

## EXPORT CARTELS AND THE CASE FOR GLOBAL WELFARE

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*Export cartels are generally exempted from domestic competition laws. The status quo causes inefficiencies and unnecessary friction in various markets around the world. As such, their treatment represents a gap in international antitrust. Despite several attempts, multilaterally agreed restrictions on export cartels elude the international community for a number of reasons, such as market access demands and protecting 'national champions'. This essay examines trade friction occurring in the form of export cartels: what are they, are they problematic, and whom do they affect most? It explores the challenges that have prevented deeper international cooperation to address export cartels by building on prior legal discourse, in order to identify those issues on which a resolution hinges. The essay concludes by proposing both substantive resolutions as well as appropriate facilitators for negotiations and enforcers of a resolution.*

### **I. Introduction**

*'The only thing that will redeem mankind is co-operation.'*<sup>1</sup>

We live in a paradoxical world. Cross-border trade continues to rise and the digital revolution is bringing us closer to each other than ever before. Trade liberalization – that is, being open to cross-border trade – has been shown to provide positive effects to a nation's economic growth and investments, on average.<sup>2</sup> Recognising this, most developing nations have introduced reforms that embrace external economic liberalisation in the past decades, following

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<sup>1</sup> Bertrand Russell, 'Human Society in Ethics and Politics' G. Allen & Unwin, 1954, 212.

<sup>2</sup> See eg Romain Wacziarg & Karen Horn Welch, 'Trade Liberalization and Growth: New Evidence' (2008) 22 The World Bank Economic Review 212-213.

in the footsteps of economically advanced nations.<sup>3</sup> However, fear of the unknown and disappointment by those who are yet to enjoy the benefits of such liberalisation concurrently fuel nationalistic and inward-thinking political movements. In economic world, various regulatory barriers to trade represent the product of such protectionist and inward-thinking policy. These barriers may occasionally be beneficial to individual actors in individual situations, but certainly such friction cannot be regarded as generally beneficial in the long run, particularly when considering the welfare of any broader international community.

Export cartels are an example of a practice that is both welfare decreasing and widespread. They represent a non-tariff barrier to trade. Cooperation between exporting companies that runs excessively deep, so as to include hard-core cartel conduct, is often detrimental to global welfare, as will be further illustrated in the coming Sections. As such, there is a gap in international antitrust rules when it comes to export cartels. Hence, this is the focus of this essay. Export cartels range from agreements between entirely private entities to full state-to-state arrangements, such as the cartel between petroleum exporting nations (OPEC). In between, there are a range of cartels with mixed private and public interests, such as the international vitamin C cartel that has been under the sponsorship of the People's Republic of China (China).<sup>4</sup>

Along with spreading international trade liberalisation, competition law and its inherent welfare-enhancing benefits are ever more widely recognised. As of the publication of this essay, well over 100 nations have some form of competition legislation and an authority enforcing it. This represents a drastic increase compared to just a few decades ago: around 1990, only 16 jurisdictions globally had a competition authority.<sup>5</sup> The increase is remarkable and is – in the author's opinion – a mostly positive thing, since this development makes it more likely that national domestic markets function competitively, i.e. effectively.

The *status quo* is, however, not without problems. Due to increasing international trade and more prevalence of competition laws and authorities,

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<sup>3</sup> Ibid, 187.

<sup>4</sup> Eleanor Fox & Merit Janow, 'China, the WTO, and State-Sponsored Export Cartels: Where trade and competition ought to meet' (2012) 4 *Concurrences* 5-7.

<sup>5</sup> OECD, 'International Co-operation in Competition Law Enforcement' (2014), available at: <[https://www.oecd.org/mcm/C-MIN\(2014\)17-ENG.pdf](https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf)> (last visited 12.8.2017) 22-23.

there is more business taking place that simultaneously affects several jurisdictions. This means, there are also ever more jurisdictions whose competition laws may apply simultaneously and whose laws may be enforced simultaneously, and potentially extraterritorially. The end result equals unpredictability for businesses and inefficiency in general. All these underscore the potential benefits in cooperating with other jurisdictions.

The existence and effects of export cartels have been widely discussed for decades, whether in relation to the restrictive practices of large multinational corporations or concerning the market for a certain raw material or commodity that is dominated by the corporations of a certain nation. The topic appeared already in the draft charter of the envisaged United Nations (UN) agency, the International Trade Organisation (ITO) in late 1940s and has since – along with competition policy more broadly – been a subject of both discussion and negotiation within the UN and the World Trade Organisation (WTO). Despite the attempts at the various forums, restrictions on the use of export cartels on a multilateral level elude the international community.<sup>6</sup> The latest discussions within the WTO where competition policy – and export cartels as a part of it – was discussed, took place at the Fifth Ministerial Conference in Cancún, Mexico, in September 2003. However, competition policy was dropped from the list of items to be further negotiated due to irreconcilable differences, both substantive and practical. Developing countries were particularly weary of subjecting themselves to the WTO dispute resolution mechanism, given the, generally, low level of experience and scarce resources they had in competition policy issues.<sup>7</sup>

In recent years, the topic has not received as much attention as it has during the previous decades and has instead been somewhat neglected. This essay's interest lies with the question of why the core issue remains unresolved, while the *status quo* is, still, clearly less than desirable in terms of global welfare.

The intention is to first unravel the phenomena that are export cartels in Section II by dissecting the concept of export cartels and addressing why they are relevant. This Section will also include a description of the common legal

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<sup>6</sup> The ITO charter was signed in Havana in 1948 during a UN Conference on Trade and Employment, but faced problems with its ratification. Ultimately, it was blocked by US Congress and the ITO never became what it was envisioned to be.

<sup>7</sup> Aditya Bhattacharjea, 'The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective' (2006) 9 *Journal of International Economic Law* 297.

frameworks by virtue of which the existence of export cartels is possible. Section III dives into a pro-con analysis on the impact of export cartels to the international community and whom it affects most. International cooperation in competition policy matters has been limited, including cooperation in relation to export cartels. Section IV describes the main reasons for this, while Section V attempts to list a few possible resolutions to the unsatisfying *status quo*. Section VI concludes the essay with a few thoughts built upon the preceding Chapters.

For practical purposes, this essay assumes that an increase in international trade equally increases global welfare and does not explore that area as such, while recognising however that such causation is an oversimplification. ‘Welfare’, as mentioned throughout this essay, is meant to refer to the economic welfare, i.e. the amount of prosperity of individuals. ‘Global welfare’, in turn, is meant to refer to the aggregated economic welfare of individuals without regard to borders between nation-states. Cartels that occur purely between nations, such as the cartel between oil-producing nations, OPEC, are excluded and instead focus is placed on the export cartel conduct of entities that are subject to domestic competition laws. The focus of this essay is export cartels exclusively, meaning that domestic cartels are not. International cartels will be addressed to the extent that their conduct affects markets other than their own domestic market.

