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Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy

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EXPORT CARTELS AND VOLUNTARY EXPORT RESTRAINTS BETWEEN TRADE AND COMPETITION POLICY

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Abstract: This article discusses the conflicts between trade regulation and competition policy. It begins with a survey of the effect of restrictive practices — particularly those like export cartels that are exempted from competition law regulation — and continues with a critique of national support and authorization for restrictive practices as well as protective state activities, including antidumping rules, rules against "unfair" trade practices, and voluntary export restraints. The article concludes with a summary of unilateral, bilateral, and multilateral approaches to a more effective international regime for competition policy. It also introduces the recommendation for a Draft International Antitrust Code, which was submitted to GATT.

CONTENTS

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I. INTRODUCTION

An increasing number of states, including most recently the formerly socialist countries of Eastern Europe, have adopted antitrust legislation. Rather than prohibit national cartels, however, most countries permit or encourage export cartels relating to foreign markets. Exporting countries permit domestic export cartels because they expect to increase exports by enabling domestic enterprises to compete more successfully in foreign markets. They expect to achieve this by reducing export costs and enhancing bargaining power against foreign buyers and competitors. The question to be examined in this paper is whether the existing rules exempting export cartels from antitrust enforcement still serve the objective of promoting national exports in light of the globalization of international trade and production.

In addition to domestic legislation, export cartels must also take into account the competition law of the importing country. Also, third countries whose enterprises or markets are affected may express their interests or even apply their competition law. The application of the importing countries' competition law is not only restricted by the general problems of extraterritorial application but by political issues as well. In some cases, the foreign governmental support of export cartels or, as in the OPEC case, its direct involvement, has to be accepted as a matter of economic policy and may immunize cartels from the competition law of the importing country. If the government of the importing country initiates export restraints on foreign undertakings for protectionist reasons, it is questionable whether domestic competition law is still applicable. So-called voluntary export restraints ("VERs") and voluntary restraint agreements ("VRAs") have gained significance while the implementation of import restrictions has become more difficult in the developing GATT system. In the grey area between trade and competition policy, between governmental and private restraints, VERs have sometimes served as a means to circumvent both antitrust regulation and GATT procedures. As a result of the Uruguay Round, VERs are explicitly outlined in the GATT Agreement on Safeguards, which states that they shall not be applied without fulfilling the requirements of the safeguard clause of article XIX of GATT. Whether this amendment will successfully fill the gap between the responsibility for governmental restraints in the GATT System and the responsibility for private restraints under competition law remains to be answered.

Part II of this article examines how competition laws are applied to domestic and foreign export cartels in different countries. Part III focuses on the legislative rationales for exempting export cartels and describes the economic consequences of export cartels on the exporting country, the importing country, and international trade. While distinguishing between governmental and private restraints, Part IV analyzes different approaches to the arising problems. These include unilateral reforms of competition law, bilateral agreements, regional cooperation and multilateral approaches suggesting a "world competition law."

II. LEGAL SITUATION: EXPORT CARTELS AND VER UNDER COMPETITION LAW

A. *Domestic Export Cartels Under Competition Law*

1. *Introduction*

Export cartels restrict competition in foreign markets. Whether they are subject to domestic competition law depends on the scope of application of the law. Jurisdiction of competition law is based on either the "effect" of anticompetitive activities on the domestic market irrespective of where those activities were carried out ("effects principle"), or the fact that the anticompetitive activities were carried out within the domestic territory ("principle of territoriality"). Under the principle of territoriality, national competition law applies to domestic enterprises. Under the effects principle, only "mixed" export cartels which also involve domestic restraints of competition are covered. The application of competition law and supervision on "pure" export cartels, which restrict exclusively competition in foreign markets, can only be achieved by enacting additional, special rules. A comparative analysis should consider the substantial requirements for exemptions of pure, mixed and international export cartels. State control over international export cartels is limited inasmuch as states generally are able to prohibit only domestic enterprises from participating in international cartels. The inability of any single state to prevent the formation of international cartels by firms beyond the jurisdictional reach of its competition law in turn becomes an incentive not to prohibit domestic firm participation. Otherwise domestic products may be disadvantaged without corresponding benefits to domestic consumers.

A comparative analysis should furthermore consider different degrees of governmental and private enforcement of competition rules restricting the activities of export cartels. In addition, active governmental promotion of export cartels as a part of national trade policy must be considered with regard to the application of the competition law of the importing country.

2. *Domestic Export Cartels Under U.S. Antitrust Law*

Export cartels relating to United States exports come under the general prohibition of section 1 of the Sherman Act, which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations." The broad scope of application has to be considered because it covers not only domestic but also international trade.

In 1918 the Webb-Pomerene Act ("WPA")[1] was enacted to exempt export associations "entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade" from the prohibitions of the Sherman Act. The WPA was designed primarily to enable exports of small and medium-sized firms without individual export ability, and to form a countervailing power against foreign cartels. It was assumed that the costs of exporting would be reduced by eliminating duplicate sales organizations or by obtaining lower rates on export services such as insurance and freight. Groups of relatively smaller scale U.S. producers would more readily be able to enter into and survive in foreign markets in the face of powerful combinations because of their reduced export costs and increased financial resources supporting export programs. Higher prices and improved sales terms generally would be obtained from foreign buyers, especially those organized into buying cartels.[2] One prerequisite for the exemption is that the association does not restrain the domestic trade or the export trade of a domestic competitor. The association must not enter into any agreement that artificially or intentionally enhances or depresses prices within the United States of commodities of the class exported by the association, or that substantially lessens competition within the United States or otherwise restrains trade therein.[3] Hence the WPA exempts only pure export cartels; mixed export cartels are subject to the same rules as domestic cartels. The exemption does not apply to international export cartels, as stated in the case *United States v. U.S. Alkali Export Association*.[4] Even though the export cartel agreements in *Alkali* did not specifically allocate the U.S. market, the Court determined that the participants in fact intended to allocate the U.S. market. By limiting foreign exports into the United States, the export cartel was assumed to cause anticompetitive spillover effects within the United States.

The Act provides that the Federal Trade Commission (FTC) be notified of Webb-Pomerene Associations within thirty days after their creation.[5] Additional prerequisites for an antitrust exemption were requested by the

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1 Webb-Pomerene Export Trade Act, 15 U.S.C. §§ 61-65 (1982).

2 FEDERAL TRADE COMMISSION, ECONOMIC REPORT OF WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 6 (1967).

3 15 U.S.C. § 62 (1982).

4 325 U.S. 196 (1945).

5 15 U.S.C. § 65 (1982).

courts[6] and the FTC. In *United States v. Minnesota Mining & Manufacturing Co.*, the Justice Department claimed that the participants exceeded the exemption for pure export trade associations. The Court held that the following restrictions were inherent in any export association and exempted, absent special circumstances: exclusive exporting arrangements for the members, the refusal of the association to handle exports of nonmembers, fixing of resale prices of foreign distributors or sales quotas, and price-fixing agreements.[7] The FTC also published a list of restrictions considered to be permitted.[8] This list included the members' duty to export exclusively through the association, rules restricting the members' right to withdraw from the association, post-contractual statutory prohibition of competition, and price-fixing and sales quotas agreements. In 1982 the Export Trading Company Act was enacted to promote U.S. exports by removing alleged impediments to U.S. export trade arising from antitrust laws. U.S. firms had claimed that they were handicapped by U.S. law that followed them into foreign markets. At the same time, the Foreign Trade Antitrust Improvement Act narrowed the jurisdictional reach of the Sherman Act with respect to export transactions by inserting section 6(a) of the Sherman Act, which reads:

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect
> (a) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
> (b) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce on the United States.

Although the Export Trading Company Act offered substantially more protection to export associations than the WPA, it has not significantly

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6 United States v. U.S. Alkali Export Ass'n, 325 U.S. 196 (1945); United States v. Minnesota Mining & Mfg. Co., 92 F. Supp. 947, 965-66 (D.Mass. 1950); Pfizer, Inc. v. Government of India, 434 U.S. 308, 314 n.12 (1978); *see generally* BARRY E. HAWK, UNITED STATES, COMMON MARKET AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE 99 (1979).

7 Minnesota Mining & Mfg. Co., 92 F. Supp. at 965-66.

8 *See* HAWK, *supra* note 6, at 99.

promoted U.S. exports.[9] The small significance of export associations for U.S. exports is due to relatively strict private and public antitrust enforcement, and also from the strict prohibition against mixed cartels affecting U.S. markets. This may be justified by the significance of domestic sales compared with export sales, so that enforcing competition is preferable to promoting exports.[10]

3. *Domestic Export Cartels Under German Competition Law*

The international scope of application of the German competition law is defined by section 98(2) of the Law Against Restraints of Competition ("GWB") which follows the effects doctrine: "[T]his Act shall apply to all restraints of competition which have effect in the area in which the Act applies, even if they result from acts done outside such area." Three types of German export cartels must be distinguished. Export cartels that regulate domestic competition are covered by the general prohibition of cartels.[11] Export cartels without domestic regulations that have domestic effects are covered by the prohibition of cartels due to the effects doctrine.[12] Pure export cartels that exclusively regulate competition in foreign markets without domestic effects are also covered by the Act. These cartels did not previously fall under the scope of section 1 as stated in the *Oil Pipe Lines* case.[13] They did not even have to provide notice and the Federal Cartel Office ("FCO") had no supervision of this type of export cartel. Therefore, section 98 (2 (2)) was implemented, which expressly stated that the Act applies to pure export cartels. Section 6 of the GWB also includes broad exemptions for pure and mixed export cartels. The legislative intent of the exemptions was similar to the Webb-Pomerene Act:

> Many foreign countries have none or no restrictive antitrust legislation. Other countries enacted general exemptions for foreign trade (for instance the Webb-Pomerene Act in the

[9] Paul Victor, *Export Cartels: An Idea whose Time has Passed*, 60 ANTITRUST L.J. 571, 575 (1992); William W. Nye, *An Economic Profile of Export Trading Companies*, 38 ANTITRUST BULL. 309, 311 (1993).

[10] James D. Whitney, *The Causes and Consequences of Webb-Pomerene Associations: A Reappraisal*, 38 ANTITRUST BULL. 395, 413 (1993).

[11] Gesetz gegen Wettbewerbsbeshrankungen (Law Against Restraints of Competition) BGBl. I 1081 (1957) [hereinafter GWB].

[12] *Id.*

[13] Decision of the Bundesgerichtshof *in* WIRTSHCAFT UND WETTBEWERB, (WuW/E BGH) at 1276, 1278.

> United States). It would be an unreasonable impediment for German exporters if the Act provided stronger obligations for them than for their foreign competitors. In addition, the foreign market is less known to the German exporter than for the local competitors. This situation is often exploited by forcing the German producers to offer their goods below market prices. This causes a cut-throat competition including losses not only for single firms but also for the German exchange balance.[14]

The exemptions for both pure and mixed export cartels require that the cartels serve "the protection and promotion of exports." An increase in national exports, not simply in the exports or profits of the cartel members, is therefore necessary.[15] Pure export cartels, which are exempted by section 6(1), must notify the Federal Cartel Office ("FCO").[16] Section 6(2) of the GWB provides for a case by case authorization of mixed export cartels by the Federal Cartel Office. Even domestic restraints are taken into account if they are "necessary" to the performance of the export cartel. "Necessary," for example, is an agreement between producers to require their German export traders to resell in foreign markets only at fixed prices. If the export traders were permitted to undersell the cartel members in foreign markets, the export cartel would soon collapse.[17]

International cartels are not subject to special provisions. In general, the exemptions of section 6 are applicable as stated in the FCO pronouncement.[18] In 1982, almost half of German export cartels included foreign participants.[19] An international cartel which allocates world markets is prohibited if restrictions of foreign exports to the German market are included.[20] International export cartels frequently involve national quotas, so it is doubtful that the requirement of "the protection and promotion of exports" is met. This might be the case if German undertakings would not

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14 Begündung zum Regierungsentwurf 1952, Bundestags-Drucksache 1/3462, at 17, 26.

15 FEDERAL CARTEL OFFICE, ANNUAL REPORT 19 (1970); ALBRECHT VON DER HEYDEN, DAS EXPORTKARTELL 109 (1972); Eckard Rehbinder, *in* GESETZ GEGEN WETTBEWERBSBESHCRÄNKUNGEN § 6, at 69 (Immenga & Mestmäcker eds.).

16 GWB § 9(1).

17 Decisions of the Federal Cartel Office, *in* WIRTSCHAFT UND WETTBEWERB (WuW/E BKartA) 197 "Hauer"; WuW/E BKartA 381 "Schwermetallhalbzeug."

18 Pronouncement No. 48/90 of the Federal Cartel Office concerning administrative rules on the procedure for notification of export cartels, II (June 25, 1990).

19 The FCO determined in 1981-82 that out of 55 pure export cartels, 25 included foreign participants. FEDERAL CARTEL OFFICE, ANNUAL REPORT 13 (1981-82).

20 Rehbinder, *supra* note 15, § 6, at 179.

be able to export at all or would export less without participation in a powerful international cartel.[21] The authorization for mixed export cartels[22] and the exemption for pure export cartels[23] both require that "the principles of international treaties of the Federal Republic of Germany relating to trade in goods or commercial services" not be violated. In other words, the Government has indirect power to prohibit them. This could be done by signing international treaties which prevent or induce a revocation of the authorization by the FCO. By doing so the power of the executive branch is not reduced and the independence of the Federal Cartel Office is guaranteed. This demonstrates the principle of alternative authorization by political and competition authorities in German competition law.

4. Domestic Export Cartels Under European Competition Law

Article 85 of the European Community Treaty prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market." Therefore, intra European Community ("EC") export cartels restricting exports from one member country to another are prohibited.

However, an export cartel relating to non-EC countries is "not in itself likely to restrict or distort competition within the common market."[24] Such restrictions are subject to article 85 only if they have appreciable repercussions within the Community, which must affect not only one particular part of the Community, but must specifically affect trade between member states.[25] Such effects on trade between member states may occur if traders in third countries are prevented from re-importing into the Community.[26] In practice this is unlikely because of duplicate tariffs. Pure

21 FEDERAL CARTEL OFFICE, *supra* note 15; FEDERAL CARTEL OFFICE, ANNUAL REPORT 54 (1971); FEDERAL CARTEL OFFICE, ANNUAL REPORT 88 (1973); Rehbinder, *supra* note 15, § 6, at 175; Erich Hoppmann, *Exportkartell und Gesetz gegen Wettbewerbsbeschränkungen*, *in* EXPORTKARTELL UND WETTBEWERB 74, 141 (Eichler et al. eds., 1964). A contrary opinion is expressed by Scherf in FRANKFURTER KOMMENTAR, GWB § 6, at 148.

