EXPORT CARTELS – A CENTURY OF FUMBLE ATTITUDES?

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Abstract

The present article analyzes, from a historical perspective, the debate concerning the export cartel debate from its birth in 1918 until today. There can be identified four different periods of the debate that revolve around the enactment of the Webb-Pomerene Act, the creation of the Bretton Woods institutions, the creation of the World Trade Organization and the July package decision of 1 July 2004. The article highlights the actors and the ideas that shaped the debate and the results that were obtained. While it is clear that the fairest solution to the issue of export cartels would be the prohibition of this practice, what is not clear is the path that would lead to the ban and the institutional framework that would support it afterwards. This paper thus proposes an approach for identifying the most affordable solution. It argues however that, before launching an institutionalized solution on export cartels, more in depths analysis is needed[2)].

Keywords: *export cartels; World Trade Organization; competition law; cartels*

INTRODUCTION

1. In a global world some issues become, inevitably, more visible. One such issue is the practice of providing exemptions from national competition legislation to firms that cooperate in their export activities, known also as the export cartel exemption.

2. The export cartels are "mysterious" cartels. While international cartels received and continue receiving attention both from the national authorities and from the International Organizations (IGOs), export cartels remain almost unobserved. This paper presents the evolution of the export cartels debate that began in 1918 with the enactment in the US of the Webb-Pomerene Act, the main actors and ideas that shaped the debate, and the achieved results. The paper also

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attempts to emit some general conclusions concerning the evolution of trade relations and trade law thinking that accompanied the export cartels debate.

The paper is divided into four parts which present the waves of academic thinking on export cartels. The first part depicts the first years of the 20th century. The second part highlights the evolution of the export cartel debate after the World War II (WWII). The third part follows the development of the export cartel debate after the creation of the World Trade Organization (WTO). The last part focuses on the very recent works on export cartels that were published after the failure of the trade and competition debate within the WTO. A special emphasis will be placed in the last part of the present dissertation on the feasible solutions for the export cartel issue.

I. THE WEB-POMERENE MOMENTUM

The legal writing on trade and competition is not a recent invention. The survey of the early literature on export cartels surprises with the amount, the quality and the depth of the legal thinking at the beginning of the 20th century.

In relation to the enactment of the Webb-Pomerene Act, it is interesting to highlight, from the point of view of the modern lawyer, the reasons for the adoption of such legislation, the advantages and disadvantages of enacting such legislation and some of the specific questions asked by the academics who first considered this issue.

The Webb-Pomerene Act (WPA) was adopted in 1918. The Act was designed to promote the American export trade by granting relief from the Sherman Act provisions to the so-called export associations.

Since a proper balance must have been struck between a provision that would have *de facto* repealed the Sherman Act and a provision that would have given the American exporters what they required, the reasons for enacting such legislation were carefully considered.

One could identify four main reasons that lead to the adoption of the Webb-Pomerene Act.

a) An eye for an eye, a cartel for a cartel

Export associations were considered a legal answer to a late business start. In order to compete with the already established and very powerful German[3], British, Dutch or Japanese "combinations", the small American business needed to be empowered with a necessary business wisdom, the wisdom of association[4]. Since all the leading trade nations of those times allowed associations for the

[3] Steven B. Webb, 'Tariffs, Cartels, Technology and Growth in the German Steel Industry, 1879 to 1914' (1980) 40 The Journal Of Economic History 2, 309-330.

[4] Eliot Jones, 'The Webb-Pomerene Act' (1920) 28 The Journal Of Political Economy 9, 754.

promotion of exports, the American exporters saw the Sherman Act, which did not provide for such an exemption, as a betrayal. As Kirsh observed, "a more tolerant attitude than that evidenced by the American anti-trust policy is manifested by all of the governments of foreign nations. There are at present in no European country restrictive legal provisions which embody the regulations and contain the drastic penalties of the American anti-trust laws"[5].

The export association legislation was, on the other hand, a general policy choice. Canadian trade officials and the British Board of Trade – that historically and culturally praised individualism and condemned monopolist tendencies – strongly supported export association legislation[6].

Finally, the export associations were needed to respond to the European combinations of buyers that had the effect of lowering the price of the exported American goods[7].

In the light of these arguments it appears that the Webb-Pomerene Act was, at the time of its adoption, a necessary law.

b) Solving a bigger puzzle

The Webb-Pomerene Act represented only one piece of a larger policy which endeavored to promote U.S. foreign trade. The inadequate banking and credit facilities abroad, the discrimination against the American goods by foreign steamship lines, the small amount of American investment in the securities of foreign companies and the comparative inexperience[8] of American business society needed to be compensated by strong incentives to export and to invest. One such incentive was granted by the WPA aimed to lower the export costs, to secure better credit information and thus better financing of the business and to allow an exchange of know-how between the members of the association.

The Shipping Board Act, the Edge Act, the Merchant Marine Act were part of the same logic, providing exemptions from the anti-trust laws and making available new financial means for foreign trade promotion[9].

c) Stop competing with each other!

One could also identify an unconventional reason for the adoption of the WPA: the intention to make the American exporters stop competing with each other in the foreign markets. This idea is highlighted by Eliot who noted that the elimination of competition between the American firms will lead to better prices

[5] Benjamin S. Kirsh, 'Foreign Trade Functions of Trade Associations: The Legal Aspects' (1928) 76 University Of Pennsilvania Law Review 8, 894.

[6] William Notz, 'Cartels During the War' (1919) 27 The Journal Of Political Economy 1, 6-7

[7] Jones (1920), 757.

[8] *Ibid*., 757.

[9] Kirsh (1928), 913.

for the products sold abroad[10]. In the same sense, another author wrote "that it is not the economies of combination that attract Webb-Pomerene association activities. Rather it is the opportunity to lessen competitive rivalry, ostensibly in foreign markets"[11]. In this way what was supposed to act as an incentive to export became in fact an incentive to cartelize.

The biggest amount of information available about export associations relates to the advantages and disadvantages that such legislation exhibits. Two observations should be made at this point. First, it appears that the only absolute supporter of the export association legislation was the Federal Trade Commission. Except of the FTC, few authors voiced unconditional support for the WPA. Second, the number of critics surpassed from the beginning the number of the WPA supporters.

In a report issued in 1927, the Federal Trade Commission enumerated the advantages of the export trade associations: (1) reduction of the selling and transport costs; (2) standardization of business practices; (3) improvement of product quality; (4) elimination of the cut-throat competition in the foreign markets; (5) economy in operation; (6) better distribution systems; (7) prorating of business data collection[12].

One of the few supporters of the Webb statute concluded in 1929 that the WPA "has provided thus far a serviceable piece of legislation and within reasonable bounds accomplished what its name proclaims: An Act to Promote Export Trade"[13].

On the side of academics who voiced rather skeptical views, two main types of criticism can be identified in relation to the implementation of the WPA: (a) egotistic criticism and (b) altruistic criticism.

a. Egotistic criticisms

"The chief objection to the export associations authorized by the Webb Act is that they may be used as a means of restricting competition in the domestic market"[14]. As Fournier explains, the idea that domestic market and foreign markets are separate is "entirely erroneous" since "the two markets cannot be kept distinct and separate without restraint of competition in both markets"[15].

Taken into account the intensive international cartel activity before the WWI, many authors expressed the view that the removal of the Sherman Act restrictions

[10] Jones (1920), 757.

[11] Leslie T. Fournier, 'The Purpose and Results of the Webb-Pomerene Law' (1932) 22 The American Economic Review 1, 20.

[12] Anual Report Of Federal Trade Commission for year ending June, 1927, paragraph 23.

[13] William Notz, 'Ten Years' Operation of the Webb Law' (1929) 19 The American Economic Review 1, 19.

[14] Jones (1920), 765.

[15] Fournier (1932), 26.

as regards the export trade associations will lead to the proliferation of international cartels[16].

Another fear expressed by the academia was that the "a cartel for a cartel" approach might be just the beginning of a trade war. The Webb statute may create a reaction on the side of the foreign competitors that could seek to expand the already existing cartels in order to react to the newly empowered American business[17].