## II. The basics of export cartels

Merriam-Webster defines a cartel as ‘a combination of independent commercial or industrial enterprises designed to limit competition or fix prices’.<sup>8</sup> Export cartels consist of exporters of goods or services that may include members from a single nation or from several nations acting in concert. The former is referred to as a ‘domestic’ export cartel and the latter as an ‘international’ export cartel. A ‘pure’ export cartel consists of conduct that affects solely foreign markets, whereas the competitive restraints contained in a ‘mixed’ export cartel also affect the exporting company’s

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<sup>8</sup> Merriam-Webster, Definition of a cartel <<https://www.merriam-webster.com/dictionary/cartel>> (last visited 12.8.2017).

domestic markets.<sup>9</sup> Export cartels are a trade measure whose aim is to give exporters of a certain nation an advantage in world trade by – either explicitly or implicitly – exempting conduct to the extent that its effects do not harm domestic markets. This includes cooperation that otherwise might be prohibited as a hard-core cartel, if the international dimension were omitted. The term ‘beggar-thy-neighbour’ is often referred to when speaking about export cartels. This refers to an economic policy in which a nation attempts to improve its economic situation using means that are to the detriment of another nation.<sup>10</sup> Indeed, export cartels represent a quite clear and unbridled nation’s bias in applying its competition policy in favour of exporting legal entities.<sup>11</sup> An original intention of such export cooperation was said to be to balance the detrimental effects of cartels then present on the buyer-side in the importing market.<sup>12</sup>

Problems arise when many nations begin to simultaneously enforce competition legislation and still maintain exemptions for export cooperation. Historically, this approach is understandable – proper codified competition policy was rare and consequentially the likelihood of infringing competition laws faced by an importing entity was significantly lower. As mentioned in the Introduction, this has since changed and some form of competition legislation and its enforcement is nowadays more the norm than the exception. Moreover, global welfare is not a zero-sum game and, thus, improved conditions for one do not inevitably mean respectively worse conditions for the other. There are a number of known export cartels, originating in a number of nations, *inter alia*, the vitamin C cartel in China,<sup>13</sup>

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<sup>9</sup> Frederic Jenny, ‘Export Cartels in Primary Products: The Potash Case in Perspective’ (2012) in: (Evenett/Jenny eds) *Trade, Competition and the Pricing of Commodities*, Centre for Economic Policy Research, London 99; Paul Victor, ‘Export cartels: An idea whose time has passed’ (1991) 60 *Antitrust Law Journal* 571.

<sup>10</sup> Marina Bode & Oliver Budzinski, ‘Competing Ways Towards International Antitrust: the WTO versus the ICN’ (2005) 3 *Marburg Papers on Economics* 5.

<sup>11</sup> Andrew Guzman, ‘The Case for International Antitrust’ (2003) 128 *UC Berkeley Public Law Research Paper* 5.

<sup>12</sup> See Brendan Sweeney, ‘The Internationalisation of Competition Rules’ Routledge; 2011; 57.

<sup>13</sup> Chinese Vitamin C manufacturers have fixed prices regarding sales into the United States, in 2013. See eg <<http://www.nytimes.com/2013/03/16/business/global/us-fines-chinese-vitamin-c-makers.html>> (last visited 12.8.2017).

the American soda ash cartel,<sup>14</sup> Ghana's cocoa bean cartel,<sup>15</sup> and the potash cartel between companies of Canadian origin.<sup>16</sup> Given their prevalence, it is rather surprising that reliable empirical data about export cartels is scarce. This is largely due to most nations having chosen to implicitly allow export cartel activity, which requires no registration with authorities and which thus often operates undetected.<sup>17</sup>

The US Supreme Court has described cartels as the 'supreme evil of antitrust'<sup>18</sup> and there seems to be a broad consensus across jurisdictions that cartels are harmful to competition.<sup>19</sup> Hence, it is natural that hard-core cartel conduct often is treated as a *per se* infringement whose object is to infringe competition law. Still, export cartels are often treated differently: most nations with competition laws either implicitly or explicitly exempt restraints to competition, provided that such restraints do not affect domestic markets. Moreover, there are substantial disagreements over how export cartels should be treated on an international scale. Currently, most nations have chosen the path of implicit exemptions: *de facto* allowing export cartels by prohibiting cartel conduct only to the extent that the object or effect of such conduct impairs competition in domestic markets. This limitation to the scope of a competition regimes laws is stated in the relevant statutes. The EU provides an example in Article 101 of the Treaty on the Functioning of the EU (TFEU), which prohibits agreements and concerted practices that 'may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.<sup>20</sup> Thus, while nations that maintain systems of implicit exemptions for export cartels do not usually separately give consent to the operation of

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<sup>14</sup> Export cartel involving the American Natural Soda Ash Corporation ('ANSAC'), an association formed under the Webb-Pomerene Act.

<sup>15</sup> Ghana Cocoa Board, a government-controlled institution controls the price of cocoa beans in Ghana.

<sup>16</sup> Canpotex Limited handles the exports of majority of the Canadian potash industry. See also Jenny (n 9) for an analysis about this export cartel.

<sup>17</sup> See however Margaret C. Levenstein & Valerie Y. Suslow, 'The Economic Impact of the U.S. Export Trading Company Act' Valerie Y. (2007) 27 Antitrust Law Journal for an interesting analysis on US export associations under the Export Trading Act.

<sup>18</sup> Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 [2004].

<sup>19</sup> Jenny (n 9) 99-100. This view was echoed by Richard Whish at the 2015 International In-House Counsel Journal Competition Law Conference.

<sup>20</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art. 101.

export cartels, these are allowed to operate by virtue of the limitation of the scope in such nation's competition laws.

A few nations, such as the US<sup>21</sup> and Australia<sup>22</sup> maintain systems of explicit exemptions that allow export cartels to operate without infringing domestic antitrust laws, if they remain within a determined framework. It is common that an explicit exemption system is accompanied by a notification or registration requirement, for authorities to confirm an arrangement's compatibility with the exemption system. The popularity for implicit exemptions has grown in recent years, for unknown reasons, as opposed to maintaining a system of explicit exemptions.<sup>23</sup> *Levenstein & Suslow* argue that explicit exemptions would be a better system compared to the currently more often-used system of implicit exemptions. Notification systems are usually used in conjunction with explicit exemptions, to exempt only those arrangements that truly do not harm domestic competition. This allows for a proper *ex ante* analysis of the likely effects of the arrangement.<sup>24</sup> This is both an interesting and valid point. As will be discussed further in the following Section, domestic spillover effects of export cartels may well be significant and very much possible. Thus, pre-emptive review of such arrangements is quite warranted.

