COMP(2003)7
- Resch A (2008) Phases of competition policy in Europe, Inst. of European Studies Paper 050401, 2005, available at <http://repositories.cdlib.org/ies/050401/>. Visited on Jul. 10, 2008

Strategies to Achieve a Binding International
Agreement on Regulating Cartels
Overcoming Doha Standstill

Lee, J.S.

2016, XIII, 336 p. 5 illus., Hardcover

ISBN: 978-981-10-2755-0