Fournier pointed out that the Webb-Pomerene Act was very likely to create "serious administrative difficulties", by placing on the Department of Justice a heavier burden of proof as to the domestic restraint on trade.

b. Altruistic criticisms

One of the most astonishing and prophetical criticism expressed in relation to the WPA at the beginning of the last century was the so-called "world consumers issue"[18]. Fournier noted that the Webb bill and its future interpretations represent a "vehicle for the oppression of foreign people", proposing already in the 1920s what today would be classified under the name of accountability.

Jones noted that, except of a trade war, "the pursuit of trade by large groups will tend to upset once more the peace of the world"[19]. In the same way Notz, while highlighting the "dangerous effects of commercial friction upon the political relations among nations", suggests that the only healthy way in which trade could be pursued in the future is to "give to commerce the humane imprint which shall always constitute the emblem of genuine civilization and enlightenment"[20].

In sum, the WPA was the first concrete attempt to establish a policy on export associations. The Act was part of the US competition policy, and a step ahead towards the crystallization of an American trade policy.

The WPA was an expression of a political wisdom. No special legal necessity or economic reasoning seemed to require this amendment to the Sherman Act. The fact that Woodrow Wilson himself intervened two times to ask the Congress to speed up the process of adoption of an export association bill points out to the weight that the political, rather than the legal or economic, interests played in the adoption of this law.

Furthermore, it appears that the initial commentators of the WPA were more concerned with its political impact rather than with its legal impact. Thus the debate whether cartels ensure peace by guaranteeing that competitors will not intervene in each others' markets or, on contrary, may lead to a war by developing

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[16] William Notz, 'International Private Agreements in the Form of Cartels, Syndicates, and Other Combinations' (1920) 28 The Journal Of Political Economy 8, 667-671.

[17] Jones (1920), 766.

[18] Fournier (1932), 19.

[19] Jones (1920), 766.

[20] Notz (1919), 45.

an ill-feeling among nations prevailed in the American academia. In fact, the export association legislation was seen against the peace time-war time background. The fact that the Treaty of Versailles – which was a peace-making treaty – obliged Germany "to protect the trade of the Allies against unfair competition" is symptomatic of the tendency in the policy making process of that time to balance out the benefits from trade with the possible damages to the world peace. This leads inevitably to the idea that the export association legislation was perceived as political necessity in the first instance, the economic and legal reasoning on efficiencies or enforcement was absent or only at the periphery of the academic interest.

Also, one could assume that the WPA was an important component of the American endeavor to quit its isolationist instincts. The increase of trade officials, the amendment of banking laws and the campaigns for "building up among the people of the United States an appreciation of the significance of international trade"[21)] lead to the conclusion that trade was perceived as a great opportunity for the American business to meet the outside world. The Webb law was only one of the incentives to do so and, as such, part of a systemic change.

One should also mention the prophetic talent of the academic debate revolving around the Webb bill. The references to the "world consumers", the expressed need for an international mechanism to prevent unfair competition, and the enforcement problems are questions that challenge the minds and the personal philosophy of modern lawyers and economists, just as they did almost one century ago.

Lastly, one could affirm that the Webb Act was a legal text issued from a realistic reasoning, but which had an idealistic bias. On the one hand, the purpose of the act was clearly to empower the small American businesses to compete with foreign players. On the other hand, the wording "export association" (instead of "export cartel") tends to put the same behaviour – cartelization for the purpose of dividing markets, imposing prices or building barriers to entry – in a more favorable light, thus leading to the conclusion that the initiators of the Act believed, out of an idealistic inrush, that export associations will represent a sort of higher good.

II. THE BRETTON WOODS MOMENTUM

1. (Big) Politics that Shaped (Small) Policies

The WWII left behind a politically, economically and legally "depressed" world. That is why any attempt to explain policy choices of that era should be followed by this vision of a politically, economically and legally "depressed" world.

[21)] Chauncey D. Snow, 'American Foreign Trade Problems' (1924) 14 The American Economic Review 1, 7.

While the main concern after the WWI was to restore peace, the main concern after the WWII was to maintain peace. Also, while peace after the WWI meant mainly security of borders, peace after WWII meant well-being of everyone. The commercial policy features of the treaties ending the WWI were minimal and the attempts to develop trade relationships after the WWI were loose[22]. This was not the case after the WWII, when trade was affirmed not only as one of the pillars of international relations, but also as guardian of the world peace. That is why the post-war vision as achieved at Bretton Woods in 1944 entailed that the future economic structure shall include the International Monetary Fund, the International Bank for Development and Reconstruction and the International Trade Organization (ITO). Even if the ITO never came into being, the fact that a trade organization was placed on the Bretton Woods agenda proves that trade was considered as one of the future pieces in the international relations game. What is more, the agreement to cut tariffs and make other concessions represented "a dramatic break from earlier 'mercantilist' approach to trade and was intended to inaugurate a new era of open commerce"[23].

One might say that the founders of the Bretton Woods system adopted a "maximal" approach to trade. As the Havana Charter suggests, trade relations were supposed to bring about not only the reduction of tariffs (which would account for the "minimal" approach to trade), but more broadly employment, non-discrimination and higher volume of income. In this sense, the Havana Charter contained provisions not only concerning tariffs and quantitative restrictions – which represent the core of any trade policy – but also provisions on subsidies, commodity agreements, employment and restrictive business practices.

In the context of the "maximal" approach to trade, the debate on the restrictive business practices was an important one, both for policy-makers and for scholars. In this sense, the Havana Charter stipulated that:

Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade[24].

The practices targeted by the Havana Charter included inter alia:

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[22] Charles Kindleberg, 'Commercial Policy between the Wars' in Peter Mathias and Sidney Pollard (eds) *The Cambridge Economic History of Europe* (1989) Cambridge: Cambridge University Press, 161- 196; Charles H. Feinstein, Peter Temin and Gianni Tonniolo, 'The Legacy of the First War' in *The European Economy between the Wars* (1997) Oxford: OUP, 18-37.

[23] Tony Judt, *Postwar: A History of Europe since 1945* (2005) New York: Penguin Books, 107.

[24] *Havana Charter for an International Trade Organization*, 24 March, 1948, U.N Doc./E C.2/78, reprinted in Dep't St., Pub. No. 3206, Commercial Policy Series 114, 86-87 (1948) (hereinafter '*Havana Charter*'), Article 46.

(a) fixing prices, terms or conditions to be observed in dealing with others in the purchase, sale or lease of any product;

(b) excluding enterprises from, or allocating or dividing, any territorial market or field of business activity, or allocating customers, or fixing sales quotas or purchase quotas;

(c) discriminating against particular enterprises;

(d) limiting production or fixing production quotas.

The Havana Charter provided for a consultation procedure, an investigation procedure and special procedures with respect to services for the remedial of a situation that potentially affects international trade by restricting competition, limiting access to markets and fostering monopolistic control. If consultations could not resolve the problem, than all the Members sitting in the Conference had the opportunity to refer the issue to the UN executive board for further review. The International Court of Justice could review the decisions taken by the Conference[25)].

As a later account pointed out, implicit in the Havana Charter was "the idea that government actions in the domestic market can affect the international movement of goods, capital, and services. The idea driving the negotiations was that governments should obligate themselves to not only providing MFN and national treatment to the goods and nationals of other Member States, but to constructing a domestic economy without access barriers (e.g., through the obligations on restrictive business practices to investment protection)"[26)].

2. The Academic Debate

The Havana Charter provisions on restrictive business practices were preceded by a passionate academic debate. Two main ideas were developed by the scholarly literature during the Bretton Woods era: first, that cartel activity is dangerous and, second, that action against combines is necessary for the attainment of a lasting peace.

After an *inter bellum* period characterized both by the fact that cartelization was perceived as a necessary part of the surviving philosophy during the belligerence and by the fact that cartelization substituted government action in many instances, the academic society seemed to arrive at the conclusion that cartels represent a dangerous business practice. As Taylor puts it, "after the World War II, a paradigm shift in international thought occurred in which the adverse political consequences of industrial cartelization were clearly recognized, as were the adverse welfare effects of excessive concentration of economic power"[27)].

[25)] *Havana Charter*, Chapter VIII, 'Settlement of Differences'.

[26)] Peter S. Watson, Joseph E. Flynn and Chad C. Conwell, *Completing the World Tradeing System:Proposals for a Millennium Round* (1999) The Hague: Kluwer Law International, 349.