A system of explicit exemptions is, however, not a comprehensive solution, even for the exporting nation. This is because export cartels – more precisely the companies participating in them – risk encountering problems with the importing nation's competition authorities. Usually, such cartel conduct is not exempted in said importing nation, i.e. the nation that bears the detrimental effects of the cartel's conduct. Nevertheless, since the existence of export cartels does not seem to be bound to a certain level of a nation's economic development or choice of legal system, export cartels originate in nations that substantially differ from each other. Further, it seems that export cartel activity is not limited to certain types of goods: they appear to be possible in both primary and intermediate goods, as well as in final products.

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<sup>21</sup> 15 U.S.C. §§ 61-65. [1973].

<sup>22</sup> Australian Competition and Consumer Act 2010.

<sup>23</sup> Margaret C. Levenstein & Valerie Y. Suslow, 'The Changing International Status of Export Cartel Exemptions' (2004) 20 *American University International Law Review* 18.

<sup>24</sup> *Ibid* 4 & 7.

In the US, the Webb-Pomerene Act<sup>25</sup> has allowed limited exemptions for export associations since 1918. The purpose of the Act was to boost trade by allowing an antitrust exemption to associations of competitors to engage in collective export sales.<sup>26</sup> It was, however, perceived as having certain gaps and, in 1982, the US export cartel exemption system was supplemented by the Export Trading Act<sup>27</sup> and the Foreign Trade Antitrust Improvements Act<sup>28</sup> in order to increase the system's popularity. The supplementary Acts expanded the system by exempting all conduct that did not have a 'direct, substantial, and reasonably foreseeable' effect on US commerce as well as by exempting essentially all categories of trade, where the original Webb-Pomerene Act had only concerned commodities and had not applied to arrangements with any spillover effects to the US.<sup>29</sup>

### **III. Are export cartels a problem?**

The impact of export cartels is a highly-debated topic. It is still somewhat unresolved, partly owing to the dearth of reliable and comprehensive empirical data for the reasons explained in the previous Section. This section will nevertheless highlight a few of the main arguments that are considered most compelling, both for and against export cartels.

#### **1. Critical views**

It seems that many credible scholars do recognise detrimental effects of export cartels to welfare, particularly when taking a perspective broader than concerning a single nation. Many of these detriments appear in substantially similar ways to those of domestic hard-core cartel conduct, e.g. as higher prices and limited output.<sup>30</sup> It must be noted that views do exist that the currently available data is not sufficiently robust to form this conclusion about

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<sup>25</sup> 15 U.S.C. §§ 61-65. [1973].

<sup>26</sup> Einer Elhauge & Damien Geradin, 'Global Competition Law and Economics' Hart Publishing; 2011; 1188-1189.

<sup>27</sup> 15 U.S.C. §§ 4001-4003 [2000].

<sup>28</sup> 15 U.S.C. § 6a [2000].

<sup>29</sup> Victor (n 9) 572-575.

<sup>30</sup> See eg Victor (n 9) 577; Jenny (n 9) 104; Bhattacharjea (n 7) 320.

export cartels.<sup>31</sup> The most vocal opponents of export cartels seem to consist of the EU and Japan, which have stated that export cartels distort trade and mostly appear to benefit larger companies (instead of SMEs which are in more justifiable need of such help) and have called for multilateral restrictive regulation.<sup>32</sup>

An acknowledged policy risk associated with export cartels concerns excessive information exchange between competitors, meaning inorganic market transparency and resulting tacit collusion.<sup>33</sup> This is a recurring and significant issue that general anti-cartel laws attempt to address and is highly relevant in export cooperation as well: authorities are concerned about potential – and rather likely – spillover effects affecting domestic markets when horizontal export cooperation takes place. Spillover effects tend to be a main feature in the review of authorities in jurisdictions where explicit limited antitrust exemption may be granted to export cartels, such as in the case of the US and Australia. Such nations attempt to avoid any such cooperation to develop that would include material spillover to the domestic market by performing an advance review of it. For instance, the Australian Competition and Consumer Commission explicitly states in its guide on interpreting the Australian regime for export cartel exemptions that ‘[s]pillover effects from an export arrangement reducing competition in domestic markets are a concern, and therefore the exemption only relates to the export of goods and services.’<sup>34</sup> In export cooperation, spillover effects are indeed often likely once competitors have shared sensitive information about conduct in foreign markets and coordinate related practices. Such information may in itself allow excessive transparency in breach of regulation on horizontal cooperation and the familiarity of cooperating closely on foreign markets is only a short step from repeating the same domestically as well.

Further, the existence and operation of export cartels has the effect of creating additional trade tension between nations, more internationally speaking. This is contrary to the WTO’s aim of promoting free trade and reducing barriers

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<sup>31</sup> See Daniel D. Sokol, ‘What Do We Really Know About Export Cartels and What is the Appropriate Solution?’ (2008) 4 *Journal of Law and Economics* 982; and Sweeney (n 13) 71.

<sup>32</sup> See Sweeney (n 12) 58.

<sup>33</sup> See Victor (n 9) 577-578.

<sup>34</sup> Australian Competition and Consumer Commission, ‘Guide to the export agreement exemption in the Competition and Consumer Act’ (2011) 2.

to trade. Export cartels are argued to cause trade friction and harm in the form of added legal complexity and ambiguity, as experienced in, e.g. the Wood Pulp case.<sup>35</sup> If nothing else, they are against the spirit and principles of trade liberalisation.<sup>36</sup>

A common argument is that export cartels are mainly a problem for developing nations<sup>37</sup>. However, it appears that export cartels may harm both advanced and developing nations, since the formation and maintenance of an export cartel is possible irrespective of a nation's level of development. The main difference lies in enforcement of export cartels originating in other nations: advanced nations are often better placed to both enforce their competition laws extraterritorially and to otherwise put pressure the exporting nations by utilizing other trade measures. Thus, the net effect is likely most felt in nations whose domestic enforcement resources and international bargaining power are limited.