22 GWB §11(5), No. 3.

23 GWB §12 (2)(3).

24 Bulk Oil V. Sun, 1986 E.C.R. 559, 589.

25 Decision of the Commission (Junghans), 1977 O.J. (L 30/10) 14; *see also* EEC COMPETITION LAW, A PRACTITIONERS GUIDE 22 (Ritter et al. eds., 1991).

26 Decision of the Commission (Goodyear Italiana), 1975 O.J. (L 38/110) 12; *see* GLEISS & HIRSCH, KOMMENTAR ZUM EG-KARTELLRECHT art. 85, at 255 (4th ed. 1993).

export cartels related to foreign countries without effects on the Common Market are therefore not covered by article 85. No notification by pure export cartels is required, and no supervision exists. Therefore, European competition law, according to which pure export cartels are not under the scope of the prohibition of cartels, differs from other competition laws where export cartels are subject to both competition law and exemptions. In order to be legal, mixed export cartels with regulations restricting trade between member states must apply for an exemption under article 85 (3). International cartels are illegal to the extent they include or restrict trade between member states. As a result, export cartels of EC member states are generally supervised only by the member states' competition laws. The EC competition law is only applied in exceptional circumstances since it protects only intra-EC trade.

5. *Domestic Export Cartels Under Japanese Competition Law*

Japanese export cartels may in principle fall under several prohibitions of the Antimonopoly Law ("AML"). Section 3 of the AML prohibits private monopolization and unreasonable restraints of trade. Section 6 prohibits international agreements which contain unreasonable restraints of trade or unfair business practices. Section 8 prohibits trade associations from unreasonable restraints of trade and international agreements. The Export-Import Transaction Act ("EITA") exempts from the Antimonopoly Law[27] and distinguishes five different types of export cooperations. Agreements concerning export trading of exporters (pure export cartels) are exempted by notification by the Ministry of International Trade and Industry ("MITI") within ten days.[28] Agreements of exporters,[29] agreements of producers or sellers[30] concerning domestic transactions (mixed export cartels) and export-import agreements[31] require an express authorization by MITI. The differing rules for exporters, producers, and sellers derive from the fact that Japanese exports have largely been handled through export traders (indirect export). Activities of non-profit export

27 Yushutsunyū torihiki hō (Export-Import Transaction Act) § 33, Law No. 299 of 1952 [hereinafter EITA].
28 *Id.* § 5.
29 *Id.* § 5-2.
30 *Id.* § 5-3.
31 *Id.* § 7-3.

trade associations are exempted by notification[32] or by authorization.[33] All exemptions of agreements require that there must be:

1) no fear of violating international treaties with foreign governments,
2) no injury to the interests of importers or enterprises concerned in the country of destination and no fear of gravely injuring international confidence in Japanese exporters,
3) no fear of injuring the sound development of export trade
4) no unjustifiable discrimination,
5) no unjustifiable restriction of the participation in or the withdrawal from the agreement, and
6) no fear of unjustly injuring the interests of domestic enterprises engaged in agriculture, forestry, fishery, small enterprises or consumers in general.

If those requirements are fulfilled, the restraint of competition is prohibited only if it is regarded as "unreasonable," which section 2(6) defines as "contrary to the public interest." As a result, Japanese law contains broad exemptions for pure and mixed export cartels, although there has been criticism regarding the lack of positive requirements.[34]

International cartels must consider strict requirements. In the "International Oil Pipe Cartel Investigation" the German Federal Cartel Office discovered an international cartel where German and Japanese firms agreed to restrict their exports to third countries.[35] After fining the German members, the FCO notified the Japanese Fair Trade Commission ("JFTC"); the Japanese members then canceled the cartel.[36] The JFTC announced it would apply the prohibition of international agreements (EITA section 6) but not the prohibition of "unreasonable restraints of trade" (EITA section 3) to international cartels.[37] An international export cartel with Japanese participants comes under the AML prohibition of international agreements regardless of whether it is concluded before or after the formation of an ex-

32 *Id.* § 11(1).

33 *Id.* § 11(2).

34 Mitsuo Matsushita, *Export Control and Export Cartels in Japan*, 20 HARV. INT'L L.J. 103, 112 (1979); Negishi, *Yushutsu karuteru to dokkihō tekiyōjōgai (Export Cartels and Exemptions from the Anti-Monopoly Act)*, 265 KOSEI TORIHIKI 4-5 (1972).

35 Decision of July 12, 1973 (Oil Pipe Lines), Bundesgerichtschof [supreme court] BGHZ 1276.

36 *See* Matsushita, *supra* note 34, at 118.

37 *Antimonopoly Act interpretation relating to export cartels and international agreements, reprinted in* HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS OF JAPAN 275 (1983).

port cartel. The JFTC's rationale was that an international cartel cannot fulfill the requirements of the EITA for an exemption because the foreign parties demand the restriction of the freedom of entry and withdrawal of the members.[38]

The competent authority for notification and authorization under the EITA is MITI and not the Fair Trade Commission. Section 34 of the EITA obliges MITI only to notify and consult the JFTC. MITI has extensive power to guide and regulate export cartels as an integral part of Japanese trade policy. MITI may pass export restrictions under the Foreign Exchange and Foreign Trade Control Law if they are deemed necessary "for the maintenance of the balance of international payments and the sound development of international trade or the national economy."[39] In this case, the activities of the concerned firms are exempted from the Antimonopoly Law by article 65 of the Control Law.[40] Section 28 of the EITA authorizes MITI, if necessary, to ensure the sound development of export trade, to regulate price, quality, design, and other trade conditions or quantity of exports, even by non-members of the export cartel. Contrary to the Webb-Pomerene Act in the United States, which protects non-members from the cartel, the EITA protects the export cartel from non-members. In practice, those powers are not used, but MITIs influence is expressed by "administrative guidance." For example, to develop long term strategies for national exports, MITI "guided" Japanese exporters by "*gyoseishido*" ("administrative guidance") in the form of informal advice, persuasion, and control to promote export cartels. To perform obligations of international trade agreements or to prevent trade conflicts with other countries, MITI "advises" the private firms to form an export agreement. Whether or not the exporters are "compelled" by MITI depends on the individual case.[41] The presence or absence of compulsion may determine the application of the importing countries' competition law.

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[38] *See* various decisions recited in Matsushita, *supra* note 34, at 120.

[39] Gaikoku kawase oyobi gaikoku bōeki kanri hō (Foreign Exchange and Foreign Trade Control Law) art. 48, Law No. 65 of 1979 (restricting the general principle of free export in art. 47); *see* Matsushita, *supra* note 34, at 104; IYORI ET AL, DAS JAPANISHE KARTELLRECHT 131 (1994).

[40] IYORI ET AL., *supra* note 39.

[41] Whether or not administrative guidance is "compulsory" and, therefore, immune against the Japanese Antimonopoly Law remained uncertain in the *Oil Cartel Cases*; *see* JFTC STATEMENT *Concerning the Relationship Between the Antimonopoly Law and Administrative Guidance, reprinted in* Akira Negishi, *Administrative Guidance and the Antimonopoly Law*, 49 RABELS ZEITUNG 189, 277 (1985).

6. *Comparative Analysis*

According to the "effects doctrine" most competition laws apply only to restraints of competition which harm the domestic market. Pure export cartels without domestic effects are not within the scope of EC competition law and are exempted by special provisions from all other competition laws analyzed in this article. Pure export cartels in the United States, Japan, and Germany are subject to supervision by special provisions. The EC law and many other less strict competition laws[42] provided for neither notification nor supervision of pure export cartels. Mixed export cartels are subject to all competition laws analyzed above. The United States and the EC, where the domestic market has much more importance than export markets, strictly prohibit mixed export cartels. The export-oriented nations of Germany and Japan allow mixed export cartels with domestic restraints if the restraints are ancillary to the restraint in export trade due to export promotion. International cartels are treated differently. Section 6 of the Japanese Antimonopoly Law prohibits Japanese enterprises from entering into any international agreement; but the prohibition does not apply to foreign participants. In the United States, international cartels are prohibited because spillover effects within domestic markets are assumed. In Germany, international cartels are not subject to special provisions. They have to fulfill the requirement of serving "real protection and promotion of exports" and shall not include import restrictions relating to the German Market.

The legislative intents of the various competition laws appear to be similar to that of the Webb-Pomerene Act. The exemptions were designed to improve or enable exports of small and medium-sized firms that otherwise lack individual export ability. Common sales organization and cooperation in transport are expected to reduce export costs, thus creating a countervailing power against powerful foreign buyers and competitors. The existence of exemptions in foreign competition laws is often mentioned as a reason to enable domestic firms "to play on equal terms."

Other domestic cartels with export activities must be considered along with the export cartels. For instance, exemptions for small and medium size enterprises and for certain branches must be considered. In this context, national cartels could use monopoly profits earned in domestic

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42 For a comparative analysis see OECD, EXPORT CARTELS, REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES 22 (1974).

markets for commonly "dumped" exports. The enforcement of competition rules and national competition policy in general also influences export cartels' activities. Different degrees and instruments of restricting or promoting domestic export cartels also determine the application of the importing countries' competition law. For instance, the degree and form of promoting export cartels by the Japanese government through "administrative guidance" determines the immunity from U.S. antitrust law. Additional differences in antitrust enforcement appear in the damages available to litigating parties. The U.S. law allows for treble damage suits which provide an incentive for private antitrust enforcement. In contrast, there have been only fifteen private damage claims in Japanese competition law since 1949.[43] Prohibitions of export cartels could be subject to bilateral negotiations on trade and competition issues if trade policy authorities were empowered to enact prohibitions. Only MITI in Japan has an express power to prohibit export cartels. In Germany, the supervision of export cartels lies in the cartel authority, but the government has an indirect power to prohibit export cartels by concluding international treaties. In the United States, the President is not permitted to prohibit or modify an export agreement.[44]

Differences between the competition laws and the legislative intents are revealed by analyzing the prerequisites for exemptions. For instance, laws differ in their treatment of exporting non-members. In the United States, the exemption fails to apply if domestic competitors are restrained. Thus non-members of export cooperations are protected by law. On the other hand, the Japanese Export and Import Trading Act protects the export cartel against non-members through far reaching powers of MITI to promote and protect the aims of domestic export cartels. The actual protection or promotion of national and private exports by every single export cartel is required only in German competition law. In other competition laws the legislative intent of export promotion seems to displace the requirement of actually promoting exports.

The lack of positive requirements has been criticized, and a needs test has been suggested in several countries. Such prerequisites could assure that the antitrust exemption is limited to those cases where the exemption is necessary to assure the ability of domestic exporters to compete and operate successfully in foreign markets. In practice, the bargaining power of for-

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[43] From 1949 to 1990, there were only 15 private damage claims related to violations of the Antimonopoly Law. *See* IYORI ET AL., *supra* note 39, at 204.

[44] *See* HAWK, *supra* note 6, at 102.

eign buying cartels and monopolies did not need to be proven, although it is often mentioned in the legislative process. This demonstrates the common problem of the analyzed competition laws, namely, the differences and contradictions between the legislative intent, the existing rules, and their application. Whether the need for legal reforms relating to export cartels is intensified due to the globalization of international trade and production is discussed below.

B. Foreign Export Cartels Under Competition Law

1. Extraterritorial Application and Governmental Inducement of Private Restraints

Concerning the importing country, the question arises whether the ban on cartels applied to domestic firms also applies to foreign firms. The doctrine based on the effects principle holds that the importing state has jurisdiction to apply domestic competition law to restraints of competition committed by parties located outside its territory if the restraint causes anticompetitive effects within its territory. Although this extraterritorial application probably concerns interests of the foreign country where the restraints of competition are carried out, the effects doctrine is generally accepted in many countries. The applicability of competition law may be restricted by political issues if the government of the exporting or importing country is involved. The toleration, promotion, or compulsion of an export cartel by the foreign government may immunize foreign firms from the importing countries' competition law. The encouragement or compulsion of the foreign export restraints by the importing countries' government may also limit the applicability of domestic competition law.

This compulsion raises questions about voluntary export restraints ("VER"s) of exporting firms according to the importing countries' request and voluntary restraint agreements ("VRA"s) concluded between firms, associations or the government of the importing country, and firms, associations or the government of the exporting country. For a comparative analysis of the application of importing countries' competition laws, different types of export agreements must be distinguished according to the degree of governmental involvement:

1) agreements between private firms
   a) without governmental involvement
   b) with governmental involvement

i) with "compulsion" by the exporting country
ii) with "encouragement" by the exporting country
iii) with "encouragement" by the importing country (VER)

2) agreements between the importing country and exporting firms (VRA)
3) agreements between countries (VRA)

2. *Foreign Export Cartels Under U.S. Antitrust Law*

a. *Extraterritorial application of U.S. antitrust law*

Foreign export cartels which harm the U.S. market may be subject to section 1 of the Sherman Act. The effects doctrine was first stated in *United States v. ALCOA,* where a U.S. court held that the Sherman Act applies "even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends."[45] Due to the fact that almost every act carried out in foreign countries that trade with the United States might affect U.S. trade, the Sherman Act has been limited to only such conduct which was meant to produce, and did in fact produce, some substantial effect in the United States, as was recently stated in *Hartford Fire Insurance v. State of California.*[46] Whether the "direct, substantial and reasonably foreseeable effect" standard outlined in the Foreign Trade Antitrust Improvement Act of 1982 also applies to imports, or is limited to export activities, remained unclear in *Hartford.*[47] This extraterritorial application of U.S. antitrust laws caused diplomatic protests by foreign governments which argued that their interests were adversely affected. Due to the broad interpretation of the effects doctrine in *Uranium Trust Litigation,*[48] several governments enacted blocking statutes to protect their domestic firms against the U.S. government and private litigants in antitrust cases.[49] These statutes prohibit the disclosure, inspection or removal of documents located in the territory of the enacting state in compliance with orders of foreign authorities. Furthermore, the clawback

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[45] United States v. Aluminium Co. of Am., 148 F.2d 416, 443 (2d Cir. 1945).

[46] Hartford Fire Ins. v. State of California, 113 S. Ct. 2891, 2909 (1993).

[47] *Id.* at n.23.

[48] Westinghouse Elec. Corp. v. Rio Algom, Ltd. (*In re* Uranium Antitrust Litigation), 617 F.2d 1248 (7th Cir. 1980); *see also* Deepa Rishikesh, *Extraterritoriality Versus Sovereignty in International Antitrust Jurisdiction,* 14 WORLD COMPETITION 33, 34 (Mar. 1994).