[27)] Taylor (2006), 149.

It was recognized that cartels restrict international trade[28] and mitigate the effects of reducing the tariff walls[29]. They reduce competition, diminish the incentives to innovate, limit the possibilities for the buyers to protect themselves against low quality and limit new industrial capacity[30]. Furthermore, authors that followed the development of international cartels in the interwar period argued that a link might be established between, on the one side, the cartel activity and, on the other side, the left-wing politics and the antidemocratic movements like Fascism, *Hispanidad* and *Kokutai*. In addition, in the international trade game, cartel activity subdues not only individuals and companies, but also industries and governments.

One author concluded that "history has proven the cartel justifiers grossly in error. Actually the cartel system fostered an economic Balkanization of the world. It set up artificial economic states, commodity by commodity, each with its own government, laws, division and trade barriers, imposed and superimposed over one another with increasing complexity"[31].

During this period, it was acknowledged for the first time at the international level that action was needed to prevent and counteract the effects that cartels might have on trade[32]. Action by both international and national policy-makers was considered to be necessary[33]. Even more, it was emphasized that only the combined national and international efforts could lead to a successful geometry against combines[34] and that every policy concerning cartels should be based on well-established principles and should be accompanied by attuned economic and legal reasoning.

Despite the impressive number of works written on cartels dating from that period, the export cartel issue seemed to be of no interest for the academia. This contradiction can be explained, in part, by the broad formulation of Article 46 of the Havana Charter and, in part, by the lack of political will to pursue such practices. On the one hand, the Charter provision on restrictive business practices could have been easily interpreted to prohibit – in case there was such a need - practices like export cartels. On the other hand, the post-WWII pax Americana opened promising markets for the US exporters. And while the US was the only

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[28] F. E. Koch, 'Cartels as Instruments of International Economic Organization. Public and Private Legal Aspects of International Cartels' (1945) 8 The Modern Law Review 3, 131.

[29] Theodore J. Kreps, 'Cartels, a Phase of Business Haute Politique' (1945) 35 The American Economic Review 2, 309.

[30] Corwin D. Edwards, 'International Cartels as Obstacles to International Trade' (1944) 34 The American Economic Review 1, 331-333.

[31] Quoted by Robert Liefman, *International Cartels, Combines, and Trusts* (1927) London: Routledge and Sons, 100.

[32] Corwin D. Edwards (1944), 337.

[33] Klaus E Knorr, 'The Problem of International Cartels and Intergovernmental Commodity Agreements' (1946) 55 The Yale Law Journal 5, 1105.

[34] Heinrich Kronstein, Gertrude Leighton, 'Cartel Control: A record of Failure' (1946) 55 The Yale Law Journal 2, 297.

exporter capable of satisfying the post-WWII needs, it appeared unreasonable for the US policy-makers to deprive the American exporters of an important tool to penetrate markets. In this context it is important to recall that the Havana Charter was sabotaged by the US for various reasons[35]: "The US State Department viewed the Havana Charter as a threat to stricter US competition laws, while the US Congress viewed it as an unwarranted threat to US economic hegemony and domestic political sovereignty in the post-war era"[36].

A researcher following the evolution of the export cartels literature after the WWII will be surprised by a contradiction. On the one hand, the provisions of the Havana Charter prove the maturity of values of over fifty nations that by 1950 have ratified it. For that time the linking of trade, employment and social policy constituted "a revolution in state policy making"[37]. Also, "the consensus embodied in the Havana Charter was path breaking for the nations of the world because it created the template for all other similar broad initiatives"[38]. On the other hand however, the failure of the ITO project stands for the "immaturity" of the international community to enforce these values.

This contradiction characterizes in fact the approach to trade during the whole post-WWII period. As Moon notes, "although a liberal trading order was the paramount objective of Bretton Woods, mercantilist concerns never disappeared, and as a result, the tensions and discontinuities embodied in these two visions became imbedded in the system itself"[39]. On the one hand, the GATT and the trade liberalization rounds brought further and further the free trade ideal and gave a new meaning to trade relations in general. On the other hand, the League of Nations wounds[40], the national egoisms and incapacities combined with the newly founded American hegemony and the endeavor to protect the American industry interests[41] brought about a paralytic international trade system that was not ready to respond to some very important issues. One such issue was that of export cartels which was likely to lead to the exploitation of the world consumers and which enforced "a theoretical dichotomy in the philosophy of business operations"[42].

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[35] G. Diebold, *The End of the ITO: Essays in International Finance No. 16* (1952) Princeton: Princeton University, para. 2.5.

[36] Taylor (2006), 153.

[37] Daniel Drache, 'The Short but Significant Life of the International Trade Organization: Lessons for Our Time' (2000) CSGR Working Paper No. 62/00, 28.

[38] *Ibidem*, 23.

[39] Bruce E. Moon, *Dilemmas of International Trade* (2000) Oxford: Westwood Press, 91.

[40] Alfred E. Eckes Jr., 'U.S. Trade History' in William A. Lovett, Alfred E. Eckes Jr. and Richard L. Brinkman (eds), *U.S. Trade Policy: History, Theory and the WTO* (1999) New York: M. E. Sharpe, 75.

[41] Andreas Dür, 'Foreign Discrimination, Protection for Exporters, and U.S. Trade Liberalization' (2007) International Studies Quaterly 51, 457-480.

[42] Sidney A. Diamond, 'The Webb-Pomerene Act and Export Trade Associations' (1944) 44 Columbia Law Review 6, 832.

III. THE TRADE AND COMPETITION MOMENTUM

The debate on export cartels had its peak hour after the creation of the WTO within the Working Group on the Interaction between Trade and Competition Policy (WGTCP) and raised not only issues regarding the effects of the anti-competitive behaviour on trade, but also issues regarding the developing countries and the role of the WTO as such.

The issue of export cartels was heavily debated within the WGTCP. The positions expressed reflect in fact the divide between the export cartels-friendly countries and the export cartels-unfriendly countries. The US is the primary example of an export cartel-friendly country. From all the communications submitted by the US to the WGTCP between 1996-2004 only one mentioned the issue of export cartels and this occurred at a rather late stage of negotiations. On that occasion, the US pointed out that the issue of export cartels requires "further and more focused discussion among WTO Members"[43]. The European Community (EC), on the other hand, condemned the export cartels since its first communication to the WGTCP[44] and constantly touched upon this issue during the following years. One unexpected export cartels-unfriendly country was Japan. Japan enacted legislation that exempted export cartels from the application of anti-trust rules and made heavy use of this exemption to promote its industries. However, during the life of the WGTCP, Japan expressed constant calls for an international prohibition of export cartels[45].

Because of the fact that the Member States of the WTO expressed their positions on export cartels in the context of the wider interface between trade and competition, interesting linkages and conclusion were made. Two main types of concerns were raised by the Member States in relation to the subject-matter of this paper. First, Governments addressed substantive legal questions in relation to export cartels. Second, important procedural concerns were expressed.

1. The WGTCP Substantive Challenge

During the existence of the WGTCP the WTO member States addressed the following questions. First, the role of the WTO in dealing with trade and competition interface was considered[46]. Then, the ideological difference between trade policy and

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[43] *Communication from the United States, Working Group on the Interaction between Trade and Competition Policy*, WTO, WT/WGTCP/W/203 (data), paragraph 7-8.

[44] Communication from the European Community and its Member States, WT/WGTCP/W/1.

[45] In this sense, see the following communications form Japan: WT/WGTCP/W/52, WT/WGTCP/W/119, WT/WGTCP/W/134, WT/WGTCP/W/135, WT/WGTCP/W/156 and WT/WGTCP/W/177.

[46] Report (2000) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/4, paragraph 82-83; Report (2001) of the Working

competition policy was tackled. In this sense, it was mentioned that the export cartel exemption "gave excessive weight to the interests of national consumers and producers, to the neglect of the interests of consumers in other countries"[47].

Third, the impact of the export cartels was discussed. The question whether export cartels affect or not international trade was a crucial one. If this business practice had an adverse effect on trade, then the call for multilateral action was justified. If, on contrary, this type of collusion did not restrict international trade, then the rationale for a multilateral agreement was missing.