Even if extraterritorial application of its own antitrust rules is possible for a national competition authority (NCA), in principle, it is challenging to apply these rules in practice. If certain conduct is not against the laws of the exporting nation – due to an implicit or explicit exemption of cartel conduct occurring in relation to exports – this nation's NCA may be reluctant to cooperate with the NCA of the importing nation. Even in cases where international agreements exist between the two nations, cooperation between NCAs is commonly exercised on a voluntary basis, whether related to comity or otherwise. The problem with voluntary cooperation is that a nation may decline to assist for a number of reasons, including protectionism. In the absence of cooperation, difficulties arise both for finding evidence of potential infringements as well as fining entities for infringements, since both would require extraterritorial application of a nation's competition laws, which – in turn – requires significant support in the form of comity from nations in which such entities are based or where the cartel conduct has taken place.

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<sup>35</sup> Ibid 577; Joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 A. *Ahlström Osakeyhtiö and Others v Commission* [1993] ECR I-01307.

<sup>36</sup> Sweeney (n 12) 72.

<sup>37</sup> See eg Aditya Bhattacharjea, 'Export Cartels: A Developing Country Perspective' (2004) 38 *Journal of World Trade* 15-22

## 2. Favourable views

Certain commentators and nations – particularly the US – put forward the argument that export cartels do not pose a serious problem owing to their efficiency gains and enhanced possibilities for conducting cross-border trade, and that their net effect is positive.<sup>38</sup> This essay will highlight a few of the main points generally made in this regard.

One main claimed benefit is that enhanced efficiency is likely to outweigh possible negative effects on competition that an export cartel may have. This is claimed to be due to the economies of scale materialized by sharing resources in the marketing, distribution and sales functions directed to certain foreign markets. The efficiency argument was a major part of the US soda ash export cartel's (ANSAC) defence when it encountered problems with foreign competition law authorities a few decades ago.<sup>39</sup>

Another claimed benefit of export cartels is that they enable exporting entities to reach markets they would not be able to reach otherwise. This 'enabling' argument is one of the main justifications that are commonly mentioned in conjunction with the US Webb-Pomerene Act<sup>40</sup>. Indeed, this may be the case for SMEs, but it is largely dependent on the case at hand, given that export cartels have been said to mostly benefit larger companies,<sup>41</sup> which possess the potential to access markets individually. Market access arguments were raised, inter alia, in the ANSAC proceedings, but were not accepted – authorities deemed the parties to be able to enter the markets in question individually without cooperating within an export cartel.<sup>42</sup> *Jensen-Eriksen* argues that, from a trade policy perspective, the above-mentioned two benefits can be significant for smaller, developing nations in which exporting companies are located and refers to Finland as an example. The paper and pulp sector in 20<sup>th</sup> century Finland was a highly-cartelised affair, but also helped the then smaller companies compete with leading players on

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<sup>38</sup> Eg Sokol (n 31) 972-973.

<sup>39</sup> The defence was ultimately unsuccessful, as authorities were not convinced that efficiencies would outweigh negative effects. For a detailed account of ANSAC's defence, see Bhattacharjea (n 37) 15-22.

<sup>40</sup> 15 U.S.C. §§ 61-65. [1973].

<sup>41</sup> Sweeney (n 12) 61.

<sup>42</sup> Bhattacharjea (n 37) 15-22.

international markets and eventually helped transform Finland into a modern economy, a view also echoed by the former head of the Finnish competition authority<sup>43, 44</sup>.

What is left to be discussed is the ‘defence’ argument. In brief, this argument deals with situations in which importing nations exhibit certain structures that are either legislatively created or otherwise existing that constitute *de facto* barriers to entry for an exporting company<sup>45</sup>. As such, it is related to enhanced market access and is similar in justification to the ‘enabling’ argument. Proponents of export cartels suggest that coordinating efforts are needed to gain access to the market by acting as a countervailing force of sorts.<sup>46</sup> The ‘defence’ argument may carry some weight to the extent that export cartel members are new entrants to the import market; otherwise it is not likely to be of relevance.

### 3. Balancing interests

As mentioned in the previous Section, substantive empirical data on export cartels activity is rather limited. This disadvantage creates difficulty in taking a firm stance on them, since one would like to base such stance on actual, empirical economic data, instead of mere scholarly opinions, even if they are reasoned ones.

The harm for an export cartel largely depends on its market power and its treatment should equally depend on its true effects on the foreign market in question, rather than considering it a *per se* infringement of competition law.<sup>47</sup> However, this inevitably begs the question: why assess export cartels using different criteria than when assessing domestic cartels? From a legal standpoint, it should be sufficient and appropriate to subject all conduct to the same criteria and allow the effects to speak for themselves. *Jenny* argues that cooperation in export cartels may well be partially procompetitive, but may also partially be conduct that would be classified as hard-core collusion,

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<sup>43</sup> Matti Purasjoki, ‘Kartelli, uskonto ja isänmaa’ (2004) Helsingin Sanomat.

<sup>44</sup> Niklas Jensen-Eriksen, ‘A Potentially Crucial Advantage. Export Cartels as a Source of Power for Weak Nations’ (2013) Vol. 64 *Revue économique* 1095.

<sup>45</sup> *Ibid* 15-22.

<sup>46</sup> Bhattacharjea (n 37) 26.

<sup>47</sup> Brendan Sweeney, ‘Export Cartels: Is There a Need for Global Rules?’ (2007) 10 *Journal of International Economic Law* 89; Jensen-Eriksen (n 44) 1090.

should the effects hit the domestic market, instead of being directed elsewhere.<sup>48</sup> It is not likely necessary to consider that such combination of cooperation is inevitably essential, specifically in an export context. Rather, it would make sense to treat such cooperation as it would be treated, if the effects were to occur in the domestic market.

By focusing on the trade-enhancing side of export cartels – the benefit for the exporting nation – the assessment looks different. Export cartels may be used as a way to promote a nation’s important industries, to increase employment and to bring a boost to the nation’s economy. Domestically, interfering with a benefit-generating model like export cartels would need to entail countervailing benefits of – at least – equal proportion that could be realised with high certainty. From the perspective of a net exporting nation, its own export cartels may not be problematic. The perspective of this essay, however, is global economic welfare as a whole. By allowing export cartels to originate and operate in an exporting nation means effectively exerting a negative externality; a decision for which the exporting nation does not bear the resulting cost and which creates inefficiencies within the global economy.

Welfare economics provides useful tools for assessing how to balance interests. The so-called Kaldor-Hicks efficiency tests attempt to assess whether a measure is an improvement to the economic welfare of a society or not.<sup>49</sup> A measure is an improvement inasmuch as the presumed ‘winners’ gain exceeds the presumed ‘losers’ loss. This is assessed by considering whether said ‘winners’ could, in theory, compensate said ‘losers’ for their loss and still be better off than originally; provided simultaneously that the maximum sum that said ‘losers’ could – in theory – pay the ‘winners’ for not undertaking the measure is lower than the minimum that the ‘winners’ would accept.<sup>50</sup> Indeed, on a global level, removing special treatment expanded to export cartels could well, in the author’s view, pass the Kaldor-Hicks tests and bring our global economy one step closer to Pareto efficiency<sup>51</sup> and thus help increase global welfare.