[49] For example, see the Canadian Uranium Information Security Regulations of 1976 and the Australian Foreign Proceedings Act. *See* Rishikesh, *supra* note 48, at 41.

provision of the U.K. Protection of Trading Interests Act[50] provides for the recovery of the non-compensatory portion of treble damage awards made by U.S. courts. Apart from these procedural impediments, several defenses may restrict the extraterritorial reach of U.S. antitrust laws in the case of governmental involvement.

b. Foreign governmental involvement

i Foreign sovereign acts

In cases of foreign governmental acts restricting competition, the act of state doctrine or the Foreign Sovereign Immunities Act may immunize against U.S. antitrust law. The "classic statement" of the act of state doctrine is as follows: "Every sovereign State is bound to respect the independence of every other Sovereign State, and the courts of one country will not sit in judgment of the acts of the government of another done within its own territory."[51] The Foreign Sovereign Immunities Act ("FSIA")[52] codified that a foreign sovereign should be made a defendant in U.S. courts with regard to its political activities only in exceptional cases. The rule raises the issue of defining an exception from the FSIA[53] and from the act of state doctrine for commercial activities of a foreign government. When a U.S. Trade Union tried to recover treble damages in an antitrust suit from the member states of the OPEC, the suit failed because the Court did not evaluate the nature of the conduct — which was price-fixing — but the purpose of the conduct. The preservation and maximization of a national resource that is vital to the future prosperity and security of the OPEC member states was regarded as a sovereign activity and therefore immune.[54] In this context, the Uranium cartel referred to in Part II.B.2.a above should have gained the same immunity because it also served the conservation and exploitation of an important national resource in conformity with the national economic policies of the foreign governments involved.[55] The

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50 U.K. Protection of Trading Interests Act 1980, *reprinted in* Antitrust & Trade Reg. Rep. (BNA) No. 959, at F-1, 2 (1980).

51 Underhill v. Hernandez, 168 U.S. 250 (1897).

52 28 U.S.C. §§ 1330, 1602-1611 (1982).

53 *See, e.g.*, Joseph P. Griffin, *Special International Antitrust Doctrines and Defenses*, 60 ANTITRUST L.J. 543, 549 (1992).

54 International Ass'n of Machinists & Aerospace Workers v. OPEC, 477 F. Supp. 553 (C.D.Cal. 1979). For remarks on that decision see Griffin, *supra* note 53, at 548; *see also* Rishikesh, *supra* note 48, at 48.

55 477 F. Supp. at 553.

disparity between the *Uranium* case and the *OPEC* case indicates that the defenses are applied in political rather than in legal terms. The foreign governments involved in the Uranium case would not have injured the U.S. economy to any greater extent than the OPEC States.[56] This demonstrates not only the influence of political matters in determining antitrust application but also that these issues have already crossed the border between competition and trade policy.

ii. Private inducement of foreign sovereign acts

In the area of foreign sovereign immunity, the question arises whether there is any antitrust liability in a firm's attempt to influence a government to take legislative or legal action that may restrict competition. For instance, the Sherman Act might have been applicable to U.S. carmakers' requests to the U.S. Congress, the President and the Japanese government, which led to the Japanese Auto-VER in 1981. The Noerr-Pennington doctrine "shields from the Sherman Act a concerted effort to influence public officials regardless of anticompetitive intent or purpose . . . since the right to petition is one of the freedoms protected by the bill of rights."[57] It was explicitly noted in *California Motor Transport Co. v. Trucking Unlimited* that the petitioning immunity "includes concerted attempts to petition to the judicial branch."[58] The "sham exception" limits the doctrine only slightly. Whether or not the Noerr-Pennington petitioning immunity includes the right to petition foreign governments has not yet been decided by the Supreme Court, and the lower courts are split.[59] However, there seems to be a tendency to apply both the Noerr doctrine and the sham exception to petitioning foreign governments as stated in the Justice Department's 1988 Guidelines.[60]

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[56] *Id.*

[57] Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 138 (1961).

[58] California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).

[59] *See* Coastal States Mktg. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) (holding that petitioning immunity does apply to petitioning of foreign governments). In *Sisal Sales,* the Court assumed a private inducement when U.S. sisal traders convinced the Mexican government to monopolize their sisal trade in Mexico. However, the antitrust violation was furthermore based on other illegal restraints. United States v. Sisal Sales Corp., 274 U.S. 268 (1927); *see* AREEDA & TURNER, ANTITRUST LAW I 272, 273 (1978); Ulrich Immenga, *Internationale Selbstbeschränkungsabkommen zwischen staatlicher Handelspolitik und privater Wettbewerbs-beschränkung,* 49 RABELS ZEITUNG 303, 318 (1985).

[60] Griffin, *supra* note 45, at 550; Michael William Lochmann, *The Japanese Voluntary Restraint on Automobile Exports: An Abandonment of the Free Trade Principles of the GATT and the Free Market Principles of United States Antitrust Law,* 27 HARV. INT'L L.J. 99, 138 (1986).

iii. Foreign sovereign compulsion

Where the actions of private firms are indirectly induced by the government to restrict competition, the foreign sovereign compulsion defense ("FSC defense") has to be considered. Even when the private party is guilty of the wrong charged, it should not be punished because its actions were compelled by a foreign sovereign. The FSC defense is asserted often but rarely succeeds. One example of success, however, occurred in *Interamerican Refining Corp. v. Texaco Maracaibo Inc.*, where the court stated: "Sovereignty includes the right to regulate commerce within the nation. When a nation compels a trade practice, firms there have no choice but to obey. Acts of business become effectively acts of the sovereign. The Sherman Act does not confer jurisdiction on U.S. courts over acts of foreign sovereigns. By its terms, it prohibits only anti-competitive practices of persons and corporations."[61] The rationale of fairness to the defendant who may be caught in a dilemma between an order in the exporting country and a prohibition in the importing country was raised in the *Hartford* case. The rationale is that as long as a person "can comply with the laws of both nations at the same time, no true and direct conflict exists between U.S. and UK law, no matter if the foreign state has a strong policy to permit or encourage such conduct."[62] Thus the FSC defense requires true compulsion. The "mere permission or recommendation,"[63] the "approval"[64] or the "knowledge and endorsement"[65] of a foreign sovereign can not immunize anticompetitive conduct from antitrust liability.

The question of real compulsion leading to antitrust immunity arose several times when MITI initiated and supervised export restraints of Japanese firms by "administrative guidance" or "*gyoseishido.*" This is used by MITI "to persuade and guide a person to conduct its business in a certain way, in order to realize an administrative goal through the party's cooperation."[66] Although administrative guidance is without legal sanctions, MITI has been very successful in achieving voluntary compliance with its administrative requests. To the extent that administrative guidance falls in a

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61 Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1298 (D.Del. 1970).

62 Hartford Fire Ins. v. State of California, 113 S. Ct. 2891, 2911 (1993).

63 Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962).

64 United States v. Watchmakers of Switzerland Info. Centre, 133 F. Supp. 40 (S.D.N.Y. 1955).

65 Linseman v. World Hockey Ass'n, 439 F. Supp. 1315 (D.Conn. 1977).

66 Statement of Japanese Government before the House of Councilors, Commerce, and Industry (1970), *reprinted in* Sanekata, *Administrative guidance and the Antimonopoly Law*, 10 L. JAPAN 65, 68 (1977).

spectrum from compulsory orders, backed by civil or criminal sanctions, to purely voluntary requests without a suggestion of sanctions, Japanese courts have not clearly decided whether administrative guidance in all cases is a valid defense against the Japanese competition law.[67] In any case, written directives to form an export cartel should fall within the limits of the FSC defense. The certain knowledge that compulsory orders would be immediately forthcoming, were the written directives not obeyed, gives the Japanese firms no reasonable choice but to comply. According to the act of state doctrine, the validity of those directives should not determine the applicability of the defense.[68] In addition, an official statement of the foreign government may be sufficient to prove compulsion.[69] However, while the private enterprises are immune from foreign antitrust laws, it should be examined whether the compelling government could be made responsible for causing trade restraints.

iv. Balancing interests test

As an unmodified effects test applied to foreign conduct may result in political conflicts, U.S. courts have developed a balancing test to evaluate the conflicting interests and their impact on the parties involved. This concept was first applied in *Timberlane Lumber Co. v. Bank of America*[70] which stated, "An effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness."[71] The court held the following six factors to be relevant:

1) the degree of conflict with foreign law or policy;
2) the nationality or allegiance of the parties and the locations of principal places of business of corporations;
3) the extent to which enforcement by either state can be expected to achieve compliance;
4) the relative significance of effects on the United States as compared with those elsewhere;

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67 *See* The Petroleum Cartel Cases, Judgment of Sept. 26, 1988 (Japan v. Idemitsu Kosan, K.K.), Tokyo Kōsai [High Court], 985 HANJI 3; Judgment of Sept. 26, 1980 (Japan v. Petroleum Ass'n), Tokyo Kōsai [High Court], 983 HANJI 22.

68 *See* Lochmann, *supra* note 60, at 149.

69 Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 513 F. Supp. 1100, 1191 (E.D. Penn. 1981).

70 Timberlane Lumber Co. v. Bank of Am., 574 F. Supp. 1453, 1466 (N.D.Cal. 1983).

71 Timberlane Lumber Co. v. Bank of Am., 549 F.2d 597, 613 (9th Cir. 1976).

5) the extent to which there is explicit purpose to harm or affect American commerce, the foreseeability of such effect;
6) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

In *Mannington Mills Inc. v. Congoleum Corp.*, the court added additional factors for this "jurisdictional rule of reason" including "possible effects upon foreign relations if the court exercises jurisdiction and grants relief."[72] In 1987, the Restatement (Third) of Foreign Relations Law has incorporated the *Timberlane* approach in a general clause on prescriptive jurisdiction, section 403.

Although this balancing approach seems to be more appropriate than an unmodified effects test, it has been criticized in *National Bank of Canada v. Interbank Card Association.*[73] The *Hartford* decision failed to resolve the conflict between the effects test and the balancing test.[74] The Court also did not decide whether a court must exercise jurisdiction when the Foreign Trade Antitrust Improvement Act ("FTAIA") standard for subject matter jurisdiction is met, i.e. if the FTAIA supersedes comity balancing.[75] Problems with the balancing approach occur because there is vagueness as to how the various national interests and other factors should be weighed and balanced. Furthermore, there are doubts whether courts are a suitable forum for evaluating national and foreign interests because the conflicts are finally based on political instead of jurisdictional issues.

c. *Domestic governmental involvement*

The domestic governmental inducement of foreign VERs raises questions of both antitrust immunity for the foreign participants and presidential authority for negotiating a VER. Sections 201 and 202 of the Trade Act of 1974 give the President authority to impose import restrictions only if the International Trade Commission ("ITC") has determined that the prerequisites for import restraints, which are similar to GATT article XIX, are satisfied.[76] Whether VERs must be regarded as import restraints in this

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[72] Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287, 1297 (3d Cir. 1979).

[73] 666 F.2d 6, 8 (2d Cir. 1981). For criticism of a balancing test, see also, Laker Airways Ltd. v. Sabena, 731 F.2d (D.C. Cir. 1984).

[74] Hartford Fire Ins. v. State of California, 113 S. Ct. 2891, 2911 (1993).

[75] Eleanor M. Fox, *U.S. Law and Global Competition and Trade — Jurisdiction and Comity*, ANTITRUST REP., Oct. 1993, at 3, 5.

[76] Trade Act of 1974, §§ 201-203, 19 U.S.C. §§ 2251-2253 (1982); *see also* Lochmann, *supra* note 60, at 122.

sense, so that the President has no authority without a positive ITC recommendation, is uncertain.[77] If the conditions for import restrictions are not met, the President would find himself in a dilemma when trying to negotiate a VER with foreign exporters. Concerning domestic policy, his negotiations have to be "not binding" and merely "communicating" because of his restricted authority. On the other hand, the foreign exporters require his explicit administrative cooperation to obtain antitrust immunity from the Sherman Act. This conflict became apparent in the case of *Consumers Union v. Rogers*, where the executive directly negotiated with Japanese and European steel producers to limit their exports of steel to the U.S. market.[78] The conflict was resolved when the Congress intervened by granting an antitrust immunity to the participants by the Trade Act of 1974.[79] Without such express legislative immunity, foreign exporters forming a VER are not exempted from the Sherman Act.

3. *Foreign Export Cartels Under German Competition Law*

The GWB applies to all restraints of competition which have effects or are reasonably likely to have effects in Germany, even if they result from acts done abroad.[80] The ban on cartels, therefore, applies to foreign enterprises which have no personal contact with the territory of Germany. The application of the effects doctrine may be restricted by the rule of non-intervention, which is, nevertheless, directed towards intensive measures only. Furthermore, the misuse of law as a restriction of public international law and a balancing test required by comity have been discussed but never applied in antitrust cases.[81]

Regarding the involvement of a foreign government in foreign export cartels, only compulsion immunizes the cartels from German competition law. For instance, the FCO started an investigation of a Japanese cartel exporting electronic calculating machines, which was initiated but not compelled by Japanese authorities. Following negotiations with the Japanese authorities, the investigation was dropped after the cartel was dis-

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[77] For a discussion regarding the President's constitutionally inherent authority over foreign affairs to negotiate VERs, see Lochmann, *supra* note 60, at 127.

[78] Consumers Union v. Rogers, 352 F. Supp. 1319 (D.D.C. 1973), *aff'd in part and rev'd in part sub nom* Consumers Union v. Kissinger, 506 F.2d 136 (D.C. Cir. 1974).

[79] Trade Act of 1974, § 607, 19 U.S.C. § 2485 (1982); *see* Lochmann, *supra* note 60, at 138.

[80] GWB § 98 (2).

[81] Rehbinder, *supra* note 15, § 98 II at 22-27.

solved.[82] Foreign VERs induced by the German government are prohibited by section 1 of the GWB, although different kinds of exemptions from the ban on cartels have been suggested. For instance, justification by a rule of reason because the VER served domestic interests, or a discretionary decision by the Federal Cartel Office after governmental instruction[83] cannot create antitrust immunity because of the strict separation of political and competition authorities in German competition law.[84] Beside other legislative exemptions in the GWB section 8 provides for a ministerial authorization. The Federal Minister of Economic Affairs has power to authorize cartels if, in exceptional cases, overriding economic considerations and the public interest call for a restriction of competition. Because such authorization may be granted only in exceptional individual cases (VERs often cause economic disadvantages and, in 1972, the Minister of Economics described them as principally undesirable) it is expected that there will rarely be Minister Cartels exempting VERs.[85] Even if the VER is permitted by German authorities, the prohibition of the EC Treaty, article 85, which overrules German law, has to be considered.

Furthermore, the German government's authority for trade agreements and negotiations is restricted because trade policy authority has been transferred from the member states to the Community by the EC Treaty, article 113. Additionally, the EC Treaty contains rules for the member states to protect competition which could obstruct the member states from negotiating additional foreign VERs. Article 30 prohibits quantitative restrictions on imports and all measures having equal effect between member states. For instance, it has been applied to governmental measures promoting or facilitating private restraints of competition.[86] One member states' inducement of a foreign VER, therefore, could be subject to article 30 if the VER might affect trade between the member states.[87] Article 5(2) obliges the member states to abstain from any measure which could

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[82] FEDERAL CARTEL OFFICE, ANNUAL REPORT 66 (1975).