In the WGTCP the view was expressed that export cartels restrict competition in foreign markets[48]. Export cartels were also used "as a strategic trade policy to extract rents from foreign countries"[49]. Other countries held the view that export cartels "had pro-competitive effects in that they added additional players to the relevant markets and might bring innovation or lower prices. Moreover, they were not secret and therefore did not bear the hallmarks of what was traditionally considered to be a hardcore cartel"[50]. Responding to this last point, the clarification was offered that "in fact, most export cartels involved multinational companies, not small and medium-sized enterprises of the sort that might need to bind together for efficiency purposes"[51].

The issue of developing countries was raised constantly in the framework of the export cartels debate. It was stressed that "the victims of export cartels" often included developing countries which were importing machinery or consumer products. Furthermore, it was suggested "that the extent of such cartels and their deleterious effects on international trade and development might well be greater than was widely known, since most countries did not insist on registration of such cartels; they simply turned a blind eye to them"[52]. In addition, the point was made that "developing countries should be allowed to exempt national and international export cartels, since most developing countries' exporters or importers were mainly small scale and might need to bind together to counter the bargaining power of larger buyers or sellers from industrialized countries"[53].

Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/5, paragraph 101.

[47] WTO (1998), *Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council*, WT/WGTCP/2, paragraph 26.

[48] Report (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/3, paragraph 71.

[49] Report (2002) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/6, paragraph 27.

[50] Report (2003) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/7, paragraph 51.

[51] *Ibidem*, paragraph 52.

[52] Report (1998), paragraph 89.

[53] Report (2002), paragraph 35.

2. The WGTCP Procedural Challenge

Besides the substantive legal questions a few procedural concerns were addressed during the work of the WGTCP in relation to export cartels.

First, it was recognized that in order to tackle such anti-competitive practices in an effective manner, "there was a need for both effective national competition policies and enhanced international cooperation at the bilateral, regional and multilateral levels"[54].

Second, it was pointed out that in dealing with export cartels and other anti-competitive practices at the national level, measures to promote the progressive development of institutional capacities, the existence of effective and transparent enforcement powers and the appropriate protection of confidential information were needed[55].

Third, it was emphasized that the positive comity was unlikely to be an appropriate tool to deal with export cartels because the requested country might be reluctant to enforce its competition law at the expense of its own domestic industry and primarily for the benefit of the complaining country[56].

Fourth, the jurisdictional emasculation in dealing with export cartels was highlighted. On the one hand, the home authorities cannot punish the export cartels because they have no or little effect on the domestic market. On the other hand, the countries on whose markets the export cartels are active cannot pursue them because they lack the necessary anti-trust tools and information. This led to the conclusion that international cooperation was the appropriate means to deal with these arrangements "since there were jurisdictional limits to the solution of the problem solely through the application of competition legislation in the exporting country"[57].

Lastly, it was suggested that the international cooperation in the field of export cartels should be based on the principle of "no less favourable treatment in terms of competition rights for citizens or firms of foreign countries than that accorded to firms or nationals of the host country"[58].

3. The Academic Dispute

In parallel with the political debate in the WTO, an academic debate took place in the scholarly circles. The following features can be said to characterize the academic debate on export cartels from the 1990s on.

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[54] Report (2001), paragraph 62.
[55] Report (1999), paragraph 26.
[56] *Ibidem*, paragraph 42.
[57] Report (2003), paragraph 50.
[58] Report (1999), paragraph 27.

a. Economic analysis of export cartels

Starting with the 1990s, the analysis of export cartels was permeated with economic thinking. The main question raised was whether export cartels are efficiency-enhancing or monopoly-promoting. Using different economics tools, researchers attempted to predict in which sectors export cartels were more likely to form. As a result, an anatomy of the Webb-Pomerene cartel was developed.

First, it was concluded that Webb-Pomerene cartels were more likely to ship non-durable, capital-intensive, standardized products, to form in industries with low seller concentration, and to form in growing export markets where the United States had large market share[59)].

Second, when describing the functions pursued by the Webb cartels, Dick states that 45% of the Webb associations had as their primary function the setting of common prices and/or the allocation of markets. The remaining 55% of Webb cartels were used as an instrument to capture economies of scale[60)].

Third, it was noted that export cartels were relatively short-lived, did not reorganize after dissolution and did not become more stable due to the age or experience[61)].

b. Maybe export cartels are not so bad in the end?

One of the implications of the above-outlined economic analysis was the conclusion that export associations do not always restrict trade and competition in the foreign and in the domestic markets.

As regards the foreign markets, empirical research by Andrew Dick led to the conclusion that the primary goal of the Webb-Pomerene associations was to assist exports and that only a small part of the existing Webb-Pomerene associations can in fact exercise overseas market power. In addition, Dick's study on sixteen commodities showed that foreign consumers benefited from the existence of export cartels in six instances and were adversely affected in only three instances. Also, the WPA benefited the US producers in nine industries by lowering costs or enabling successful exercise of foreign market power[62)].

In the same vein, Waller expressed the view that "the history of the Webb-Pomerene Act suggests that few export associations will have sufficient global market power to exploit foreign markets"[63)].

[59)] Andrew R. Dick, 'Identifying Contracts, Combinations and Conspiracies in Restraint of Trade'(1996) 17 Managerial And Decision Economics 2, 213.

[60)] *Ibidem.*

[61)] Andrew R. Dick, 'When Are Cartels Stable Contracts?' (1996) 39 Journal Of Law And Economics 1, 255-257.

[62)] Andrew R. Dick, 'Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting? Evidence from the Webb-Pomerene Experience' (1992) 15 Research In Law And Economics, 89-127.

[63)] Spencer Weber Waller, 'The Failure of the Export Trading Company Program' (1992) 17 North Carolina Journal Of International Law And Commercial Regulation, 251-252.

A different approach to this issue was taken by Evenett, Levenstein and Suslow. In their study these authors suggest that the global competition race might sometimes dictate a choice between two evils. The collusive behaviour might appear as the least dangerous option. Thus, a firm seeking to build the necessary scale which would ensure a ticket for the global competition race can choose between the creation of an export cartel and a merger or a joint venture. In this case the first option seems to have the least anticompetitive effects[64].

As regards the domestic market, it was concluded that it will sense the anticompetitive effect due to the formation of an export cartel only in the case of a monopoly-promoting cartel. According to this line of argumentation the anticompetitive spill-over will not reach the domestic market in case of an efficiency-enhancing export cartel[65].

Strongly contrasting conclusions were reached by other scholars. A study conducted by Larson concluded that the pursuit of monopoly profits abroad guided the creation and existence of export cartels[66]. In addition, export cartels represent a beggar-your-neighbour policy because the "home country where such cartel originates always gains, and the foreign country loses"[67]. As such, the restrictions on international trade created by export cartels not only reduce global supply and welfare, but also hurt the interests of trading partners[68].

In relation to the work of the WGTCP Marsden noted that Members "raised issues about almost every form of business arrangement, besides the policy considered most directly relevant to their mandate: competition policy itself"[69]. Still, Marsden emphasized that the topic of export cartels should be addressed in the framework of the WTO. An agreement on this issue would enhance the anti-cartel co-operation and enforcement operations. Furthermore, export cartels represent a truly development-related agenda concern and would find its place in Doha easily[70].

Another important input was made by Victor. He argued that due to the fact that since 1976 the Webb-Pomerene associations accounted for only 1.5 percent of the US exports, the US export cartel statutes were not able to accomplish their goals. Instead the Webb statute only facilitated some anticompetitive conduct,

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[64] Simon J. Evenett, Margaret C. Levenstein and Valerie Y. Suslow, 'International Cartel Enforcement: Lessons from the 1990s' (2002) World Bank Policy Research Working Paper No. 2680, 1233, available at http://ssrn.com/abstract=265741 (last visited on 17 May 2009).

[65] Christian Schultz, 'Export Cartels and Domestic Markets' (2002) 2 Journal Of Industry, Competition And Trade 3, 223-246.

[66] David A. Larson, 'An Economic Analysis of the Webb-Pomerene Act' (1970) 13 Journal Of Law And Economics, 461-500.

[67] Sadao Nagaoka, 'International Trade Aspects of Competition Policy' (1998) NBER Working Paper 6720, 3 available at http://www.nber.org/papers/w6720.pdf (last visited on 17 May 2009).