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<sup>48</sup> Jenny (n 9) 101.

<sup>49</sup> Thomas J. Miceli, ‘The Economic Approach to Law’ Stanford University Press; 2009; 5-6.

<sup>50</sup> Ibid.

<sup>51</sup> Pareto efficiency refers to a distribution of resources in which a reallocation is impossible without making a certain actor worse off. Ibid 4-5.

Furthermore, the challenges of extraterritorial application of a nation's competition laws should be considered. In a prior article, I have discussed the negative effects that multinational companies face due to competition laws being applied on an extraterritorial basis, or even due to the potential for such application to take place. There are clear difficulties that extraterritorial application poses for authorities and there are related ambiguities that still trouble companies today.<sup>52</sup> It is important to understand that export cartels are one of the main causes for such extraterritorial application.<sup>53</sup> Should export cartels be banned or restricted (in whatever way), a likely consequence would be a lessened emphasis on such extraterritorial application. However, it would not be a 'silver bullet' – nations would likely continue to have an extraterritorial interest in merger control and in cases of unilateral conduct, at least when there is a risk that effects might spill over to their jurisdiction.

A popular course of action in contemporary competition policy is banning so-called 'naked' cartels by virtue of, e.g., the *per se* rule in the US. The logic behind said prohibition is that the likelihood of the cartel being procompetitive is marginal and imposing a prohibition without a thorough review is the most effective way to utilise an authority's resources, even while acknowledging that some of this prohibited conduct might contain procompetitive elements in practice.<sup>54</sup> One cannot but wonder what would alter such a basic notion not to hold true in an international context. The following Section will address the main issues for which it has proved difficult to find common ground.

#### **IV. Challenges in embracing a common approach**

Historically, there have been a number of attempts to address the problem of export cartels. Often it has been a part of broader framework of negotiations about a possibility for multilateral harmonisation on competition policy questions. Already in the 1940s during the negotiations for founding the ITO,

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<sup>52</sup> Michael Ristaniemi, 'What Extraterritorial Application of Competition Law Means for MNCs' (2014) Vol. 7, No. 28 *International In-house Counsel Journal* 1.

<sup>53</sup> This view is echoed by, eg Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law' (2012) 15 *Journal of International Economic Law* 39.

<sup>54</sup> Andrew M. Rosenfield, Dennis W. Carlton & Robert H. Gertner, 'Communication among Competitors: Game Theory and Antitrust Application of Game Theory to Antitrust' (1997) 5 *George Mason Law Review* 425.

competition policy was discussed and a chapter concerning regulating both public and private restraints to competition was included in its charter. Despite the ITO charter having been signed, it however was never finally ratified<sup>55</sup> and its importance thus never became what it could have been.

Thus, far the main multilateral treaty in force that is related to competition policy is the General Agreement on Tariffs and Trade (GATT), which has been ratified by 100+ nations as of the date of this essay. The GATT has been successful in limiting the scope for government-imposed restraints of international trade significantly. It deals, however, exclusively with government policies and there has been a lingering concern about trade restraints imposed by private undertakings – this has been the idea behind negotiating and preparing an agreement on international competition policy, in order to extend to where the GATT properly does not.<sup>56</sup>

As has been mentioned, the latest comprehensive attempt to agree on international rules in the realm of competition policy took place in Cancun, Mexico, as a part of the Fifth WTO Ministerial Conference, in 2003. Competition policy was one of the four so-called ‘Singapore issues’, matters for which Working Groups had been set up at the previous ministerial conference that took place in Singapore in 1996.<sup>57</sup> However, the negotiating parties ran into a mountain of differing stances that proved insurmountable for such a multilateral agreement, at least for the time being. Despite since having been discussed on multiple forums, the path towards the next broad multilateral attempt at an agreement still eludes us.

Below, this essay will introduce a few of the most compelling reasons for the absence of deeper cooperation in dealing with the competition issues related to export cartels.

### **1. Market access needs**

Certain nations, of which the US are the most influential one, argue that export cartels are needed to help ensure access to foreign markets. As argued,

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<sup>55</sup> See Bhattacharjea (n 7) 297.

<sup>56</sup> Ibid 295-296.

<sup>57</sup> The other matters were the intersection of trade and investment, trade facilitation, and how to add transparency into government procurement.

this is most relevant in cases where the receiving nation's markets do not have an adequate level of competition laws and related enforcement and, as a result, local markets are distorted to the extent that importing entities are in need of something to help countervail such distortion, e.g.. export cartels.<sup>58</sup>

However, *Nagaoka* argues that export cartels do not affect market access and that cartel prohibitions might even be bad for market access.<sup>59</sup> This makes sense, since domestic price-fixing cartels keep prices high, which would actually allow for easier market entry, not *vice versa*. Improving domestic competition laws should enhance domestic welfare and effectively enforcing a ban on domestic cartels can help make domestic markets more competitive which, in turn, is likely to make *de facto* market access more difficult.

Given what was stated in the previous paragraph, it is curious that multilateral talks seem to have been problematic due to market access demands. Currently, tariffs are imposed by many importing nations, in part due to the assumed collusion on the end of the exporting producers.<sup>60</sup> Advanced actors in negotiations – and of those, the EU in particular – have demanded improved market access conditions, meaning lower import tariffs, in exchange for more stringent treatment of export cartels in their nations. One argument in justification of allowing export cartels is that they help penetrate foreign markets.<sup>61</sup> However, while pooling resources and cooperating might well aid in expanding to new markets, it is not at all as clear that such expansion would require cartel-like collusion to succeed, as discussed earlier in this essay.<sup>62</sup>

## **2. Protectionism: national champions, national sovereignty & national welfare**

As stated in the previous Section, export cartels may be considered harmful to both developing and advanced nations. Concurrently however, each may also derive benefits from them. Certain nations may have a single industry

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<sup>58</sup> Sokol (n 31) 972.

<sup>59</sup> Sadao Nagaoka, 'International Trade Aspects of Competition Policy' (1998) No. 6720 National Bureau of Economic Research Working Paper 18.

<sup>60</sup> See Bhattacharjea (n 7) 296.