[83] In a written directive of the Minister of Economic Affairs to the FCO on August 9, 1972 concerning "orderly marketing," VERs were assumed to be principally undesirable. But exceptional temporary agreements must be tolerated for overriding economic considerations. In such cases, the Minister of Economic Affairs instructs the FCO not to apply competition law in the particular case.

[84] Such exemptions would circumvent the obligation to notify and the abuse control by the FCO. *See* Immenga, *supra* note 59, at 311.

[85] However, the requirements are not likely to be fulfilled by VERs. For commentaries about VERs and overall economic interests in the GWB see Immenga, *supra* note 59, at 310-13.

[86] INNO/ATAB, 1977 E.C.R. 2115, 2145 (Nov. 16, 1977); *see* Müller-Graff, *in* GROEBEN ET AL., EWG-VERTRAG KOMMENTAR, art. 30, at 153.

[87] *See* Wood Pulp 1988 E.C.R. 5193 (Sept. 9, 1988).

jeopardize the attainment of the objectives of the Treaty. One of these objectives is the institution of a system ensuring that competition in the common market is not distorted (article 3 lit g). However, the enforcement of those possible limits to import restraints in the form of VERs is restricted due to the interests of the parties involved.

4. *Foreign Export Cartels Under European Competition Law*

Concerning EC competition law, the European Court for a long time did not agree with the Commission's viewpoint on applying the effects doctrine. In an international Dyestuffs agreement to fix prices for selling within the Community, the Commission fined those firms located in non-member states in accordance with the effects doctrine. The Court asserted jurisdiction by regarding the foreign firms and their subsidiaries inside the EC as a "single economic unit."[88] The firms acted through subsidiaries inside the EC and these subsidiaries had to be considered as the instrumentality through which the foreign producers themselves had acted within the Community. In the *Wood Pulp* case, foreign producers fixed prices for exports into the EC. The Court held that the territoriality principle also covered the place of implementation of the agreement, and in the *Wood Pulp* case the agreement was implemented within the EC. The Court added that it was immaterial whether or not the producers had subsidiaries, agents or branches within the Community to make their contacts with purchasers within the EC.[89] Under this broad interpretation of the territoriality principle, approximating it to the effects doctrine, a foreign export cartel affecting the Community is generally subject to article 85 if there are direct, substantial and foreseeable impacts within the Community.[90]

However, the competition rules apply only insofar as anticompetitive conduct may affect trade between the member states. This may occur if restrictions for imports into the EC prohibit intra-EC firms from using low priced sources to get goods. This prohibition could increase production costs and prices of intra-EC firms, leading to a change in the conditions of competition within the EC.[91] In the *Wood Pulp* case, the effects of the foreign agreements on prices and resale within the Community have been

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88 Dyestuffs Imperial Chemical Industries Ltd., 1972 E.C.R. 619 (July 14, 1972).

89 Wood Pulp 1988 E.C.R. 5193 (Sept. 9, 1988).

90 *See* Advocate-General Mayras in Imperial Chem. Indus. Ltd.(ICI) 1972 E.C.R. 619, 703; Koch, *in* GRABITZ, KOMMENTAR ZUM EWGV 1990, vor art. 85, at 14.

91 Aluminium Imports from Eastern Europe, D. Comm. Dec. 19, 1984, 1985 O.J. (L 72/1) 46.47; *see* GLEISS-HIRSCH, *supra* note 26, art. 85 (1) Rn 252.

regarded as affecting competition within the Community.[92] The question of whether the involvement of a foreign government prevents the application of article 85 was decided by the Commission while investigating a Franco-Japanese ball bearings agreement. In 1972, French and Japanese producers agreed through their business associations to increase prices for Japanese exports designed for the French market to adapt them to the prices of French products. The Commission assumed a violation of article 85 but did not impose fines.[93] It published a press release distinguishing four different kinds of export restraints.[94] The release stated:

> 1. Measures taken in pursuance of trade agreements between the Community and Japan do not fall under article 85.
>
> 2. Measures that were imposed on Japanese firms by the Japanese authorities are not subject to article 85. Nevertheless the prohibition applies to additional agreements and concerted practices.
>
> 3. Article 85 is applicable to measures resulting solely from agreements, concerted practices, or decisions by associations of firms, entered into or engaged in either unilaterally by Japanese firms or in concert with European firms.
>
> 4. Measures resulting from agreements or concerted practices between Japanese firms that were merely authorized by the Japanese authorities under Japanese law could be subject to article 85 because the firms would be free not to enter into the agreements or engage in the concerted practices.

The Court of Justice confirmed these criteria in the *Wood Pulp* case. In that case, a United States export cartel expressly exempted from U.S. antitrust rules by the Webb-Pomerene Act claimed a violation of the rule of non-intervention when the Commission imposed fines under article 85 on the cartel. The court expressly did not decide about the rule of non-intervention because no conflicting requirements by the U.S. and EC authorities existed. The statutory exemption for export cartels from the application of U.S. antitrust laws "does not require such cartels to be concluded."[95] In the

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92 Wood Pulp, 1988 E.C.R. 5193 (Sept. 9, 1988).

93 Franco-Japanese Ball bearings Agreement, 1974 O.J. (L 343/19).

94 Announcement concerning the import of Japanese goods into the Community that are subject to the Treaty of Rome, 1972 Nr. C 111 at 13.

95 *Id.* ¶ 20.

absence of compulsion to engage in the conduct prohibited by article 85, article 85 applies and can be enforced.

Concerning domestic governmental inducement in foreign restraints, initiatives by the Commission and by member states have to be distinguished. The member states' inducement could be subject to article 30 or article 5 (2) EC Treaty (see section II(B)(3), "Foreign Export Cartels under German Competition Law" above). But trade policy measures, including VERs and VRAs[96] by single member states, lose significance since the national authorities for trade policy agreements in principle were transferred to the Community (article 113).[97] Agreements or concerted practices of firms in pursuance of trade agreements of the EC are not subject to article 85. But it remains to be analyzed whether the member states' obligation to promote and not to jeopardize a system of undistorted competition within the Community also applies to the Commission. This might restrict the Commission's authority to negotiate foreign VERs.

5. *Foreign Export Cartels Under Japanese Competition Law*

In Japan, foreign export cartels could fall under the prohibitions of unreasonable restraint of trade,[98] international agreements,[99] or the corresponding prohibitions for trade associations.[100] Unlike other competition laws, the Antimonopoly Law of Japan does not have any general provision regarding international application. The principle of territoriality, rather than the effects doctrine, seems to be the basis of jurisdiction for several reasons. Other provisions of the AML, for example sections 9 and 10, expressly state its applicability to foreign enterprises. Additionally, other Japanese laws designed to be applied to activities carried out outside the territory usually have special provisions explicitly stating the extraterritorial

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96 VERs and VRAs have to be regarded as trade policy measures in this sense. *See, e.g.*, GRABITZ ET AL., EUROPAISCHES AUBENWIRTSHAFTSRECHT 301 (1994). According to Walter Werner, VERs require special regulation. WALTER WERNER, SELBSTBESCHRANKUNGSABKOMMEN IM AUBENHANDEL 171 (1984) (art. 16(1) Reg. No. 288/82 EC).

97 However, numerous examples of VERs to Member States markets include 49 export restricting agreements of Japanese exporters in 1992 for France, Italy, Spain, Portugal and Greece. *See* GRABITZ ET AL., *supra* note 96, at 292. In the late 1980s some fourteen VERs of Japanese cars to various national markets of the EC were implemented by the Member States. GATT, REVIEW OF DEVELOPMENTS IN THE TRADING SYSTEM 184 (1989); Michel M. Kostecki, *Marketing Strategies and Voluntary Export Restraints*, 14 WORLD COMPETITION 21, 24 (1991).

98 Sheteki dokusen kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu [Law Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade] § 3, Law No. 54 of 1947.

99 *Id.* § 6

100 *Id.* § 8

applicability, such as section 2 of the Criminal Code, and sections 36 and 37 of the Foreign Exchange and Foreign Trade Control Law. Thus, it may be inferred from the absence of such provisions that the AML generally follows the principle of territoriality.[101] Furthermore, Article 98 of the Japanese Constitution obliges Japan to respect and observe international law so that the jurisdiction is basically territorial.[102]

Contested cases in this area have not clarified the international sphere of application, although the Organization of Economic Cooperation and Development (OECD) report "Restrictive Business Practices of Multinational Enterprises" regarded the *Triple Freight Conference* case[103] as recognition of the effects theory in Japan.[104] But other decisions seem to hold that an effect on Japanese trade is not a sufficient basis of jurisdiction. The AML has been applied only when a violation, or part of a violation, was carried out in Japan. Therefore, a personal connection with the territory of Japan through resident representatives or agents seems to be required.[105] Ohara described this different sphere of international application, compared with the strict effects doctrine in Germany, as a result of different characteristics of the nationals. "The Japanese, who live within typhoon area, have a general tendency to wait for the passing of an irresistible force such as a typhoon like bamboo, whereas the German character is compared with an oak."[106]

The limits of the Japanese competition law were illustrated when the AML was applied to international cartels affecting Japanese markets. In the 1972 "man made fibres" cases,[107] both Japanese and European firms mutually restricted or prohibited exports to the other country. The JFTC applied the prohibition of international agreements (AML section 6) only to

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101 Mitsuo Matsushita, *The Antimonopoly Act of Japan and International Transactions*, *in* JAPANESE ANNUAL OF INTERNATIONAL LAW S.1, 6 (1969) [hereinafter Matsushita, *Transactions*]; Yoshio Ohara & Robin Stewart, *in* DOING BUSINESS IN JAPAN § 7.01(1)(d) (Kitagawa & Zentaro eds., 1989).

102 Matsushita, *Transactions*, *supra* note 101; Makoto Yazawa, *Interim Report of the Committee on the extraterritorial effects of Trade Regulation*, 9 JAPANESE ANNUAL INT'L L. 174, 177 (1965).

103 Triple Freight Conference Case, Judgment of Aug. 18, 1972 (FTC v. Nippon Yusen K.K.), FTC [decision], 19 Shinketsushū 57.

104 OECD, *Restrictive Business Practices of Multinational Enterprises*, *in* REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES 37 (1977).

105 *See, e.g.*, Freight Conference Cases, Judgment of May 19, 1971 (Novo Industri S.A. v. FTC), FTC [decision], 17 Shinketsushū 297. The foreign firm was not made a respondent because it had no personal connection with Japan.

106 Yoshio Ohara, *International Application of the Japanese Antimonopoly Act*, SWISS REVIEW OF INT'L COMPETITION LAW 7, 11, n.29 (1986).

107 Judgment of Dec. 27, 1972 (*In re* Asahi Kasei Kogyo Co.), FTC [decision], 19 Shinketsushū 124.

the Japanese firms. Although imports to Japanese markets were restricted, the European participants of the international cartel were not made subject to the proceeding, probably because they had no personal connection with Japanese territory.[108] Similarly, after price-fixing agreements were carried out by an international trade association of "felt and canvas,"[109] the JFTC held only the Japanese members responsible for violating section 6 of the AML. Neither the United States trade association (for violating section 8(1)) nor European member firms (for violating section 6(1)) have been accused by the JFTC for restricting imports to Japan. Foreign VERs to Japanese markets have not yet emerged, probably due to the existence of other barriers to entry.

6. *Comparative Analysis*

Export cartels restrict competition in foreign markets. If a state opens its markets to foreigners, it has an interest that the rules and obstacles for domestic firms also apply to foreign firms enabled to participate in domestic competition. The European Union, the United States, Germany and most other OECD member Countries except for Japan follow the effects doctrine, although definitions of the doctrine vary.

The extraterritorial application of domestic competition law may be limited if no subsidiaries or agents of the foreign exporters are located within the import country's territory. Limitations occur in the areas of discovery procedures and the enforcement of prohibitions and fines. Foreign statutes blocking discovery rules demonstrate that cooperation is missing in international antitrust cases.

The foreign governmental involvement in an export cartel may hinder the application of the importing country's competition law. The criteria are derived from the act of state doctrine and the foreign sovereign compulsion defense, but neither encouragement nor antitrust exemption of an export cartel can immunize it from antitrust law, as stated in *Wood Pulp*. If, and to what extent, a balancing interests test is able to restrict or extend the application remains uncertain in several competition laws. On a national level, as well as on an international level, there is a lack of explicit rules defining how the various national interests and other factors are to be weighed and balanced. Therefore, differences in the promotion and toleration of export

108 *See* Ohara, *supra* note 106, at 15.

109 Judgment of Jan. 12, 1973 (*In re* Nippon Felt Co.), FTC [decision], 19 Shinketsushū 109; *see also* Ohara, *supra* note 101, at 16.

cartels in the exporting country also determine antitrust application in the importing country.

The domestic governmental inducement of foreign VERs raises questions both of antitrust immunity for the foreign participants and domestic authority for negotiating a VER under trade laws. In general, only a binding agreement (VRA) concluded with the domestic government, but not pure "encouragement" or "communication," can cause antitrust immunity for the foreign exporters. Additionally, in Germany an antitrust exemption of a foreign VER requires an authorization by the Federal Minister for Economic Affairs, which is granted only if the VER serves the economy as a whole and the public interest (Minister Cartel, GWB section 8). This demonstrates the separation of political and competition related matters in German competition law and policy. In the United States, the presidential authority for import restraints is limited by the provisions of the Trade Act. If the Trade Act also applies to negotiating agreements with foreign exporters, the prerequisites for import restraints determine antitrust immunity. In the EC, the member states' ability to negotiate a foreign VER is restricted because trade policy authorities were transferred to the Community by article 113. Furthermore, the EC Treaty could restrict the member states' and also the Commission's authority to negotiate foreign VERs.

However, even if domestic provisions for negotiating foreign VERs are not fulfilled and antitrust immunity is not granted, there is a lack of enforcement. If a foreign export cartel serves national trade policy by displacing other import restraints, national competition authorities and courts are reserved in applying competition law. In this area the lack of distinction between private and governmental restraints demonstrates the link between competition and trade policy.

III. ECONOMIC ANALYSIS OF EXPORT CARTELS

Although VERs in most cases are similar to aggressive export cartels in their effects of increasing prices and decreasing quantities, the interests and objectives of the concerned firms and governments differ. Therefore, the economic consequences of VERs and normal export cartels must be examined separately.