[68] *Ibidem*, 2.

[69] Philip Marsden, *A Competition Policy for the WTO* (2003) Cameron May, London, 59.

[70] *Ibidem*, 87.

both abroad and in the US market. For this, "the Webb Act has proven to be a dismal failure"[71]. Still, in formulating a recommendation, Victor argued that protection should be withdrawn only from the monopoly-promoting export cartels. Protection for efficiency-enhancing collusion should remain in place[72].

c. Export cartels and other fiends

One important feature of the scholarly literature that accompanied the 1990s debate on export cartels was the endeavour to link the issue of export cartels to other subject-matters.

In the context of the more classical linkage between competition law and intellectual property law a novel conclusion was drawn as to the relation between intellectual property law and export cartels. In this sense, Cottier and Meitinger argue that "the lawful existence of export cartels in most jurisdictions is likely to reinforce the doctrine of national exhaustion and thus of market segregation abroad"[73]. For this reason, Cottier and Meitinger recommend to adopt international binding disciplines on export cartels in the framework of the WTO which "may affect territorial use and allocation of IPRs and work in support of enhanced market access opportunities"[74].

An interesting linkage was drawn between export cartels and antidumping measures. It was stressed that from a welfare point of view only an international action directed in the same time at the reform of the antidumping measures and the abolition of export cartels can be conducive of welfare gains[75].

Lastly, in the context of the Japanese example, the point was made that export cartels were an important mean to implement the Voluntary Export Restraints (hereafter VERs) and the Multi-Fiber-Agreements. Consequently, the prohibition and phasing-out of VERs at the WTO level led to the numerical reduction of the export cartels in Japan[76].

d. Export cartels and the revisionary thinking

The debate on export cartels gave rise to a wave of revisionary thinking. Thus, it was acknowledged that, prior to any further discussion on export cartels, a new benchmark should be set for the evaluation of the impact that anticompetitive practices might have on welfare. The old national welfare criterion – which

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[71] Paul A. Victor, 'Export Cartels: An Idea Whose Time Has Passed' (1992) 60 Antitrust Law Journal, 573.

[72] Victor (1992), 578.

[73] Thomas Cottier and Ingo Meitinger, 'The TRIPs Agreement without a Competition Agreement?' (1998) Fondazione Eni Enrico Mattei Working Paper No. 65-99, 13, available at http://www.iew.unibe.ch/unibe/rechtswissenschaft/dwr/iew/content/e3870/e3985/e4122/e4510/ipr_suppl-lektion_5_ger.pdf (last visited on 17 May 2009).

[74] *Ibidem*, 14.

[75] Nagaoka (1998), 4.

[76] *Ibidem*, 10.

prohibits cartels in the domestic market, but immunizes them for the exercise of foreign market power – was suitable for the old "international world". The new "globalized world" requires a new global welfare criterion which would prohibit an anticompetitive practice even if its effects occur only in a foreign market.

An immediate consequence of this ethical re-evaluation of the welfare criterion should be the establishment of the national treatment in the application of competition policy. This would mean that domestic and foreign firms as well as domestic and foreign consumers will be treated in the same way, without discriminating between them. As an implicit consequence of putting on the same footing the domestic and the foreign markets, export cartels should be prohibited[77)].

Before moving to the next point, one should observe that the constant players of the trade and competition debate held within the WGTCP were the US, the EU and Japan. Other Members had occasional inputs, without attempting to be strong policy-shapers. Per total, 21,08 % of the WTO Members expressed an opinion on export cartels during the work of the WGTCP. The following table illustrates which policy-makers – except of the constant players mentioned above – presented a policy statement concerning the export cartels. As the table clearly shows, the occasional players are not many and they mainly represent the developed world. This could stand whether for the lack of interest of the developing world in this issue, or for a lack of know-how. Either way, the absence of a multi-player debate was detrimental to the fate of the trade and competition debate and led to the elimination of the issue from the WTO agenda.

The work and activity of the WGTCP highlighted one of the contradictions of the recent trade relations. On the one hand, the issue of export cartels was discussed for the first time at the multilateral level in an environment were each Member had a voice and a chance to express a view. On the other hand, the same WGTCP experience showed that the developing countries need not only a voice and a forum to express this voice. The developing world needs to be empowered with know-how. Otherwise their voice risks to play no role at all or even to rebel against the developed world.

The discussions held within the WGTCP on trade and competition policy reflect the developments in the Member States legislations. Also, they prove the shift towards and the preference for market economy. On the other hand, these discussions highlight the fact that some countries – despite the fact that they have adopted a competition law – are not ready to play the trade and competition game.

Even if the trade and competition debate was finally expelled from the WTO ambit, the author of the present paper takes the view that the work of the WGTCP was highly successful and had a great impact on the competition policies around the world. First of all, the activity of the WGTCP gave an occasion to the World

[77)] Nagaoka (1998), 16.

Bank, the UNCTAD and the OECD to submit communications to the WTO. While doing so, none of the above mentioned IGOs challenged the competence of the WTO to deal with these issues, thus implicitly accepting that the WTO is the right forum to address the trade and competition debate.

Also, the trade and competition debate provoked a wave of competition thinking that reverberated in many of the regional trade organizations and in the regional trade agreements[78]. India, for example, considered incorporating competition clauses in its bilateral trade agreements to prevent global cartels from entering the country and to punish them for wrongdoing[79].

IV. THE POST TRADE AND COMPETITION DEBATE

After the failure of the trade and competition debate within the WTO, three approaches were adopted in relation to the issue of export cartels: (1) the "no business no cry" approach, (2) the "business as usual" approach and (3) the "business reinvented" approach.

1. The "no business no cry" approach

The issue of export cartels was ignored by the WTO after the July package decision. The reticence of the developing counties and the contradictory positions of the US and the EU on this subject, led the policy-makers to the conclusion that it was preferable to close the eyes at the problems raised by export cartels.

The same attitude was adopted by the newly-created International Competition Network (ICN). The ICN has as mission to identify "subjects of potential interests to Members" and to "consider proposals for projects including those aimed at leading to non-binding general guidelines or 'best practices' recommendations"[80]. Also, the ICN Cartel Working Group (CWG) is mandated "to address the challenges of anti-cartel enforcement, both domestically and internationally, across the entire range of ICN members and amongst agencies with differing levels of experience"[81]. However, the issue of export cartels was never considered as a subject of potential interest to Members and was never put on the agenda of the CWG. One plausible explanation of this could be the fact that the ICN focuses mainly on hard-core cartels. Export cartels, on the other hand, are

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[78] UNCTAD, *Ways in Which Possible International Agreements on Competition Might Apply to Developing Countries*, TD/B/COM.2/CLP/46/Rev.3, 7 May 2007.

[79] "Competition Clause May Find a Place in FTAs", *Financial Express*, July 5, 2007.

[80] *International Competition Network Operational Framework*, available at http://www.internationalcompetitionnetwork.org/index.php/en/about-icn/operational-framework (last visited on 17 May 2009).

[81] *International Competition Network Working Group on Cartels Mandate*, available at http://www.internationalcompetitionnetwork.org/media/archive0611/cartelworkplan2004.pdf (last visited on 17 May 2009).

said to have some pro-competitive effects that outweigh the anti-competitive damage. Still, the wording of the ICN documents leaves the strong impression that export cartels represent a "no-issue" in the sense that this question was ignored on purpose. In the report prepared for the ICN 4th Annual Conference the CWG mentioned that "while the basic understanding of what constitutes a cartel and the harmful effects of cartels is remarkably consistent across jurisdictions, there are several complicating issues that give rise to different approaches in defining and enforcing a cartel prohibition"[82]. One such complicating issue is the existence of anti-trust exemptions. Still, this report makes no reference to export cartels neither as type of collusion with harmful effects, nor as practice exempted from the application of competition rules. This approach sits very oddly with the fact that the same competition authorities that argued – within the framework of the WTO – in favour of a multilateral agreement prohibiting export cartels choose to disregard this problem within the framework of the ICN.