<sup>61</sup> *Ibid.*

<sup>62</sup> Jenny (n 9) 101.

where its companies may hold a strong market position globally, or in several individual nations, and consequently the industry is of particular importance to the exporting nation. Should the possibility to utilize export cartels be limited, it would inevitably reflect on the economy of their nation as well, which helps explain as to why such a ban is viewed quite critically.<sup>63</sup> A view voiced by developing nations during the WTO Cancún negotiation round was that export cartels of advanced nations be banned and such ban being enforced by competition authorities of said advanced nations, while export cartels of developing nations would remain untouched.<sup>64</sup> The rationale for this was that such a ban would lower the prices for raw material and equipment that developing nations require which would help with their industrialisation process.<sup>65</sup>

Further, international binding agreements concerning competition policy are seen as problematic due to the resulting restrictions in a nation's sovereignty. This is a classic issue of federalism, which raises its own questions. Many developing nations have, for long, been encouraged to adopt policies and related laws of advanced nations in North America and Europe and tend to be rather reluctant to such transplants, pointing to their nations' own characteristics.<sup>66</sup> This concern is amplified in resolutions that would include any degree of surrendering jurisdiction over conduct of such nation's citizens or over conduct that has occurred within its borders.<sup>67</sup>

The primary concern of all nations, as rational actors, is their own welfare. Change in economic policy, including competition policy, requires an incentive, given that export cartels may well be welfare-increasing for the exporting nation and concurrently are, as such, unlikely to be welfare decreasing for such nation. It is, however, of no use for a single nation to unilaterally prohibit export cartels and interfere with their anticompetitive edge, as it would be merely hurting its own economy and economic welfare.<sup>68</sup> *Sweeney* rightfully calls the situation a 'prisoner's dilemma', where the equilibrium currently lies in permitting export cartel conduct across the globe.

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<sup>63</sup> Bhattacharjea (n 7) 298 & 310; Bhattacharjea (n 37) 4.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

<sup>66</sup> *Sweeney* (n 12) 397.

<sup>67</sup> *Ibid.*

<sup>68</sup> *Victor* (n 9) 578.

Doing otherwise unilaterally would not be wise from the perspective of an individual nation – the classic paradigm of game theory in economics. Being able to ‘escape the prison’ genuinely calls for an international, multilateral agreement.<sup>69</sup>

### 3. Enforcement

Appropriate enforcement of any understanding to be reached is a key challenge for deeper cooperation in competition issues, including in relation to export cartels. Should there be binding international rules of some sort pertaining to export cartels, enforcement of such rules is nevertheless needed in a formalised manner that is clear on any issues that might arise.

The main proposals usually belong to either of the following two categories: 1) whether to utilise current national competition authorities (NCAs) – either of advanced nations only or of all contracting parties, or 2) whether to rely on a supranational authority, such as the WTO and its dispute resolution mechanism, for enforcement.<sup>70</sup> Benefits of the latter include less risk of protectionism and a promise of more equality, since NCAs drastically vary from nation to nation, both in terms of resources as well as experience.<sup>71</sup> Relying on NCAs alone to enforce a multilateral agreement would risk creating diverging standards. Supranational organisations are not without their faults, either. They may be costly, especially if a new one was to be created, and they may be perceived as undemocratic.<sup>72</sup> However, as the WTO appellate body has once stated: ‘when a nation enters into an international treaty, that act equals exercising its sovereignty and is inevitably based on its own national interests and benefits that it assumes it will eventually receive by doing so.’<sup>73</sup>

A third alternative is the path of soft law, in the form of non-binding cooperation that takes place on a lower, technocratic level between government actors. *Bradford* has called this type of cooperation

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<sup>69</sup> Sweeney (n 12) 70-71.

<sup>70</sup> See eg Guzman (n 11) 32-33.

<sup>71</sup> Bhattacharjea (n 7) 297.

<sup>72</sup> Paul Stephan, ‘Regulatory Cooperation and Competition - The Search for Virtue’ (1999) 99-12, University of Virginia Law School Legal Studies Working Paper 36-37.

<sup>73</sup> WTO, Appellate Body Report, Japan—Taxes on Alcoholic Beverages (1996) 13–14 WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R 15.

‘transgovernmental networks’, as opposed to the more official intergovernmental cooperation, mostly visible in the form of trade agreements between nations.<sup>74</sup> Indeed, such administrative cooperation between authorities and other state actors of different nations has streamlined international merger review as well as investigations of certain international cartels. On a broader scale, the ICN has been an important forum for such transgovernmental cooperation that has helped spread best practices and experience in competition laws and their enforcement from between authorities worldwide. However, administrative cooperation and sharing ‘lessons learned’ is still far from negotiating changes to a nation’s competition policy. The limits of voluntary cooperation are likely to be reached in situations where a net-exporting nation was to face limitations on export cartels originating within its national territory – a view echoed by *Sokol* by stating that authorities would likely have little incentive to pursue export cartels together.<sup>75</sup>

#### 4. Belief in a market economy

Finally, a key hurdle in finding a multilateral agreement on the treatment of export cartels, and on competition law more broadly, hangs on the differing perspectives of nations of the virtues of a market economy. *Bhattacharjea* argues that certain nations are not as convinced in this as many advanced economies are and want to retain more control on their own industrial policy.<sup>76</sup> An example of such a nation is China and its socialist market economy, in which resource allocation is not left to be decided by the market, but partially by the nation-state which attempts to retain a certain degree of control over the market.<sup>77</sup> The principles of this type of market economy may, at times, be challenging to reconcile with free and international trade, as envisioned by the WTO.

Significant dogmatic differences in approaches to economic thinking can surely be difficult to overcome. For the purposes of this essay, however,

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<sup>74</sup> Anu Bradford, ‘Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation’ (2003) 39 *Stanford Journal of International Law* 211-214.

<sup>75</sup> *Sokol* (n 30) 979.

<sup>76</sup> *Bhattacharjea* (n 7) 298.

<sup>77</sup> Yong Huang, ‘Coordination of International Competition Policies’, (Guzman ed) *Cooperation, Comity and Competition Policy*; Oxford University Press; 2011; 239.

prohibitions or other restrictions on export cartels do not really require comprehensive harmonisation of nations' competition laws or policy, as such.

## V. Possible resolutions

### 1. Substantively

Among commentators, proposals for improving the *status quo* seem to vary. Proposed resolutions often include removing special treatment and instead advise to prohibit anticompetitive conduct of export cartels on equal grounds as would be done in cases of domestic cartels. Even total bans on export cartels have been proposed.<sup>78</sup> Further, a number of trade-related resolutions have been proposed, some proposing using revamping the WTO anti-dumping to apply to overcharges or by utilising innovative interpretations of the GATT to encourage states to act in the collective benefit.