A. *Economic Consequences of Export Cartels*

1. *Objectives and Consequences for the Exporting Country: Export Promotion vs. Domestic Repercussions*

a. *The objective of export promotion*

The exporting countries' antitrust exemptions for export cartels are intended to promote exports by enabling small and medium producers to enter into and survive in foreign markets. Reducing export costs and forming a "countervailing power" against foreign buying cartels and competitors are expected to enable domestic firms to "play on equal terms" on international markets. In addition, aggressive export cartels are tolerated or even promoted to serve national welfare. "What's good for General Motors is good for the country when sellers are domestic and buyers are foreign."[110]

The intent of a single export cartel — like that of a single enterprise — may contain an increase or decrease in prices, quantities, turnover or profit. For instance, an increase in profits may be caused by price cuts as well as by price increases. Under certain circumstances even lower profits or losses are taken into account for a transition period to enter into foreign markets as demonstrated in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*[111]

While export cartels in theory may contain different objectives and instruments, and therefore permit no consistent evaluation, it is questionable in practice if they serve to promote national exports. The positive effect of export promotion may be outweighed by negative repercussions on domestic markets. However, knowledge of this balance remains incomplete due to missing disclosure provisions and a presumably large number of unknown violations.

Concerning Japanese export cartels, VERs are regarded as an integral part of Japanese trade policy. In the early 1980s, almost half of the registered Japanese export cartels were from the textile industry, relating to the Multifibre Arrangement.[112] While in 1977, price fixing agreements dominated, in 1992, most export cartels included quantitative restrictions.[113]

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110 Whitney, *supra* note 10, at 397.

111 513 F. Supp. 1100, 1191 (E.D. Pa. 1981).

112 OECD, *supra* note 42, at 30.

113 According to Matsushita, in 1977, 31 out of 86 registered export agreements were price-fixing and 25 included quantitative restrictions. In March 1991, 20 out of 31 export cartels were trade associations, 10 included agreements between producers and sellers, 4 price-fixing agreements, 21 quantitative restrictions, 2 quality agreements and 10 compulsory cartels. Matsushita, *Transactions, supra*

The total number of registered export cartels decreased from 175 in 1972,[114] to 25 in 1993.[115] Apart from VERs, it has been assumed that Japanese export cartels were centered in industries where production is concentrated among very few firms, in which Japan occupies a large share of the total world market and in products that face few close substitutes in demand. In other words, they were formed to exercise market power abroad by firms which were able to export on their own.

An empirical analysis by Andrew Dick indicates contrary results.[116] His analysis is based on contrary price and quantity effects of typical export cartels' activities. He concludes that the exercising of common market power abroad generally leads to a price increase accompanied by a quantitative restriction. Cost reducing and enabling small and middle-sized firms to export on competitive foreign markets generally increases quantity and lowers export prices. Guaranteeing delivering schedules, establishing industry brand names, and common quality standards may shift the export demand rightward, yielding an increase in export volume and price. Due to the price and volume impacts, he distinguishes whether the export cartel's role was monopoly-promoting, cost-reducing, or quality-assuring. The study indicates that exercising common market power has little significance. It shows that Japanese export cartels mostly consist of small and medium-sized exporters in unconcentrated industries where Japan accounts for a small share of total world production. Results of the study, however, are questionable since many other factors, such as the power of foreign competitors and buyers, general changes in demand, exchange rates and trade policy developments were neglected.

In Germany, available information is rare because notifications of pure export cartels are not published. Analyses of the past indicated price cartels were predominant and joint sales agencies were rare.[117] Considering the fact that almost half of German export cartels had domestic market

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note 101; *see also* IYORI ET AL., *supra* note 39, at 131, 222. However, considering the number of compulsory cartels it has to be mentioned that in most cases cartel behavior is caused by "administrative guidance" without legally binding orders.

114 Negishi, *supra* note 41, at 302 (according to JFTC-Reports).

115 According to the JFTC, at the end of 1993 there were 23 export cartels still existing, including 23 export associations (§ 11(1)) and 2 agreements of producers and sellers (§ 5-3). JAPAN FAIR TRADE COMMISSION, ANNUAL REPORT 186 (1994).

116 Andrew Dick, *The Competitive Consequences of Japan's Export Cartel Associations*, 1992 J. JAPANESE & INT'L ECON. 275.

117 *See* EDWARDS, CARTELIZATION IN WESTERN EUROPE 19, 21 (U.S. Dep't of State Policy Research Study, 1964); Kurt Markert, *Zur gegenwürtigen Situation der Exportkartelle*, 1970 AUSSENWIRTSCHAFTSDIENST 99, 105.

shares of more than seventy-five percent, it seems likely that a substantial part of "cartelized" exports is accounted for by firms strong enough to export on their own.[118] In its 1970 annual report, the Federal Cartel Office doubted whether all German export cartels in fact protected and promoted exports.[119] Presently there are two mixed and fifty pure export cartels, of which half are international export cartels.[120] German export cartels accounted for two percent of total German exports.[121]

Regarding the United States, an FTC Staff Report[122] in 1967 indicated that Webb-Pomerene Associations consisted primarily of large firms operating in concentrated industries and marketing standardized products. Only in a few exceptional cases did they serve to significantly reduce the costs of exporting. There were few indications that export cartels were necessary as an instrument of countervailing power against cartels of foreign competitors or foreign buyers. Sometimes a foreign buying cartel was formed just as a reaction to the U.S. export cartel.[123] Later analyses by *Larson*[124] and *Amacher*[125] also indicated a significant positive association of WPAs with industry concentration and product homogeneity. At their peak during the 1930s, WPAs handled approximately nineteen percent of U.S. exports.[126] In 1982, when the Export Trading Company Act was enacted, WPAs accounted for only two to three percent of U.S. exports.[127] Although the Export Trading Act offers more protection to export cartels, it has not significantly spurred U.S. exports. One hundred twenty-seven

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118 OECD, *supra* note 42, at 49; *see also* Rehbinder *supra* note 15, § 6 at 23; Markert, *supra* note 117, at 105.

119 FEDERAL CARTEL OFFICE, *supra* note 15, at 21; OECD, *supra* note 42, at 49 (No. 138).

120 For a report of mixed export cartels, see FEDERAL CARTEL OFFICE, ANNUAL REPORT 169 (1991-92). Publications about pure export cartels are rare; at the end of 1984, 53 pure export cartels were existing. *See* FEDERAL CARTEL OFFICE, ANNUAL REPORT 140 (1983-84). Out of 55 export cartels 25 had foreign participants.

121 In 1981, German export cartels shared for 2% of German exports with a total amount of 7-8 billion DM. FEDERAL CARTEL OFFICE, ANNUAL REPORT 196 (1981-82).

122 UNITED STATES FEDERAL TRADE COMMISSION, ECONOMIC REPORT ON WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 6 (1967); Larson, *An Analysis of the Webb-Pomerene Act*, 1970 J.L. & ECON. 462.

123 *See* Markert, *supra* note 117, at 105.

124 Larson, *supra* note 122.

125 Amacher et al., *Note on the Webb-Pomerene Law and Webb-Cartels*, 23 ANTITRUST BULL. 371 (1978).

126 OECD, *supra* note 42, at 30.

127 *See* Whitney, *supra* note 10, at 395; Victor, *supra* note 9, at 573. According to the Federal Trade Commission, WPAs shared for 1,5 per cent of U.S. exports. FEDERAL TRADE COMMISSION, MEMORANDUM: ANALYSIS OF RESPONSES TO WEBB-POMERENE QUESTIONNAIRE 15 (1978).

Export Trading Companies were registered in the first nine years.[128] These were mainly small and mid-sized firms with a share of U.S. exports below one percent.[129]

Compared with an estimated export cartel ratio of twenty to twenty-five percent in Japan,[130] the share of registered "cartelized" exports of about two to three percent in the United States and Germany seems to be insignificant. Yet in several industries, the share of such exports is significant.[131] As a result, existing case study evidence suggests that the typical export cartel consists of oligopolistic firms trying to restrict exports rather than consisting of competitive firms trying to promote exports. Most cartels are in fact not defensive in this sense, but instead must be regarded as aggressive measures. Considering the role of VERs and the missing survey of international cartels — a large number of non-registered international cartels has to be assumed[132] — the export restricting role seems to outweigh the export promoting role of export cartels. Whether the net profits of the member firms compared with the overall economy export reduction cause positive or negative effects for the exporting country has to be examined case by case.

b. Repercussions on domestic markets

Apart from the beneficial effects which appear infrequently, export cartels can cause various problems for domestic competition and other objectives of the exporting country. They frequently have repercussions on domestic competition, even if there is an explicit clause in the cartel contract that no internal effects are intended.[133] Comparable to "side effects" of joint ventures, the exchange of information on prices, costs, capacities and sales policies may influence the domestic competitive conduct of the cartel members and lead to conscious parallelism. Every export cartel whose members account for a substantial share of domestic production can influence domestic supplies and prices through its export decisions. Such

128 Victor, *supra* note 9, at 575.

129 In 1986, ETC export total was about one-tenth of one percent of U.S. merchandise exports in 1986. *See* Nye, *supra* note 9, at 311.

130 *See* Dick, *supra* note 104, at 275, 276.

131 FEDERAL CARTEL OFFICE, ANNUAL REPORT 13 (1981-82); HANS H. GLISMANN, WETTBEWERBS BESHCRÄNKENDE ABSPRACHEN IM AUSSENHANDEL 31, 32 (1975).

132 OECD, *supra* note 42, at 46; Markert, *supra* note 117, at 102; FEDERAL CARTEL OFFICE, ANNUAL REPORT 70 (1971).

133 OECD, *supra* note 42, at 50.

spillovers occur if the export quantity influences utilization of capacity and therefore, *uno actu*, the total output and the domestic sales.[134] Sometimes dumping abroad might be made possible by monopoly profits earned in domestic markets. An additional domestic effect is the exclusion of competition between export traders.[135] Furthermore, the typical long term problems of price and sales quota cartels must be regarded. Such problems include the delay of technical progress, increasing costs, and a tendency for over-capacity. For the exporting country, export cartels are, therefore, not necessarily beneficial. However, contrary to increasing export revenues, those disadvantages are difficult to evaluate and are not immediately apparent.

2. *Consequences for the Importing Country*

For the importing country, foreign export cartels may be beneficial if they are formed by small and medium-sized firms which are thereby enabled to export. Export co-operation may also lead to higher quality and lower prices by reduced export costs. On the other hand, export cartels may maintain or create barriers to trade by forcing customers to pay high, non-competitive prices or by limiting the quantity of imports. In these ways, their effects are similar to import cartels or domestic cartels. The opportunity for an export cartel to exercise market power abroad is greater if it faces less domestic competition. In this case, countries with less developed industries are more likely to get hurt than highly industrialized countries with competitive domestic industries.

3. *International Cartels and Strategic Alliances*

International cartels combine export restrictions by exporters from different countries. Thereby producers of two countries often reserve their domestic markets when they mutually agree to refrain from selling in the other country (mutual international cartels). When this happens, the agreement affects domestic markets. In contrast, there are common international cartels consisting of firms of different exporting nations that affect only third country markets, for example, the OPEC. The cartel can be directed to one or more importing countries, including in most cases territorial divi-

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[134] Erich Hoppmann, *Wettbewerbspolitik und Exportkartelle*, JAHRBUCH FÜR NATIONALEKONOMIE UND STATISTIK, Band 173, 343, 372 (1961).

[135] *Id.* at 370.

sions. Therefore, direct international cartels consisting of firms of different countries and indirect international cartels consisting of different countries' export associations must be distinguished.

International cartels gained importance especially in the 1920s and 1930s when there were estimated to be between 250 and 1200 cartels.[136] One study indicated that international cartels accounted for approximately forty-two percent of world trade.[137] When world trade broke down through "beggar-thy-neighbor policies," it became apparent that over-capacities had been constructed due to the increased demand in the war period of 1914-18, the erection of new production centers in separated markets during the war, and the post-war boom of the 1920s. Some assumed that the problems of such over-capacities could better be resolved by output-allocating agreements of private international cartels than by government restraints. Private firms would more likely close the most inefficient factories with the highest production costs, while governmental negotiations could protect inefficient firms of powerful nations. It was assumed that international cartels could complement, or even displace, import tariffs and serve to prevent dumped exports spurred by subsidies and a devaluation of the exporting nation's currency. In this context, Great Britain increased its import tariff for steel to improve the bargaining position of its producers that were entering into an international cartel of continental steel producers. When the international agreement was concluded with an improved position of British steel producers, the British import tariff was lowered again.[138]

Furthermore, it was assumed that international cartels serve to stabilize prices, especially those of primary commodities which often face inelastic demand. This led to the discussion about buffer stock cartels regulating trade in primary commodities. However, the price of preventing desperate beggar-thy-neighbor strategies by allowing international cartels is the monopolistic price-fixing of the "cartelists" and the lack of tariff revenues for each country. Therefore, such trade policy objectives would better be pursued by negotiating mutual abolishment of trade restraints or, as a second choice, by government restraints like tariffs.

The decreasing number and significance of international cartels since the 1940s may have been caused by the strict prohibition of U.S. export

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136 Wagenführ, KARTELLRUNDSCHAU, Band 38, N. 7; Frederick Haussmann & Daniel Ahearn, *International Cartels and World Trade, an Explanatory Estimate,* 1944 Q. REV. FORDHAM U. 429.

137 Haussmann & Ahearn, *supra* note 136, at 434.

138 *See* INTERNATIONAL CARTELS: A LEAGUE OF NATIONS MEMORANDUM, 1948 II.D.2, at 39.

cartels since then, the resulting absence of U.S. firms, and by stricter enforcement of competition law in other countries. However, a large number of non-registered international cartels must be assumed to still exist.[139]

Today new forms of international co-operation have emerged which might require different evaluation. Especially in strongly integrated sectors like electronics, firms of different countries are interrelated through participation structures and joint ventures, including inter-firm research, production, and marketing programs. In this context, concerns are expressed that pro-competitive joint ventures might be treated like "usual" international cartels which restrict quantities and increase prices by protecting each cartel members' domestic market. The so-called "strategic alliances" are suspected in some cases to be the first step to an attempt of multinational enterprises to build up their own private market organization by avoiding antitrust conflicts.[140] On the other hand, such co-operation in research and development, combined with exchange of information in global networks, could be regarded as a contribution to promote a public good. This would require a rule of reason for strategic alliances.[141] Considering that other countries allow their firms to participate in strategic alliances, it could be beneficial for a nation to allow domestic firms to do the same in order not to exclude them from developing "future markets." Therefore, it has to be suspected that each countries' antitrust enforcement concerning ancillary restraints may be cautious so domestic firms are not unnecessarily impeded. Hence, only multilateral rules and institutions can prevent restraints of competition by such strategic alliances.