2. The "business as usual" approach

Other international bodies whose work touches upon the trade and competition debate did not make any significant inputs into the export cartels discussion after 2004. For example OECD, in its latest country reviews, showed that the situation of the export trade exemptions in the US did not change[83]. Contrary to the US, Japan undertook a process of revision of its anti-trust exemptions and, as a result, there were no export cartel exemptions granted in Japan at the time of the review[84].

At the national level, no new initiatives were taken for the abolition of the export cartel legislation. The FTC and the DoJ in the US and the European Commission in the EU deal both with competition issues and with trade issues. Since 2004, none of these bodies undertook any research in relation to export cartels. Neither have they referred to this issue in any official document.

In the US, the Antitrust Modernization Commission (AMC) was created in 2002 to examine the need "to modernize the antitrust laws"[85]. One of the aims of the AMC was to analyze in how far the impunities granted by the export association legislation to exporters are justified in the 21st century[86]. The most important findings of the AMC in this sense are the following:

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[82] "Building Blocks for Effective Anti-Cartel Regimes (vol. 1) – Defining Hard-Core Cartel Conduct" (2005), Report prepared by the ICN Working Group on Cartels, available at http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf (last visited on 17 May 2009).

[83] OECD, *United States – Report on Competition Law and Institutions (2004)*, DAF/COMP(2005)13, 14.

[84] OECD, *Regulatory Reform – Monitoring Review of Japan*, DAFFE/COMP(2004)11/REV1, 20.

[85] Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273 § 11053 (1).

[86] AMC Staff, Impunities and Exemptions Discussion Memorandum (11 July 2006), available at: http://www.amc.gov/pdf/meetings/IE-Statutory%20DiscMemo060711fin.pdf (last visited on 17 May

- The AMC acknowledged *ab initio* that any exemption to antitrust laws benefits only some small and concentrated interest groups, while the costs of the same exemption are bared by a large number of consumers. Since consumers are likely to show no opposition to the enactment of exceptions to antitrust laws, the Congress is likely to hear no complaints from those who bear in fact the cost of the exemption[87)].
- The AMC recognized that there is no reason that could justify why the small and medium-sized companies "should be held to a lesser standard of antitrust compliance than any other companies doing business"[88)].
- The AMC noted that export association legislation raises a 'particularly acute concern' insofar as it may be seen as granting immunity for cartel activity abroad. For this, "it is inconsistent for US antitrust enforcers to emphasize to foreign antitrust enforcers the importance of cartel enforcement at the same time that US law immunizes what some consider to constitute overseas cartel behavior by American firms"[89)].

However, in the final recommendations presented to the US Congress and to the President of the US the AMC made no specific proposal for the repeal of the export cartel legislation. The AMC only stated in very broad terms that "statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the US economy in general"[90)].

The AMC concluded that the US antitrust laws are "sound" and "sufficiently flexible to allow for their continued 'modernization' as the world continues to change and our understanding of how markets operate continues to evolve through decisions by the courts and enforcement agencies"[91)].

Another authority that adopted the "business as usual" approach was the Supreme Court of the United States while delivering its decision in the *Empagran* case[92)]. Although this case did not raise questions about export cartels, the approach taken by the Supreme Court in *Empagran* is relevant to the subject matter of this paper in so far as the Court clarified the relationship between the

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2009); AMC Immunities and Exemptions Study Group, Immunities and Exemptions Working Plan (6 May 2005), available at: http://www.amc.gov/pdf/meetings/ImmunitiesExemptionsStudyPlan.pdf (last visited on 17 May 2009).

87) AMC, AMC Report and Recommendations (2007), p. 335, available at: http://www.amc.gov/report_recommendation/introduction.pdf (last visited on 17 May 2009).

88) *Ibidem*, p. 352.

89) AMC Report and Recommendations (2007), 353.

90) *Ibidem*, p. 20.

91) *Ibidem*, p. 2.

92) *F. Hoffman-La Roche Ltd. v. Empagran*, 542 U.S. 155 (2004).

existence of a foreign price-fixing activity that has requisite domestic effect and that has independent foreign effects giving rise to the plaintiff's claim.

The pre- *Empagran* case-law attempted an expansive interpretation of FTAIA, allowing foreign plaintiffs to challenge foreign anticompetitive behavior under the US antitrust laws. Thus, in *Kruman v.Christie's International PLC*[93], a Second Circuit decision that involved the two largest auction houses in the world, the court found that the FTAIA provides a standard for foreign plaintiffs to seek relief in US courts[94]. Unlike the majority view on this subject[95], the Second Circuit court established that once the first prong of the FTAIA is met and the requisite effect on the US commerce is established, the second prong of the FTAIA – namely, "gives rise to a claim" – did not impose an important barrier to the establishment of jurisdiction. The interpretation given to FTAIA in the *Kruman* decision implies along the lines that if a foreign plaintiff proves that an US export cartel affects US commerce, the US courts have jurisdiction to judge the foreign effects in the US.

Taking into account the huge policy implications that the *Kruman* extensive interpretation of the FTAIA might have had, the US Supreme Court sought to clarify this issue in its *Empagran* case, by holding that:

The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets (underlined by the author). . . . It does so by removing from the Sherman Act's reach (1) export activities and (2) other commercial activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States[96].

3. The "business reinvented" approach

If governments seemed to have embraced a "medieval" approach to export cartels, the academic debate reached a state-of-the-art level concerning the same topic. New elements were introduced in the debate and new perspectives were proposed. And one might say, without running the risk of exaggerating, that it is only due to academia that export cartels are still raised today as an important issue.

While looking for a solution to the export cartel problem, some authors searched again in the trade and competition arsenal. Such an effort was accompanied by a philosophical influx and justified by the belief that only by demystifying the trade and competition debate, a solution could be found to the more specific issue of export cartels.

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[93] 284 F. 3d 384 (2d Cir. 2002).
[94] *Kruman*, 284 F. 3d at 401, 403.
[95] See in this sense *Den Norske Stats Oljeselskap As v. Heeremac Vof*, 241 F.3d 420 (5th Cir. 2001).
[96] 542 U.S. 155, 161 (2004) (emphasis in original).

In this sense, Gerber emphasized that the future of the WTO is intricately interwoven with competition law issues. He recognized that "the changes that would be necessary to introduce and successfully implement competition law in the WTO are to a large extent the same as those that the institution will need to make if it is to enrich its role as an institution"[97].

Some political science elements were brought into the export cartels debate and shifted the discussion into new directions. While emphasizing the exodus of the economics thinking from the trade and competition debate, Kröll illustrated that "competition policy has been used as a bargaining chip for mutual concessions in other policy areas like agriculture and services"[98].

Interesting results were obtained by a few researchers who applied the prisoner's dilemma theory to the export cartels issue. Thus, Hoekman and Saggi showed that companies originating in a high income country have little incentive to cartelize in a low income country with a concentrated market structure and a high tariff. On the other hand, when the low income country has a highly competitive market, cartelization is highly profitable even if the low income country has a high tariff. The authors concluded for these reasons that cartelization, combined with a tariff represent a prisoner's dilemma in a competitive market structure[99].

Sweeney, on the other hand, expressed the view that the incentives to discipline export cartels present a prisoner's dilemma in the sense that a country currently prohibiting export cartels can always make itself better off by allowing them and a country that currently permits export cartels can make itself worse off by prohibiting them. Sweeney thus concludes that "in the absence of an agreement, the world's trading nations are in equilibrium when they permit export cartels"[100].

A similar conclusion was reached by Durand, Galarza, and Mehta who examined the welfare effects of banning or allowing export cartels. The authors scrutinized the following situations:

(a) in the situation when both the home and the foreign countries exempt export cartels from antitrust prosecution, each country gains from its export industry, but loses from the import sector;

(b) in the situation when the home country and the foreign country ban export cartels, both countries' welfare is maximized[101]. However, this situation is unreal

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[97] David J. Gerber, 'Competition Law and the WTO: Rethinking the Relationship' (2007) 10 Journal Of International And Economic Law 3, 707.

[98] Daniella Kröll (2007), 170.

[99] Bernard Hoekman and Kamal Saggi, 'Tariff Bindings and Bilateral Cooperation on Export Cartels' (2007) 83 Journal Of Development Economics 1, 144-145.

[100] Brendan Sweeney, 'Export Cartels: Is There a Need for Global Rules' (2007) 10 Journal Of International And Economic Law 1, 103- 104.