One key change that is needed is to first cease the special treatment that is currently still afforded to export cartels by explicitly exempting conduct that would otherwise be considered *per se* illegal. While this would, in itself, be an arduous process requiring legislative changes in several countries, it would however still not suffice to handle the problem as long as implicit exemptions exists by virtue of an 'effects' doctrine, since effects of export cartels are mostly outside the exporting nation's territory.<sup>79</sup> To be comprehensive, a resolution is needed where the exporting nation has an obligation to take effects occurring in an importing nation into consideration in its competition law review, particularly provided that it has received a request to do so from said importing nation. Further, in order to be in a position to make such a request, the importing nation must also have the right to cooperate with the NCA of the exporting nation, in terms of gathering evidence and otherwise in its own investigations.<sup>80</sup> Another interesting approach would be to utilise the GATT for combating export cartels. The nation hurt by an export cartel could, in theory, bring complaints based on a GATT violation.

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<sup>78</sup> See Patrick Messerlin, 'Should Antidumping Rules be Replaced by National or International Competition Rules?' (1994) 49 *Aussenwirtschaft* 2-3.

<sup>79</sup> Jenny (n 9) 571.

<sup>80</sup> Sweeney (n 13) 395-398; See also OECD, 'Trade and Competition Policies' (1994) 18 *World Competition* 185-191.

Most nations utilise an implicit exemption of competition laws for export cartels in which case a so-called 'non-violation' complaint would, in principle, be possible. Such complaints may be raised where a nation's measure may not directly be in breach of its obligations under the GATT, but where its measure *de facto* impairs existing concessions made under it. A nation could argue that not prohibiting the hard-core cartel conduct of an export cartel constitutes a 'regulatory subsidy' that could then give rise to a non-violation complaint. In other words, the importing nation would be the complainant and the exporting nation the defendant who would have allegedly violated its GATT-based obligations.<sup>81</sup> While this approach is not novel, it is yet to be tested and – in my opinion – it seems like stretching the boundaries of the GATT, since the main purpose of the GATT is to smoothen out and eliminate government-imposed restraints to trade, such as tariffs and quotas<sup>82</sup>. Privately run cartels are quite a separate thing from that.

In terms of state-supported export cartels, *Jenny* proposes that making nations pay for the privilege of being able to maintain them in a multilateral framework may be a way forward. His logic is that nations engaging in trade will likely restrain from engaging in state-supported export cartels if the risk of retaliation against them from importing nations by withdrawing trade concessions becomes excessively costly.<sup>83</sup> A key challenge in finding a broadly satisfying resolutions lies in the following state of affairs: nations that benefit significantly from exporting, so-called 'net exporters', have different incentives than nations whose companies import more than export, so-called 'net importers'. Net exporters would naturally prefer to keep the *status quo*. Some proposals lean more heavily on the trade aspect in order to correct the current imbalance. Some propose that the importing nation should be able to counter detrimental effects of export cartels with trade measures under the WTO. The main approaches are:

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<sup>81</sup> Bernard Hoekman & Petros Mavroidis, 'Competition, Competition Policy and the GATT' (1994) Volume 17, Issue 2 *The World Economy* 25-26; See also Joel Trachtman, 'International Regulatory Competition, Externalization and Jurisdiction' (1993) 34 *Harvard International Law Journal* 48.

<sup>82</sup> Hoekman & Mavroidis (n 81) 3-4.

<sup>83</sup> *Jenny* (n 9) 130.

- Utilising the WTO anti-dumping system for export cartel originating overcharges, by imposing a sanction based on the sum that represents excess above a calculated ‘normal price’;
- Imposing tariffs on goods sold by export cartel participants; and
- By suspending relevant compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs).<sup>84</sup>

As *Sweeney* notes, these approaches are unorthodox for handling competition problems, since they utilize tools that are typically more commonly used in relation to market access conflicts.<sup>85</sup> Further, setting tariffs on imports based on export cartels are likely to result in domestic consumer welfare losses in developing nations as well as in smaller nations, owing to resulting higher entry barriers and in case the export cartel members exits such markets.<sup>86</sup> Given the vastly differing interests of nations and the resulting challenges that have thus far encountered those who have been involved in negotiating comprehensive multilateral agreements in competition law matters, prohibitions might be too ambitious goals to achieve. While any of the alternatives discussed above would likely bring significant benefit on a global level, if implemented on a broad multilateral basis, it seems that none of them are truly realistic to achieve, at least for the time being. Other forms of cooperation thus need to be considered in order to achieve convergence and harmony on a global scale in terms of export cartels.

Voluntary cooperation has an established role in international competition law. Most of the actual international cooperation in competition law and policy has thus far been and still is conducted in bilateral and regional trade agreements (TAs) as well as more informally, such as within the International Competition Network (ICN), where competition authorities are able to share best practices and other practical information. It may sound surprising, but nearly half of the recent TAs globally do contain provisions on competition policy, typically contain assurances that each signatory will prohibit restrictive business practices, such as cartels, abuses of dominant position etc. as well enforce such prohibitions adequately. The common denominator is

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<sup>84</sup> Bhattacharjea (n 37) 32-35.

<sup>85</sup> *Sweeney* (n 13) 402-403.

<sup>86</sup> *Ibid* 70.

that said cooperation is mostly of a *de facto* non-binding nature only<sup>87</sup>.<sup>88</sup> This has likely facilitated such widespread appearance of these provisions in TAs. The absence of sanctions for non-compliance means that nations are more easily able to accommodate wishes for such chapters, while emphasis may instead be placed elsewhere in TA negotiations.

Soft law may be helpful to an extent, *inter alia* in investigations regarding potential infringements as well as in mergers requiring review by several nations running in parallel. However, non-binding international cooperation has not been able to induce nations to restrict the conduct of export cartels. What is needed in addition to mere soft law, are regulations that bind nations to action. To the extent that chapters on competition policy are included in TAs, they should include provisions on export cartels and be made binding on the contracting parties, with appropriate dispute resolution mechanisms included.

*Guzman* favours deeper cooperation than that offered by the current framework of voluntary information sharing, but is sceptical about whether a proper multilateral agreement on international competition law is reachable. Instead, he proposes a system of compensatory payments in exchange for accepting a policy that differs from the nation's preferences.<sup>89</sup> While this could, theoretically, be useful in certain isolated bilateral trade agreements, it is difficult to imagine that nations would be prepared to ever render such payments in practice. *Saggi & Hoekman* have proposed a trade-off of sorts: they suggest that developing nations reduce tariffs for imports coming from a certain developed nation, in exchange for such developed nation banning export cartels which affect said developing nation.<sup>90</sup> However, this approach does not take into consideration that possible detrimental effects of export cartels are not limited to nations that fall below a certain level of 'development'. While disregarding the concept of 'development', a

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<sup>87</sup> Some TAs include binding chapters on competition policy, but these generally lack a dispute resolution provision, which means that breaches are thus actually unenforceable.