4. *Export Cartels' Effects on World Trade*

The fact that export cartels may have beneficial effects in one country and harmful effects in another country raises the question whether the net effect is positive or negative. Assuming that the exporting country is benefited, three results are possible. First, the importing country may also benefit by enabled or quality-improved exports, or by lower prices. Second, the losses for the importing country caused by quantitative restrictions and price increases could be outweighed by the benefits for the exporting coun-

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139 For example, in a routine control the German FCO discovered that the domestic members of a registered international export cartel participated in another international export cartel which had not been notified. *See* FEDERAL CARTEL OFFICE, ANNUAL REPORT 70 (1971); *see* Markert, *supra* note 117, at 102.

140 Wolfgang Kartte, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 15, 1992 (former President of the German FCO).

141 A. MODY, LEARNING THROUGH ALLIANCES (World Bank Paper 23,1990).

try. For instance, the protection may give domestic producers time to invest and become internationally competitive and, hence, reduce the overall disadvantages to the concerned countries. Third, the importing countries' losses caused by aggressive export cartels may outweigh the benefits in the exporting country because of "dead weight losses." Like other trade restraints, export cartels not only redistribute rents but may also cause overall net losses. Negative net effects occur only in the last of the three cases. As shown by evidence in other trade restraints, this has to be assumed to be the most likely case. Additionally, the resulting distortions of competition impede economical adjustment and evolutionary processes. Foreign retaliatory actions in the form of import cartels, anti-dumping measures, or subsidies may be caused by export cartels.

Apart from those direct consequences, indirect economic effects result from the interdependence of the legal treatment of export cartels in different countries. Applying game theory, the exemptions for export cartels encourage the formation of cartels and restrict international trade in three ways. First, foreign exemptions for export cartels create an incentive for one country to grant such exemptions to enable domestic firms to participate on equal terms in international markets.[142] Second, exempting export cartels intensifies the tendency towards international cartels, causing decreases in international output and the volume of trade.[143] This occurs because an *indirect* international cartel consisting of national export cartels is more stable than a direct international cartel consisting of firms from different countries, which are not allowed to form national export cartels. Third, antitrust immunity for foreign sovereign compulsion of export cartels may be an incentive for more active regulation of national exports by crossing the border between "encouraging" and "compelling" export cartels.[144]

B. Economic Consequences of VERs

Although voluntary export restraints are carried out by foreign exporters, they are initiated by the importing country where they serve to displace other import restrictions. Therefore, the effects on the importing country should first be examined.

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142 OECD, *supra* note 42, at 51.

143 *See* HOPPMANN, WETTBEWERBSPOLITIK UND EXPORTKARTELLE 362.

144 "Extraterritorial conflicts are therefore a source of sharper political conflict by pushing states to regulate their exporting companies." Rishikesh, *supra* note 48, at 44.

1. Objectives and Consequences of VERs in the Importing Country

According to the traditional economic theory of international trade, free trade increases the general welfare of all trading nations because each trading nation can consume more goods than it could have produced itself in the absence of international trade. Although each trading nation has an aggregate economic gain from international trade, individual persons and industries will not necessarily benefit from free trade. Consumers and import-demanding industries gain from lower priced imports. The import-competing industries face increasing competition and become the economic losers of free trade. The introduction of a trade barrier can change the economic winners and losers. Consumers and import-demanding industries are burdened by increased import prices. The Japanese Auto VER for the U.S. market in the 1980s, for instance, cost U.S. consumers an extra $4.3 billion per year. The VER raised prices for Japanese and U.S. cars by an extra $400 per auto. One study indicated that 2 million Americans wanted to purchase new cars but were priced out of the market.[145] The VER of Japanese videotape recorders to the EC in the mid-80s caused price rises of up to 50 percent.[146]

On the other hand, the import-competing industries and their workers profit from the introduction of a trade barrier. The U.S. car production increased from 7 million cars in 1982 to 9.2 million in 1983 and to 11.1 million in 1984.[147] The annual profits of U.S. automakers increased to $5.65 billion in 1983 and $9.7 billion in 1984 after losses in the preceding years.[148] The wage increase for U.S. autoworkers was almost twice the average.[149] According to traditional trade theory, the loss to the consumers, to import-demanding industries, and to export industries outweighs the benefits to the import-competing industries caused by trade barriers. Like other import restraints, VERs are normally requested as a temporary, defensive and exceptional measure to cope with an extraordinarily difficult

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[145] *See* David Pauly et al., *Car Quotas: End of the Road?* NEWSWEEK, Feb. 18, 1985, at 65; Lochmann, *supra* note 60, at 112.

[146] Kostecki, *supra* note 97, at 27.

[147] Lochmann, *supra* note 60, at 112.

[148] In 1980 and 1981 they had losses of 4.2 and 1.3 billion U.S. dollars. *Id.*

[149] *Id.*

situation in the importing countries' industry. Most VERs, however, are renewed and tend to be permanent.[150]

Such economic disadvantages for the importing country are caused by VERs, as well as by other trade barriers. However, VERs differ from other import restrictions in important ways. First, VERs discriminate against one exporting country while tariffs and quotas are generally non-discriminating in accordance with the most favored nation principle of the GATT. Second, the scarcity rent of a VER is collected by foreigners. Under a tariff, part of the loss due to the increasing prices is recouped by the government through tariff revenue. Under a quota, the scarcity rent could be collected by the government if it levies fees for the right to import the restricted good. If it does not collect fees for import licenses, the rents accrue to domestic persons holding the import licenses. Under a VER, any scarcity rent is collected by the foreign exporters or by the foreign government if it sells export licenses. Third, contrary to tariffs, VERs add a hidden cost because they disturb the invisible hand of the market.[151] If consumers' habits change and demand increases, or if technological developments increase foreign supply, imports would automatically increase under a tariff. Under non-tariff barriers, like import quotas or VERs, imports could not increase until the state reacts to the changes with increased quotas. Furthermore, VERs are less flexible than import quotas because the state decision also depends on foreign license holders who may try to delay the quantitative increase to keep their rental profits. The implementation costs of governmental regulation of VERs are difficult to evaluate.[152] They might be lower than administrative costs of tariffs. But negotiating VERs with several exporting countries can multiply transaction costs.

Despite those economical disadvantages for importing countries, VERs seemed to have displaced other import restrictions with progressive

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[150] For instance, the Japanese Auto-VER to the United States in 1981 and the following years, the Japanese and European steel exports VER from 1969 and VERs about textiles from Asian countries starting in 1956 have all been partly renewed several times. *See* Misao Tatsuta, *Voluntary Export Restraints - Implementation and Implications*, 49 RABELS ZEITUNG 328, 329 (1985).

[151] Lochmann, *supra* note 60, at 114.

[152] It was assumed that the U.S. government spent about $500,000 annually as a budgeted cost in connection with the textiles and steel VER. Comptroller-General of the United States, *Economic and Foreign Policy Effects of Voluntary Restraint Agreements on Textiles and Steel*, *reprinted in* JOHN H. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT (1977).

growth. According to Kostecki,[153] about ten to fifteen percent of world import volume in the late 1980s was subject to VERs. This is not only caused by the greater protection afforded domestic producers through the quantitative effect as compared with tariffs. VERs are more flexible than other restrictions. They may be expressed in terms of value of exports, volume of exports, market share, increase in market share, minimum export prices or distribution strategies and conditions.

There are three basic methods to share markets between domestic and foreign suppliers.[154] Under the home-industry-first approach, the risk of demand fluctuation is borne by the foreign suppliers. Under the exporter-first approach the risk of demand fluctuation lies with the domestic suppliers. The constant-market-share approach shares the risk of demand fluctuation between the foreign and the domestic suppliers. Most important is the fact that VERs can be negotiated by the government of the importing country without public interference. While tariffs require parliamentary legislation, VERs are subject to executive branch negotiations.[155] This helps to speed up the procedure and may prevent domestic policy conflicts as well as discussions about protectionism. The responsibility seems to be transferred to the foreign exporters.[156] VERs thereby reflect the interests of certain pressure groups trying to change the distribution of income in their favor, even if the welfare of the country as a whole is reduced.

2. *Domestic Effects of VERs in the Exporting Country*

Faced with threatened import restrictions, the exporting country may attempt to protect its remaining export chances by concluding a VER. The exporting firms or associations are more willing to accept a VER because the request for it is accompanied by a threat of protectionist action. They may also fear the use of anti-dumping or anti-subsidy procedures with the accompanying risk of becoming tied up by their competitors in costly legal proceedings designed to put them under pressure.

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153 For 1986, he estimated 10%. His 1991 study indicated that 15% of world trade was covered by VERs. Michel M. Kostecki, *Export-Restraint Arrangements and Trade Liberalization*, 10 WORLD ECON. 425-453 (1987); Kosteki, *supra* note 97, at 21.

154 *Id.* at 23.

155 *See* REINHARD QUICK, EXPORTSELBSTBESCHRANGKUNGEN UND ARTIKEL XIX GATT 156; BRUNO FREY, INTERNATIONALE POLITISCHE EKONOMIE 46 (1985).

156 For commentaries about the U.S. President's negotiations about the Japanese Auto-VER, his "merely communicating" role and the responsibility for the restraints, see Lochmann, *supra* note 60, at 130.

Whether exports are truly restricted or enabled through the VER depends on the real threat posed by other import restrictions. Compared with import restrictions based on the GATT escape clause, VERs are more flexible for the exporters because duration and quantity can be re-negotiated. The exporters may compensate for revenue losses caused by the quantitative restriction by increasing their export prices. In most cases, export prices are adapted to higher local prices in the importing country to protect the importing countries' industries. Moreover, exports may be shifted to larger, technologically more advanced, and therefore, higher priced products if the restraint agreement concerns only quantities and not revenue.[157] Such "upgrading effects" occurred when Japanese car producers during the Auto-VER shifted their exports to larger, more luxurious and expensive cars and earned record high profits.[158] Although such upgrading would have been possible without a VER, the quantitative restriction connected with higher profits might not have been carried out independently because Japanese firms typically care more about growth than about short term profitability in export markets.[159] Hence VERs do not necessarily harm the requested exporters and the exporting country.

Problems in the exporting country may be caused by the distribution of export licenses. The established firms need not fear new domestic competitors which are hindered from participating in the foreign market because exporters' shares are fixed. Additionally, spillovers into domestic markets are to be suspected by export agreements. In the long run, the export industries' competitiveness may be jeopardized.[160]

3. *The Effect of VERs on Third Countries*

As a result of a VER, exporters may shift to third country markets. For instance, it was claimed that as a result of the Japanese-European arrangements, Japanese steel producers had shifted their exports to the United States market and therefore violated section 301 of the Trade Act of 1974.[161] It is possible that increased prices caused by restricting exports

157 NEWSWEEK, Feb. 14, 1985, at 65, col. 2.; Tatsuta, *supra* note 150, at 344.
158 Tatsuta, *supra* note 150, at 344.
159 Kostecki, *supra* note 97, at 25.
160 Tatsuta, *supra* note 150, at 344.
161 *Id.* at 345.

serve to "dump" export prices for third countries which could give rise to antidumping measures or to another VER.[162]

Third country exporters may extend their market shares due to the foreign VER. For example, Taiwan had a ninety-four percent increase in color TV exports to the United States during the Japanese VER in 1977.[163] Such an extension reduces the effectiveness of a VER as an import restraint and gives rise to further VERs with other countries, causing a chain reaction.[164]

In addition, third country exporters of similar products may also be affected. For example, the upgrading effects shifting Japanese car exports into the United States to larger, higher priced models distorted and sharpened competition in these markets at the expense of German car producers. It is questionable if the third countries' trade or competition laws cover such conduct by protecting its exporters.[165] Without international co-operation, such problems are unlikely to be resolved.

4. *The Effect of VERs on World Trade*

Contrary to "real" export cartels, which may simultaneously restrain competition in some ways while promoting competition in other ways, a VER restrains competition in foreign markets and international trade. In the importing country, the loss to consumers and import-demanding industries outweighs the benefits to the import-competing industries. Whether the price rise turns the losses caused by the quantitative restriction into profits for the restricting exporters is uncertain. More certain is that for the exporting countries, not only export quantities, but also export revenues decrease.

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162 Due to the Japanese Auto-VER for the U.S. market, Canada and several European countries did not initiate GATT proceedings but tried to negotiate further Japanese VERs for their markets. *See* Quick, *supra* note 155, at 277.

163 Robert C. Klose, *The Orderly Marketing Agreement with Japan: Implications for U.S. Trade Policy*, N.C. J. INT'L L. & COMM. REG., S. 246, 260 (1978).

164 Glismann, *supra* note 119, at 228.

165 U.S. antitrust law, for instance, does not only protect U.S. consumers in international cases but also U.S. exporters. This follows from the U.S. Department of Justice's announcement to delete footnote 159 in its 1988 Antitrust Enforcement Guidelines for International Operations, which had been interpreted to protect exclusively U.S. consumers. Dep't of Justice Press release of April 3, 1992, *cited in* Trade Cas. (CCH) ¶ 13,108. In this context the *Canadian Patent Pool* case has to be mentioned when U.S. exporters were hindered to export to Canada. United States v. General Elec. Co., 1962 Trade Cas. (CCH) ¶ 70,342 (June 25, 1962); United States v. Allen-Bradley Co., 1962 Trade Cas. (CCH) ¶ 70,420 (July 31, 1962); United States v. General Elec. Co., 1962 Trade Cas. (CCH) ¶ 70,546 (Nov. 1, 1962); *see also* Yoshio Ohara, *The New U.S. Policy on the Extraterritorial Application of Antitrust Laws, and Japan's Response*, 17 WORLD COMPETITION 49, 50 (1994).

Altogether a decrease in international trade and "dead weight losses" for the countries concerned must be expected

Due to the selective effects of VERs, their distortions of competition exceed those of other import restraints like tariffs or quotas. For example, if the restricted exports of country A are displaced by exports from third country C, the importing country B might call for another VER of C's exporters. This might improve the export chances for exporters from third country D. Additionally, if A's and C's exports to B are restricted, they may shift to importing country E which might request a VER. Additional VERs requested by other importing countries from additional exporting countries may cause a cumulation of interventionism leading to a beggar-thy-neighbor policy. In addition to welfare losses caused by protection, a large number of VERs leads to high transaction costs. Furthermore, VERs are often requested because the exports are believed to be dumped or subsidized. This demonstrates the links between VERs and other issues of trade policy like anti-dumping and anti-subsidy measures. It also demonstrates the need for global solutions.

IV. APPROACHES AND SUGGESTED CHANGES

A. *Overlaps, Conflicts, and the Grey Area Between Trade and Competition Policy*

1. *Problems and Conflicts Arising from Export Restraints*

As demonstrated above, the economic consequences of export restraints, intensified by their legal treatment, endanger the welfare of the concerned countries and world trade liberalization for several reasons. The legislative intentions to exempt export cartels are inconsistent with the legal treatment and the actual appearance of export cartels. Enforcement of competition law against export cartels is limited due to the lack of incentives and the lack of co-operation by the concerned governments. "Real" export cartels as well as VERs cause net aggregate losses, if not individual losses, to all concerned countries which might gain from liberalization of global trade. There is a lack of incentives to strictly enforce limitations on, or to unilaterally abandon, export cartel exemptions because national benefits are expected from domestic export cartels. Possibly harmful foreign VERs are regarded as beneficial or are inadequately controlled in the face of powerful protectionist pressure groups.