[101] Benoît Durand, Andrés Font Galarza and Kirtikumar Mehta, 'The Interface Between Competition Policy and International Trade Liberalization. Looking into the Future: Applying a New Virtual Anti-Trust Standard' (2004) 27 World Competition 1, 7.

– noticed the authors – due to the fact that the home country and the foreign country have a strong incentive to exempt export cartels.

Thus, when both the home and the foreign country ban export cartels, each country reaches a welfare level of 15. However, if the home country chooses to allow export cartels while the foreign country still bans this practice, the welfare of the home country rises from 15 to 20 while the foreign country welfare falls from 15 to 6. For this, the authors conclude that "if countries could co-ordinate their antitrust policy to prosecute export cartels they would all reach a higher welfare level"[102].

Other important inputs concerning the alleged beneficial or detrimental effects of the export cartel legislation were made by Bhattacharjea who criticized the lack of theoretical or empirical foundations of this debate and noticed that, in contrast to the works published in the field of international cartels, no serious "arguments seem to have been entered at any stage of the (export cartels) debate"[103].

In a 2006 study on the effects of the ETCs on exports, Levenstein and Suslow concluded that nothing in their analysis "lends support to the notion that ETCs increase exports above what they would be absent an antitrust exemption"[104]. This confirms the results of earlier studies on the ETC and WPA that economic impact of these exemptions was small both in assisting US industries and in promoting the exercise of market power by US firms.

Becker highlighted that, even in the advocates' team, few would overtly agree that an export cartel is something more than an attempt to enhance the exporting state's welfare at the expense of the target state or of the global welfare[105]. Becker also noted that "export cartel exemptions lead into a downwards spiral of anticompetitive measures and counter-measures taken by governments and market participants"[106].

4. The solutions

A remarkable feature of the post trade and competition debate on export cartels is the endeavor to "produce" a solution to this debate.

More and more researchers seem to agree that a global consumer welfare criterion should be at the basis of any effort to solve the export cartel issue. Whatever path the policy-makers will choose to fall back on, the ideal that global markets require global answers should prevail.

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[102] *Ibidem*, at 8.

[103] Aditya Bhattacharjea, 'Export Cartels – A Developing Country Perspective' (2004) 38 Journal Of World Trade 2, 336.

[104] Margaret C. Levenstein and Valerie Y. Suslow, 'The Economic Impact of the U.S. Export trading Company Act' (2006) Ross School of Business Working Paper No. 1036, 25.

[105] Florian Becker, 'The Case of Export Cartel Exemptions: Between Competition and Protectionism' (2007) 3 Journal Of Competition Law And Economics 1, 115.

[106] *Ibidem*, at 118.

Another matter of principle that should receive attention at an early stage of the decision-making process is the developing states exemption. Some authors agree that an exemption for developing states is justified and should cover only cases of export from developing into developed states[107].

Lastly, it is important to consider what Levenstein and Suslow call the "unintended consequence" of a global ban on export cartels. According to these authors, practice shows that the elimination of cooperation as a legal possibility can lead to a higher merger activity or to the lessening of competition in the domestic market[108]. This finding is in line with the ideas of the cartel literature that confirmed that prohibiting cartels speeds concentration[109].

Turning to the feasible solutions now, the survey of the academic literature on this subject leads to the identification of two paths of action for dealing with export cartels: unilateral or non-cooperative action and cooperative action. The following chart illustrates this classification.

Non-Cooperative/Unilateral Action on Export Cartels

A State that fights the incoming effects of an export cartel within its jurisdiction can act unilaterally – that is, take action based on its sole will. A State might take unilateral action based on hard-law measures or unilateral action based on soft-law measures.

(a) Some trade and competition scholars argue that, due to the difficulties that underpin all the proposed solutions to the export cartel issue, it might be reasonable to focus academic and political attention on competition advocacy and promotion of transparency in decision-making as a solution to this issue[110]. This accounts for unilateral action based on soft-law measures.

(b) There are however other authors who promote unilateral action based on hard law measures, in the sense that a compulsory act is required from the decision-makers. One unilateral response that could be given by the importing state in case of a foreign export cartel acting within its jurisdiction is to allow its own exporters to collude. Reciprocity however could be the start line of lose-lose race in the global market. As highlighted before, when two countries ban export cartels, their welfare level is 15; when two countries allow export cartels their welfare level falls to 10. Furthermore, Hoekman and Holmes explained in an

[107] Sweeney (2007), 111-113.

[108] Margaret C. Levenstein, Valerie Y. Suslow, 'The Changing International Status of Export Cartel Exemptions' (2006) 20 American University International Law Review, 813-814.

[109] Tony Freyer, *Regulating Big Business: Antitrust in Great Britain and America 1880-1990* (1992) Cambridge University Press, Cambridge; George Symeonidis, *The Effects of Competition: Cartel Policy and the Evolution of Strategy and Structure in British Industry* (2002) The MIT Press: Cambridge.

[110] Sweeney (2007), 111.

earlier paper that, even under conditions of reciprocity, some states will continue to ripe more benefits from their export cartels than other states[111].

The importing state may pursue another unilateral path and apply its own competition law extraterritorially. Extraterritoriality, however, is escorted by a set of intricacies that transform this option into a very complicated procedural matter. Gaining access to information about the foreign exporters, fighting exporters' immunity under the act of state doctrine or based on foreign sovereign compulsion or international comity[112] and enforcing a judgment against firms that do not hold any assets in the importing state – these are only a few of the complicating issues that render extraterritoriality a very difficult option[113].

Lastly, a state could unilaterally and – most probable – in breach with the WTO agreements suspend some of the GATT/WTO rights (market access, protection for intellectual property goods). This option is the one that would pose the highest threat to the whole WTO system.

Cooperative Action on Export Cartels

The cooperative action on export cartels is the action based on the will of two or more states. Depending on the number of the wills involved, the cooperative action can be bilateral, regional, plurilateral or multilateral[114].

The Bilateral Action

Ryan argues that "bilateral action would require the signing of bilateral co-operation agreements between jurisdictions which would oblige one party to respond positively to a request for investigatory support from the other party, even in cases where the practice under investigation is not a violation of the competition law of the requested party"[115]. Ryan furthermore concludes that regional groupings of competition jurisdiction and enforcement agencies represent the least problematic of the various approaches to export cartels[116].

Sweeney, on the other hand, concluded that the gain form bilateral agreements would be minimal due to the fact that they focus on hardcore cartels and lack dispute settlement mechanisms[117].

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[111] Bernard Hoekman and Peter Holmes, 'Competition Policy, Developing Countries and the WTO' (1999) World Bank Working Paper No. 2211, 19.

[112] Ulrich Immenga, 'Export Cartels and Voluntary Export Restraints between Trade and Competition Policy' (1995) 4 Pacific Rim Law And Policy Journal 93, 125-126.

[113] Sweeney (2007), 102-103.

[114] Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization: Law, Practice and Policy* (2006), Oxford: Oxford University Press, 886.

[115] Stephen Ryan, 'The Treatment of Export Cartels in EU and US Law'(forthcoming), 10.

[116] *Ibidem*, 11.

[117] Sweeney (2007), 104.

The Multilateral Action

Two main ingredients are conceivable as parts of a multilateral action against export cartels: (a) multilateral agreement on export cartels and (b) competition authority with investigatory powers. The following combinations are possible: only agreement, agreement and supranational oversight or only supranational oversight.

It is true that mandatory dispute resolution is impossible if countries cannot agree on the rule that will govern the dispute. However, "because a comprehensive code is not feasible today, it does not follow that efforts looking toward future convergence are futile"[118)].

Academia identified various types of potential export cartel agreements. Guzman proposed to apply national treatment principles to export cartels[119)]. This would lead to an agreement "to treat incoming and outgoing anticompetitive conduct alike"[120)].

Sweeney noted that, since "the most appropriate judge of the anti-competitive nature of an export cartel is in fact the importing state"[121)], a feasible solution would be to conclude an agreement giving jurisdiction to the importing state. The opposite solution can be a valid bargain as well, namely, an agreement in which exporting state considers foreign harm[122)].