<sup>88</sup> Laksmi Puri, 'Competition Provisions in Regional Trade Agreements: How to Assure Development Gains' (2005) United Nations Publication, vii-ix; Daniel D. Sokol, 'Order without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements' (2008) 83 *Chicago-Kent Law Review* 116-118.

<sup>89</sup> *Guzman* (no 11) 23.

<sup>90</sup> See Bernard Hoekman & Kamal Saggi, 'Trading Market Access for Competition Policy Enforcement' (2004) 3188 *World Bank Policy Research Working Paper* 1.

resolution could be that nations grant market access benefits for those net exporting nations that limit possibilities for export cartels to operate *vis-à-vis* the importing nation.<sup>91</sup> This kind of *quid pro quo* approach does indeed seem pragmatic, particularly in a bilateral trade relationship. However, its application would inevitably be complex to apply in a multilateral context, owing to the differing statuses of contracting nations.

Given the challenges summarised above in Section IV, it seems naïve to believe in a comprehensive binding multilateral agreement being formed anytime soon. The author feels that perhaps the simplest and the most realistic way to achieve substantive progress would be to couple export cartel restrictions with compensatory payments or tariff reductions of some form, in order to incentivise net exporting nations to act in a manner that would otherwise conflict with their nation's welfare. In terms of the format for such agreements, competition policy has already begun to appear in trade agreements, as described above. Expanding this to the restriction of anticompetitive practices of export cartels affecting the contracting parties would be a mere step away. It would, hence, be sensible to begin with provisions on export cartel conduct in bilateral or regional trade agreements, since regional agreements between fewer nations with potentially similar economic structures could be easier to reach. This would also be in line with the development of international competition policy cooperation more broadly and would, in turn, enable a path towards a more comprehensive multilateral agreement.

## **2. Possible facilitator and enforcer of such resolutions**

A key question is the appropriate forum for negotiations as well as the appropriate enforcer of a multilateral agreement, should such an agreement be reached. Some commentators propose that the WTO would be best placed to administer the negotiations and act as the umbrella organisation of an agreement,<sup>92</sup> while others favour a separate multilateral arrangement.<sup>93</sup> Should a stand-alone multilateral resolution be reached, it would, however, require setting up a separate system for monitoring and dispute settlement, something that already exists within the WTO. Thus, out of the two, the WTO

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<sup>91</sup> Jenny (n 9) 130.

<sup>92</sup> Hoekman & Saggi (n 90) 6.

<sup>93</sup> Jenny (n 9) 130.

seems more practical. Nevertheless, the WTO is not the only plausible organisation. *Bradford* suggests that developing countries would prefer an agreement concerning competition policy to be under the UN Conference on Trade and Development, which forum could help maximise the number of potential signatories.<sup>94</sup> *Guzman* proposes expanding the WTO to non-trade areas, including competition policy, particularly encouraged by the example in the area of intellectual property: after failing to conclude a multilateral agreement under the World Intellectual Property Organisation (WIPO), the WTO was expanded to cover IP matters by virtue of the TRIPs Agreement, which sets a minimum standard for IP regulations applicable to all WTO members.

There are indeed certain analogies between international negotiations in competition policy and intellectual property in terms of their strategic implications to nations as well as the fact that in IP, negotiations take place within the WTO as well as separately, which are the two main options being discussed for competition policy as well.<sup>95</sup> Expanding the WTO to competition issues would be logical, since the GATT, administered by the WTO, already covers related areas and could principally already be used to restrict internationally anticompetitive business practices, as discussed previously in this Section.

On a regional level, the negotiation of agreements would logically fall within the scope of regional trade organisations, such as ASEAN, COMESA, CARICOM, the Andean Community et cetera, since they are existing forums for cooperation between respective nations and their authorities. In terms of enforcement, a choice would have to be made whether to solely empower NCAs to enforce such an agreement, create a regional competition authority or rely on nation-to-nation dispute resolution, as agreed in the rules of the relevant regional organisation. Whichever path is chosen, a multitude of lingering questions and challenges will surely remain.

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<sup>94</sup> Anu Bradford, 'International Antitrust Negotiations and the False Hope of the WTO' (2007) 48 *Harvard International Law Journal* 435.

<sup>95</sup> Andrew Guzman, 'International Antitrust and The WTO: The Lesson From Intellectual Property' (2003) 43 *Virginia Journal of International Law* 933.

## VI. Concluding Remarks

Something should be done to maximise global welfare, i.e. the collective wellbeing of all of us living on planet Earth. As described in the preceding Sections of this essay, the *status quo* of how export cartels are treated is far from optimal, at least if a perspective is taken that values welfare that transcends the borders of an individual nation state.

Cartel conduct should not be treated in varying ways based on where the effects occur. After all, procompetitive cooperation would anyway likely continue to be viewed as such, while ‘hard-core’ restraints, whose object is restraining competition, could be better minimised than today. In the case of global welfare, the assumptions regarding the adverse effects of cartel conduct are valid irrespective of where the effects happen to occur. It is noteworthy that certain types of cooperation between exporting entities may well possess procompetitive elements. Thus, a blanket ban on such cooperation would not be an improvement. Instead, a resolution would be to remove the special treatment that export cartels have thus far enjoyed. Only this would truly allow for more fair and consistent international competition policy, to the extent that the issue of export cartels is concerned. For the time being, however, reaching a comprehensive multilateral agreement seems beyond reach, for the reasons described throughout this essay. This should not, however, be seen as the only available avenue towards progress.

Cooperation within the ICN appears to work to the extent of sharing best practices on a voluntary basis between NCAs. This is useful for *de facto* international convergence of competition law, since most NCAs globally do participate in the ICN, at least to some extent. Further, TAs nowadays often do contain provisions on competition policy, which is a trend worth monitoring, as – if continued – it may prove instrumental in restricting the use of export cartels in the future.

The onus is on the advanced and influential competition law regimes, such as the EU and the US. They have sophisticated doctrines of dissecting the good from the bad, the cooperation beneficial to society from cooperation detrimental to it. Their economies are also generally those that carry the most weight in international trade negotiations. These regimes could make

contributions towards a more internationally consistent and fair treatment of cartel conduct, irrespective of the origin or destination of such conduct.

In an ever more connected and global world, steps should be taken to maximise global welfare. While world trade with minimum barriers is integral in doing so, export cartels continue to exist as a lingering barrier that distort markets and allow inefficiencies through negative externalities. It would be wise to keep in mind that competition policy is not a zero sum game, neither domestically nor internationally.