A grey area between trade and competition policy exists when private respondents deny their responsibility by maintaining that they were compelled by their governments, and governments deny their responsibility and circumvent GATT obligations by referring to the private nature of the restricting agreement. Therefore, the private or governmental responsibility for different types of agreements must be clearly determined. The applicability of competition rules for private restraints and trade laws and GATT rules for public restraints is discussed below. The question of whether existing trade rules and the developing World Trade Organization ("WTO") system cover those restraints must be analyzed before further approaches are discussed.

2. *The Distinction Between Governmental and Private Restraints*

Agreements between exporting firms are private export cartels and should fall under both domestic and foreign competition law. However, the statutory antitrust exemptions enabling and promoting export cartels could be regarded as trade restraints and, therefore, also be subject to international trade approaches. If exporting firms are only encouraged or allowed to "cartelize" by the exporting state, they are not immune from foreign competition law. If exporting firms are compelled by the exporting state, they are immune from foreign competition law because the restriction is actually caused by the state. Therefore, the exporting state should be responsible under trade policy agreements, for example, in the GATT system.

Import restricting agreements between importing countries' firms and exporting countries' firms are private international cartels which fall under competition law.

Trade agreements between the importing state and the exporting state are not subject to competition law. Those voluntary restraint agreements (government-to-government VRAs) should be treated as trade policy issues like other import restrictions.

Regarding agreements between the importing state and exporting firms, export restraints with binding obligations, which were compelled, must be distinguished from encouraged VERs. A binding agreement between the importing state and exporting firms (government-to-industry VRA) could be treated as a private restraint of competition or as a public trade restraint. A trade policy approach could prohibit the importing state from inducing foreign export restraints by treating such action like other import restrictions. On the other hand, according to the competition policy approach, the importing countries' competition law could prohibit foreign export restraints despite whether the domestic government requested the restriction. A national approach could prohibit the agreement or require special provisions, like a minister cartel in Germany. But if the government itself requested the restraint, it is unlikely that its own cartel authorities — if not identical with the government — will take actions against the VER. Therefore, a competition policy approach must ensure antitrust enforcement by national or international cartel authorities if it is to prevent such agreements. Hence only an international competition policy approach, ensuring strict enforcement, or a trade policy approach could prevent restricting agreements between the importing state and exporting firms.

A non-binding, merely "communicating," agreement between the importing state and exporting firms (VER) could also be subject to a trade policy or a competition policy approach. The trade policy approach is restricted because non-binding agreements are not published. The threat of antitrust or trade law impediments in the importing country is an incentive to both parties not to publish the agreement. Therefore, such restraints might be difficult to prevent by treating them like public restraints. Regarding VERs as private restraints of competition in the importing country leads to problems similar to binding government-to-industry VRAs. They should be prohibited by domestic competition law, but due to the governmental involvement there is a lack of enforcement. The competition policy approach therefore must be international.

B. Approaches to Governmental Restraints

1. VERs in the GATT-WTO System

a. VERs in the GATT before the conclusion of the Uruguay Round

Because trade agreements between states and most export restraints induced by governments are not subject to competition law, questions arise whether, and how, states should be responsible for such trade restraints. If both concerned countries are contracting parties to the GATT, the introduction of a non-tariff trade barrier could violate the free trade rules of the GATT.

Article I of GATT, the Most Favored Nation ("MFN") clause, requires that "any advantage, favor, privilege, or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like products originating in or destined for the territories of all other Contracting Parties." For example, an agreement that restricts only Japanese TV exports to the United States market could violate the MFN clause in two ways. First, it would give other contracting parties an advantage relative to the United States because they could import an unlimited number of Japanese TVs. Secondly, and additionally, it would give other contracting parties an advantage relative to Japan because they could export an unlimited number of TVs to the United States market.

Article XI(1) of GATT prohibits all import restrictions other than duties, taxes or other charges, and therefore principally covers VERs.[166] However, GATT contains several exceptions to the prohibition of quantitative restrictions. The balance of payments clause in article XII permits a state to implement import restraints "to safeguard its external financial position and its balance of payments." However, this could not justify an export quota unless the exporting state could argue that a large trade surplus was something that it wished to avoid.[167] Additionally, VERs cannot meet this exemption because the balance of payments clause requires the trade restraints to be nondiscriminatory (article XIII (1)).

The safeguard clause in article XIX permits a state to use temporary import restraints to ease the hardships of adjustment and ensure an orderly and gradual shift towards more efficient industries. The four prerequisites for the restraints are:

1) an unusual increase in the quantity of imports of a specific product,
2) resulting from unforeseen developments,
3) which must be the result of GATT obligations incurred and must cause or threaten the injury,
4) and cause an actual or threatening *serious* injury to domestic producers of like kind or directly competitive products.

Whether or not an import restraint in accordance with the safeguard clause is required to fulfill the MFN clause is not expressly stated in article XIX of GATT and remains uncertain.[168] The application of the MFN clause would

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166 *See* Immenga, *supra* note 51, at 324; QUICK, *supra* note 155, at 261; Tatsuta, *supra* note 150, at 345; Lochmann, *supra* note 60, at 117.

167 Lochmann, *supra* note 60, at 118.

168 An interpretative note to article 40 of the Havana Charter indicates that the Contracting Parties intended the restraints to be nondiscriminatory. *See* Lochmann, *supra* note 60, at 121.

automatically prevent the safeguard clause from justifying a VER. Nevertheless, the enforcement of the GATT principles in the case of VERs is limited within the GATT framework. In the case of a violation of article XI, it is generally possible for a contracting party to diminish or eliminate certain advantages of another contracting party by opening GATT procedures according to articles XXII and XXIII. But due to the parties involved, such actions are unlikely to be taken. Compared to other import restraints, both negotiating parties are interested in the implementation of a VER.

Exporting third countries may extend their market shares due to the VER. Importing third countries may become the target of shifted exports. But instead of initiating a GATT procedure due to the violation of article XI, they may prefer to threaten it and to force the exporting country into another VER, for the reasons stated above. This demonstrates the lack of an international institution to ensure enforcement of the GATT rules. The control of VERs by the GATT is additionally restricted by the lack of notice because VERs are rarely published. The negotiations are rather secret, neglecting third countries' and domestic third parties' interests.[169] Furthermore, it has been argued that MFN and reciprocity are too unrealistic to cope with current situations and that the disadvantages of costly safeguard measures for the importing country are an incentive to use VERs instead of other import restrictions in accordance with article XIX of GATT.[170] Therefore, grey area measures like VERs serve as exceptional measures which are not sufficiently enabled and allowed by the safeguard clause of GATT. They will exist as long as the requirements of the safeguard clause are not reformed.

In this grey area between GATT rules for states and competition rules for private undertakings, VERs remain in most cases without sanctions. Nevertheless, VERs are selective, bilateral measures in contrast to the objectives and system of GATT. The multilateral system of GATT was designed, *inter alia*, to improve the situation of smaller countries with less negotiating power. VERs reflect the economic power of an importing state related to foreign exporters.[171] Hence, they jeopardize a multilateral "rule oriented system" by returning to a "power oriented bilateralism."[172]

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169 QUICK, *supra* note 155, at 280.

170 *See* Tatsuta, *supra* note 150, at 346; QUICK, *supra* note 155, at 154, 282.

171 Hindley, *Voluntary Export Restraints and the GATT's Main Escape Clause*, 3 WORLD ECONOMY 313, 331 (1980-81).

172 John H. Jackson, *The Crumbling Institutions of the Liberal Trade System*, J. WORLD TRADE L. 93, 98 (1978).

Reforms were, therefore, suggested that should explicitly announce the applicability of GATT rules to VERs. Reforms should facilitate the implementation of safeguards while simultaneously requiring conditions for safeguards. To achieve notice, flexibility, and multilateralism through an effective safeguard clause, it was demanded that safeguard measures be degressive and temporarily restricted, and that clear provisions for limited exceptions and the prerequisites for safeguard measures be enacted.[173]

b. VERs in the GATT after the conclusion of the Uruguay Round: The "Agreement on Safeguards"

The agreements of the Uruguay Round include an Agreement on Safeguards relating to article XIX of GATT. It contains clear provisions for safeguard measures and explicitly mentions VERs in article 11:

> Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side. These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.[174]

This clarifies that the implementation of VRAs and VERs fall under the prohibitions for other import restrictions. Existing restrictions shall be phased out. For example, the EU-Japan agreement on voluntary restraints of Japanese car exports is terminated December 31, 1999.[175] Therefore, export restricting agreements are more likely subject to negotiations and procedures in the WTO system. Due to this explicit mention, transparency might be improved. For instance, the Trade Policy Review Mechanism practiced since 1989 might encourage resistance of consumers and import-

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173 *See* Immenga, *supra* note 59, at 326; QUICK, *supra* note 155, at 282.

174 Treaty Establishing the World Trade Organization [WTO Treaty], Annex 1A: Multilateral Agreements on Trade in Goods, Agreement on Safeguards, art. 11 (1)(b) [hereinafter Agreement on Safeguards]; Prohibition and Elimination of Certain Measures, *in* Multilateral Trade Negotiations, The Uruguay Round, Trade Negotiations Committee, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, April 15, 1994.

175 Agreement on Safeguards art. 11(2).

demanding industries in the importing country against powerful protectionist pressure groups which initiate VERs.

Additionally, the use of VERs might decrease because the demand for such grey area measures depends on the opportunities to invoke the safeguard clause. The reforms, by clearly defining "serious injury,"[176] by restrictions on the duration,[177] by the degressivity of the measures[178] and by limiting selective measures under special circumstances,[179] might facilitate the use of safeguard measures according to article XIX of GATT. Hence, the objectives of VERs can partly be pursued through such safeguard measures that might therefore displace VERs.

To what extent this contributes to the prevention and abolishment of VERs depends on the development and success of the WTO system. A further need for grey area measures must be suspected. Through the explicit prohibition of governmental agreements (VRAs), the grey area is reduced to an inducement of foreign export restraints without notice or publication. An importing country may circumvent GATT obligations by requesting "voluntary" export restraints. Although the threat of other import restrictions is reduced due to the reforms of the safeguard clause, exporters might furthermore be willing to accept VERs instead of facing other import restrictions. Such VERs without proven governmental involvement are not sufficiently covered by the prohibitions of the Agreement on Safeguards.

Instead of a trade policy approach, a competition law approach could possibly improve the control of VERs. While a trade policy approach prohibits VRAs and the inducement of foreign VERs, an international competition law approach would require each nation to apply its domestic competition law to foreign VERs. This issue may be compared with the displacement of the trade policy approach of antidumping rules by the competition law approach of applying rules on predatory pricing.[180] In this context, the "domestic policy function" of international rules protecting national interests against powerful protectionist pressure groups is only partly fulfilled by GATT rules. On the contrary, domestic competition law could be directly applicable in the importing country. Nevertheless, the enforcement of national competition law by national cartel authorities

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176 *Id.* art. 4.

177 *Id.* art. 7.

178 *Id.* art. 7 (4).

179 *Id.* art. 5 (2)(b).

180 *See* Harry First, *An Antitrust Remedy For International Price Predation: Lessons from Zenith v. Matsushita*, 4 PAC. RIM L. & POL'Y J. 211 (1995).

against foreign VERs which were requested by the domestic government is limited. This might be compensated for if private suits of domestic consumers or import-demanding industries were possible. However, this opportunity is limited to few countries and, furthermore, is restricted by several defenses as shown above.

Because no state is willing to unilaterally abandon its ability to restrict imports by such a tacit antitrust permission, this "prisoners dilemma" can only be solved by international cooperation. For instance, enforcement could be strengthened if an international authority was able to sue before national courts and initiate proceedings against national cartel authorities. A proposal for such an international competition policy approach submitted to GATT is mentioned in the chapter on "Multilateral Approaches" to private restraints.

In conclusion, expressly prohibiting VERs in the Agreement on Safeguards serves to improve the successful liberalization of international trade by treating VERs like other import restrictions. But if the WTO can not significantly abolish international trade conflicts, an international competition policy approach would be preferable to the trade policy approach.

2. Other Restrictions for States Inducing VERs

Besides international obligations in the GATT/WTO system, the executive's power to negotiate foreign VERs may be limited by national trade laws or competition laws. In the United States, national responsibility for trade policy authority is provided by the Trade Act. The International Trade Commission must determine whether specific requirements similar to article XIX of GATT are satisfied before trade restraints may be implemented. If the Trade Act were applied to the new Agreement on Safeguards, the "communication" in international trade negotiations aiming at foreign VERs could also be prevented. This would demonstrate the domestic policy function of international rules.

Consequent enforcement of national competition law with a strict separation of political and competition related decisions, and an independent cartel authority, could possibly prevent harmful foreign VERs. It could at least provide for special requirements, like a minister cartel in German competition law (GWB section 8). The Treaty of the European Union could possibly prohibit the member states' or even the Commission's involvement in foreign export restraints by applying article 5 (2) or article

3. The implementation of similar provisions into an advanced WTO could be discussed after a further liberalization of international trade.

C. *Approaches to Private Restraints: Present and Potential Strategies in International Competition Law*

Obviously there is a missing institutionalized link between competition policy and international trade. Some countries have taken steps to fill this gap. International constraints and distortions of competition caused by private actors are subject to different unilateral, bilateral, regional, and multilateral approaches. It should be examined whether competition laws need to be reformed, enforcement needs to be strengthened, or new substantive or procedural regulations and agreements must be developed to fill this gap.

1. *Unilateral Approaches*

a. *Unilateral approaches in the importing country*

One might think that the strict application of competition law in the importing country under the effects doctrine could solve the problems arising from export cartels.[181] The effects doctrine could be more successful here than in other areas of competition law because export cartels are directed abroad so that relatively few interests of the exporting country need to be considered. Nevertheless, the enforcement depends on the foreign state. The foreign government actually controls this by supporting investigations and enforcement, or may hinder it through blocking statutes.

Even if the effects doctrine is applied, different obstacles remain in the case of international cartels which affect several countries. If more than one importing and one exporting country are concerned, different competition laws may lead to different legal results which need to be reconciled. There is no real consensus among nations to recognize the effects doctrine because its definition varies.

On an international level, clear and uniform criteria for the rule of non-intervention, the misuse of law, and a balancing test would be desirable. However, states may not be willing to accept the loss of sovereignty and of the power to decide on political terms about foreign export cartels as long as substantially different competition policies exist.