Bhattacharjea suggested a multilateral agreement along the lines of a "reverse" anti-dumping agreement. Where the export prices would exceed some "normal value" – that is, the reverse of normal dumping – the importing state would be entitled to impose a sanction on the colluding foreign firms[123)]. The same author pleads for an agreement that allows the suspension of TRIPs and other GATT/WTO rights as a penalty for anti-competitive behavior by foreign exporters[124)]. Bhattacharjea's proposals provoked a storm of reactions in the academic world. While Sweeney agrees that an import duty is an approach that makes a lot of theoretical sense, he argues that in practice such a duty will not compensate for consumer losses and that "only in very limited circumstances will a tariff applied to the cartel members induce the cartel members to disband the cartel"[125)]. On the other side of the opinion spectrum, Magnus argued that "global antitrust discussions can much more usefully focus on what importing countries

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[118)] Robert Pitofsky, 'Competition Policy in a Global Economy – Today and Tomorrow' (1998), available at www.ftc.gov/speeches/pitofsky/global.shtm (last visited on 17 May 2009).

[119)] Andrew Guzman, 'The Case for International Antitrust' (2004) 22 Berkeley Journal Of International Law 355, 372.

[120)] Becker (2007), 126.

[121)] Sweeney (2007), 106.

[122)] Bernard Hoekman and Petros C. Mavroidis, 'Economic Development, Competition Policy and the World Trade Organization' (2003) 37 (1) Journal Of World Trade 1, 20.

[123)] Bhattacharjea (2004), 353.

[124)] Bhattacharjea (2004), 356.

[125)] Sweeney (2007), 102-103.

do (under their antitrust laws) to limit imports, rather than on what exporting countries do not do (under their antitrust laws) to limit joint exports"[126].

The nature and the political issues underlying the export cartels suggest that supranational oversight by an international tribunal is desirable. The WTO is recognized by many scholars as the most suitable candidate for this position due to its half a century expertise in trade[127]. However, many unsolved problems pave the way to recognizing the WTO as a supranational competition authority.

Summing up the results of the post trade and competition momentum, one should notice that there are fewer states nowadays that grant explicit exemption for export cartels. However, Levenstein and Suslow concluded that "the legal status of export cartels is now more, not less, ambiguous"[128] due to the fact that enforcement became conditional on domestic harm and due to the lack of conclusive information. For this, Levenstein, Suslow and other scholars recognized that despite the already published studies and papers on export cartels, more antitrust and economics literature is needed on this subject. Furthermore, more comparative studies are needed about cartels' relationship to politics, political culture and law[129].

A wave of thinking in the trade and competition debate recognized that confidence-building is as important as solution-finding. Like Durand, Galarza and Mehta put it, any measure that would bring about the necessary paradigm shift in the trade and competition debate "could arise only out of the conviction that this will work in favour of everybody's ultimate interest"[130].

The interdependence between global trade and global peace was brought into light again.

Finally, a key question raised today concerns the solution that should be adopted in relation to the export cartel issue. One should note first of all that none of the solutions proposed until now by the academia is "trouble-free". While some suggestions collide with serious political weaknesses, others are powerless from a legal reasoning point of view. I propose following a policy level analysis and choosing the solution which the best from the point of view of its costs.

A thorough analysis of the proposed solutions shows that the non-cooperative/unilateral action implies that on a first policy level export cartel legislation should remain in place and only on a second policy level action should be taken. Such a policy structure is quite dangerous not only because it creates double costs (due to the double policy level in place), but also because the measures

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[126] John R. Magnus, 'Joint Export Trade Provisions in Antitrust Laws: A Supporter's Perspective' (2005) 39 Journal Of World Trade 1, 184.

[127] Eleanor M. Fox, 'International Antitrust and the Doha Dome' (2003) 43 Virginia Journal Of International Law 911, 926-27.

[128] Levenstein, Suslow (2005), 812.

[129] Fear (2006), 26.

[130] Durand, Galarza and Mehta (2004), 4.

based on unilateral action can provoke unwanted reactions from other trading partners and can lead to conflicts. This can be observed in relation to some countries' attempt to apply their antitrust law extraterritorially. Last but not least, unilateral action on export cartels is very likely to sabotage the multilateral trading system by suspending TRIPs, GATT or other WTO rights. For this reason, the great majority of scholars writing on export cartels support a cooperative approach for solving this problem. The author of this paper endorses the same approach.

The cooperative action, on the other hand, can take two forms:

(a) cooperative action with one policy level and (b) cooperative action with two policy levels.

Cooperative action on export cartels in the form of a multilateral agreement will require expenses only for the negotiation of the agreement. On the other hand, cooperative action on export cartels in the form of multilateral agreement plus supranational oversight will require costs not only for the negotiation of the agreement, but also for the creation and functioning of the supranational oversight. A preliminary conclusion then would be that cooperative action with one policy level is cheaper and therefore preferable to cooperative action with two policy levels.

However, I argue that one should consider other factors except the costs. First of all, no agreement is "violation-free"; no matter who gave the promise to honor a deal, there would be always an incentive for breaching the export cartel agreement. Second, a breach of a multilateral agreement can easily lead to the breakdown of the whole multilateral trading system. That is why the effort to conceive a solution for export cartels in the form of an agreement should be accompanied by a parallel effort to prevent and punish breaches. In case of not considering this aspect, the price of having in place a multilateral agreement without oversight can be higher than having the oversight in the first instance.

Lastly, when considering the supranational oversight as a compulsory element of the solution for export cartels, it is commendable to balance the financial costs with other benefits that might arise from having in place supranational oversight for the export cartel agreement. I presume that the WTO is the most suitable authority to be entrusted with the supervision of the export cartel agreement[131)]. Therefore, the author of the present paper believes that the costs of having a WTO body responsible for export cartel issues will be compensated by the following benefits:

- The WTO supranational oversight of export cartel issues will bring a new wisdom into the WTO. The recent Telmex case, many of the Anti-Dumping

[131)] The author of this paper is of course aware of all the theoretical and practical difficulties that accompany such a proposition. However, the results of her research could not identify another institution that could serve as an enforcement mechanism better than the WTO. That is why she presumes and recommends that once a multilateral agreement on export cartels will be concluded, the WTO should serve as the accompanying enforcement element of the agreement.

Agreement issues and the TRIPs experience show there is need for competition law thinking in the WTO. A specialized committee on export cartels can develop into a competition law committee or restart the activity of the WGTCP. Thus, from a specialized body the committee on export cartels can grow into a multilateral antitrust agency or into a consultative body on antitrust issues. Either way, such a body would definitely benefit both trade and competition and would bring more legitimacy to some of the WTO actions.

- A WTO export cartel body would also contribute to the confidence building between the WTO members. Trade and competition was excluded from the Doha negotiations due to the low level of confidence that existed between Members. Antitrust was perceived as a secret gun that the developed world tried to use against the developing world. Once the WTO members could agree on any of the trade and competition issues raised during the Doha negotiations – and here the export cartels could be a prime problem to agree on – the level of confidence in the WTO and in the trading partners will increase.
- Having a WTO export cartel body will also prevent breaching the agreement. This in turn will enhance the aura of fairness which is essential for the well-being of the multilateral trading system.

CONCLUSION

This paper pursued the development of the academic and political writings on export cartels from the adoption of the Webb-Pomerene Act until today. Four phases of the export cartel debate were identified and analyzed. The following conclusions can be drawn to bring to a close this paper:

Despite almost one hundred years of debate, there is still little known about the export cartels, about how they work and about their incoming or outgoing effects.

The export cartels debate has not changed a great deal in the last one hundred years: the same dichotomist approach is applied and an export cartel is always seen against the “good or bad” background.

The government ordered research on export cartels is almost absent. The export cartel debate is ongoing only due to the academia. It is also due to scholars that economic, political and philosophical thinking was introduced into the export cartel debate.

Even if neither the export cartels debate, nor the WTO trade and competition debate have delivered “enforceable” results so far, both debates prove to be successful. First of all, these debates represented a necessary process of learning. Second, the trade and competition debate within the WTO provoked a period of renaissance for the competition culture around the world. This momentum delivered competition law talks within the regional trade organizations and competition law provisions being negotiated into more free trade agreements. The same momentum created the required conditions for the adoption of competition laws around the world.

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