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181 Heinz Hauser & Rainier E. Schöne, *Is There a Need For International Competition Rules?*, AUSSENWIRTSHAFT 205, 242 (1994).

Unilateral reforms concerning foreign export cartels face the conflict between legal certainty and the legal capacity for foreign policy. The attempt to replace comity balancing with its legal uncertainties by a jurisdictional balancing approach was made by the Restatement of Foreign Relations Law (Third). It limits jurisdiction by a "reasonableness" test where the relevant factors for reasonableness are similar to the Timberland approach.[182] Although international conflicts resulting from export cartels might be generalized and regulated by law more easily than other fields of international competition policy, the political nature of the conflict remains. As experience shows, such conflicts might be resolved only by diplomatic actions.[183]

b. Unilateral approaches in the exporting country

From an international perspective, exemptions for aggressive export cartels which do not enable or promote exports should be abolished because of the net losses to the concerned parties. Due to the expected national benefits of its export cartels at the expense of other countries, no country is willing to unilaterally relinquish its exemptions. This "prisoners dilemma" can only be resolved by international strategies providing an international public good. Nevertheless, national laws exempting export cartels require legal reforms even for the purpose of improving national welfare. The objectives should be the real promotion of exports by every export cartel displacing the just legislative intent, an improved supervision of export cartels to prevent domestic repercussions, and the prevention of political conflicts. Although there are disputes about the criteria for examining the risks and positive effects of export cartels, a global exemption without close examination contains enormous risks and disadvantages. But the other extreme of strictly prohibiting each export cartel association would also endanger national welfare because, in some cases, they may be export-enhancing and beneficial to the exporting country as well as to the importing country.

Reforms of the broad exemptions for export cartels should include the application of national competition law to all export cartels. This could en-

[182] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 402-03. For commentaries see Fox, *supra* note 75, at 4.

[183] *See* Ulrich Immenga, *Extraterritoriale Rechtsanwendung zwischen Recht und Politik*, FESTSCHRIFT FÜR KARL H. NEUMAYER 323, 334 (1986).

hance the cartel authorities' supervision by making each export cartel subject to notification or permission.

Whether or not a publication of the cartel activities serves the national interest is difficult to determine. Perhaps the prosecution of exempted domestic export cartels by foreign cartel authorities should not be supported because the exploitation of foreign markets by foreign restraints serves national interests. On the other hand, the protection of domestic exporters which are not members of the export cartel requires publication. National competition laws could require the real promotion of national exports by each cartel. Therefore, positive requirements, for example a needs test requiring that the power of foreign buyers or competitors has to be individually proved, would be necessary. Also, a harmonization with national cartel exemptions would be desirable. Furthermore, the protection of export traders and producers which are not members of the cartel could be improved with respect to long run competitiveness. With regard to international cartels — the existence of which sometimes cannot be prevented by one state — it could be beneficial to allow domestic firms to participate if they are not able to export at all outside the international cartel. It should be analyzed whether or not domestic restraints or repercussions exist. Therefore, it must be analyzed whether different types of international cartels regulate or affect domestic markets, include import restraints (i.e. whether they are common or mutual), are direct or indirect, are aimed at one or more importing countries and whether they do really face powerful foreign buyers.

Supervision of international cartels is especially important to prevent domestic and import restraints. In this context, the "German solution," providing for limited supervision of international cartels by exempting them, may be preferable to a total legal ban with a large number of unknown cartels. Furthermore, the relations between strategic alliances for improving research and development and enforcing rules about international cartels have to be clearly identified to secure legal certainty and protection of competition.

2. *Bilateral Approaches*

a. *Mutual abandonment of export cartel authorization*

As previously shown, no country is willing to unilaterally relinquish its right to exempt national exporters from its own law due to expected national benefits of its export cartels. Yet a mutual abandonment by two countries could be beneficial to both countries. If aggressive export cartels are regarded as trade policy instruments to increase national welfare at the expense of foreign countries, they are logically the subject for bilateral trade negotiations. An exporting country could agree to prohibit single or all export cartels related to the other country or support antitrust investigation and enforcement of the importing country. Prerequisite for such an abandonment is that the trade policy negotiators have the power to prohibit export cartels, a power which usually lies with the cartel authority. This is provided in Japan by the broad foreign policy powers of MITI. In Germany, the government has an indirect power to prohibit export cartels by concluding international treaties which oppose the permission or exemption of cartels. In the United States, the president has no express power to prohibit U.S. export cartels.[184]

It is doubtful that export cartels could be subject to trade policy negotiations in isolation from other competition policy issues. First, mutual "disarmament" of export cartels is inadequate if the goal is to counter the power of foreign firms and that power remains. Controlling abuses by powerful buyers and sellers in the importing country may be necessary to correct the restraint of competition power. Second, bilateral solutions are limited when trade relations are rarely bilateral. Additionally, they could jeopardize the multilateral GATT objectives. Third, the lines between cartels, strategic alliances, joint ventures, mergers, and abusive practices become blurred. A clear separation of export cartels from other competition policy issues is difficult. Fourth, if export cartels were prohibited due to trade policy objectives, even competition enhancing cartels might be sacrificed in power oriented negotiations.

b. Bilateral agreements on procedural co-operation

Several international antitrust conflicts, including private antitrust suits, have led to governmental negotiations and were finally decided for political reasons such as the "OPEC," "Uranium" and "Swiss Watchmakers" cases in the United States.[185] Meanwhile, these types of intergovernmental consultations have been shifted to the earlier stage of preliminary investigations by formalized bilateral agreements. Such

184 *See* HAWK, *supra* note 6, at 102.
185 *See supra* notes 40, 46, 56.

agreements have been concluded, for example, between the United States and Canada,[186] the U.S. and Germany,[187] and the U.S. and Australia.[188] The agreements provide for inter-governmental notification, exchange of information, and coordination of actions and proceedings when important interests of the other contracting party are involved. Similar provisions for international antitrust co-operation have been developed and adopted by OECD recommendations for international co-operation.[189] The US-EC agreement,[190] though just declared invalid by the European Court, provided a new progressive element. Beyond *negative comity*, which restricts the application of domestic laws because of conflicting foreign interests, the agreement requires *positive comity.*[191] The contracting parties are obliged to enforce their laws as strictly as possible in the international activities of their firms. However, if export cartels are allowed because they have no domestic effects, the reach of positive comity is limited. The other arrangements are mostly procedural with foreign officers assisting the others in gathering evidence. The agreement between Australia and New Zealand[192] seems to be a remarkable effort. In addition to a harmonization of substantive rules, jurisdiction is extended to foreign firms. The enforcement of competition law against foreign firms by national authorities is not impeded by international law and is effectively supported by the other nation's authorities.[193] Such bilateral arrangements are mostly found between countries which have very similar substantive rules. Conflicts remain as long as countries have substantially different competition policies and different opinions about trade and competition law and policy.

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186 *See, e.g., The Joint Statement concerning Co-operation in Antitrust Matters*, 8 I.L.M. 1305 (1969); 23 I.L.M. 275-281 (1984).

187 Agreement Relating to Mutual Co-operation Regarding Restrictive Business Practices, June 23, 1976. *See* A.V. LOWE, EXTRATERRITORIAL JURISDICTION: AN ANNOTATED COLLECTION OF LEGAL MATERIALS 228 (1983).

188 Agreement Relating to Co-operation in Antitrust Matters, June 29, 1982, *reprinted in* 21 I.L.M. 702-09 (1982).

189 Recommendations were published in 1967, 1973, 1976, 1979, and 1986. OECD, COMPETITION POLICY AND INTERNATIONAL TRADE, OECD INSTRUMENTS OF COOPERATION (1987).

190 AGREEMENT BETWEEN THE COMMISSION OF THE EUROPEAN COMMUNITIES AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA REGARDING THE APPLICATION OF THEIR COMPETITION LAWS, Sept. 23, 1991, *reprinted in* 15 WORLD COMPETITION 155 (1991).

191 *Id.* art. V.

192 *Reprinted in part in* PETER MOZET, INTERNATIONALE ZUSAMMENARBEIT DER KARTELLBEHÖRDEN 127 (1991).

193 *Id.* at 75.

3. *Regional Approaches*

There are regional approaches, such as the treaty rules of the EC and NAFTA, that try to harmonize or rationalize competition policy within the region. The EC, with its strict prohibition of export cartels directed to other member states,[194] demonstrates the possibilities of a mutual abandonment of export cartels. It is important that supranational European law is directly applicable and enforceable. A supranational authority, the European Commission, has power to investigate in each member state.

Effective implementation of common substantive rules requires a similar understanding of competition policy to cope with the losses of sovereignty caused by powerful supranational institutions and jurisdiction. In national legislation by EC countries there has been an effort to harmonize. Countries without antitrust laws have largely incorporated rules similar to articles 85 and 86 of the EC Treaty. Convergence in interpreting and applying the laws is promoted through co-operation and participation by national antitrust authorities in the Commission's decisions.

In this context, further efforts have emerged concerning the European Free Trade Area (EFTA) countries and Eastern European States. The treaty between the EC and the EFTA countries regarding the European Economic Space obligates the EFTA countries to adopt EC substantive law. The Association Agreements between the EC and Poland, Hungary and the Czech Republic reflect constraints arising from EC competition law. While the effects of regional co-operation on international trade conflicts may be uncertain, in the fields of competition policy and export cartels such co-operation should be regarded as a first step towards global harmonization. Nevertheless, such control of international cartels is limited to the participating nations, leaving third countries unprotected.

4. *Multilateral Approaches*

a. *The need for international cooperation through global competition rules*

Similar to the situation of "pure" trade policy conflicts, the ability of bilateral or regional approaches to solve problems of international competition policy diminishes with the globalization of trade relations, because the effects of international restraints are rarely restricted to one or a

194 Art. 85.

few countries.[195] This is not limited to "indivisible products" like international air transport service. If different countries are affected by international cartel activities, conflicts of law arise as well as political conflicts. The European Union demonstrates that some kind of a "level playing field" for undertakings could be provided through the harmonization of competition laws. International firms are exposed to different competition laws in every country because of the effects doctrine.

In addition to such common problems of international competition policy issues, export restraints require multilateral co-operation for other reasons. When considering an abandonment of export cartel authorization, the "prisoners dilemma" arises. No country is willing to relinquish its exemptions unilaterally because export cartels are believed to improve national welfare. As long as national politicians do not pay attention to possibly harmful effects on their trading partners, they invite retaliation. Such uncoordinated "beggar-thy-neighbor" policy led to the breakdown of world trade in the period between the World Wars. The "Trade Policy Dilemma" as a non-cooperative game, therefore, has to be solved by co-operation. Even though some players have to give up nationalistic aims and gains, the corresponding welfare losses of others could be avoided, and global welfare improved. Furthermore, the supervision of international cartels by single states is restricted. In this context, the lack of incentives to strictly apply national law to international cartels when only national firms can be effectively prevented from participating has to be addressed. As shown above, VERs in the grey area between trade and competition policy are covered only partially by a trade policy approach. An international competition law approach is required to complement international trade rules and domestic competition law.

b. Former international approaches

The internationalization of competition rules is not a new phenomenon. The 1948 Havana Charter ("ITO") contained a chapter on restrictive business practices but failed to be ratified as a whole. The discussion continued, especially in the OECD and within the United Nations Convention on Trade and Development ("UNCTAD"). The UNCTAD Code, a set of multilaterally agreed principles for rules

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195 *See* Phedon Nicolaides, *Towards Multilateral Rules on Competition*, 17 WORLD COMPETITION 5 (1994).

controlling restrictive business practices, was never ratified. The OECD Committee of Experts on Restrictive Business Practices developed OECD recommendations, which of course have no binding legal force. Yet the OECD recommendations have improved the exchange of information and the cooperation between the member states.

Sovereignty losses and the great new divergences in trade, development and competition policies have been the biggest obstructions. Therefore, enforcement of minimum standards by national authorities and an international authority with limited power is the most that can be expected in the near future. Such a proposal is the Draft International Antitrust Code which has been presented to the GATT.

c. *The Draft International Antitrust Code submitted to the GATT*

In July 1993, a Draft International Antitrust Code was submitted to the GATT.[196] An independent group of academics[197] worked on this draft which proposes to implement a rule-oriented system instead of a power-oriented dispute settlement.[198] The Draft declares that "agreements, understandings and concerted practices between or among competitors that fix prices, divide customers or territories or assign quotas are illegal"[199] if at least two countries are affected.[200] The basic principles of the Draft Code are the pure application of national law adapted to common minimum standards, national treatment for foreign firms, and the limitation of the Draft Code to cross-border cases. To improve the enforcement by national cartel authorities, the Draft Code provides for international procedure initiatives. An International Antitrust Authority shall be empowered to sue in a contracting party's own national court when the contracting party has failed to enforce its law in violation of its code obligations.[201] By

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196 Wolfgang Fikentscher & Ulrich Immenga, *Draft International Antitrust Code (1995)*, *reprinted in* 64 Antitrust & Trade Reg. Rep. (BNA) No. 1628, Special Supplement, at S.1-22 (August 19, 1993), *also reprinted in* WORLD TRADE MATERIALS, Sept. 1993, at 26.

197 The group included J. Drexl (University of Munich), W. Fikentscher (University of Munich), E.M. Fox (New York University), A. Fuchs (University of Göttingen), A. Heinemann (University of Munich), U. Immenga (University of Göttingen), H.P. Kunz-Hallstein (Max-Planck-Institute Munich), E.U. Petersmann (University of St. Gallen), W.R. Schluep (University of Zürich), A. Shoda (Sofia University, Tokyo), S.J. Soltysinski (Universities of Poznan and of Pennsylvania) and I.A. Sullivan (Southwestern University Los Angeles).

198 Art. 20 sec. 3(c) IAC; *see* Wolfgang Fikentscher, *Der "Draft International Antitrust Code" - Initiative für ein Weltkartellrecht im Rahmen des Gatt*, WIRTSHCAFT UND WETTBEWERB 97, 103 (1994).

199 Art. 4 § 1.

200 Art. 3 § 1a.

201 Art. 19.

guaranteeing the application of national law, the losses of sovereignty are relatively small and a competition among regulatory systems remains possible. This suggested implementation into the GATT gives hope for success because GATT provides the required institutional and legal linkage for the liberalization of trade and competition rules. The history of GATT, the large number of member states and the existing dispute settlement system as a basis for the WTO are further reasons for optimism. The growing need for global competition rules with the globalization of trade relations has been increasingly stressed in recent years.[202] Even if the Draft is not implemented in the near future, it is a framework for intensified discussions.

V. CONCLUDING REMARKS

Curbing the use of VERs, which concern trade policies as well as competition policies, by the "Agreement on Safeguards" expressly prohibiting them, is a first step toward the abolishment of grey area competition restraints. However, this trade policy approach needs to be complemented by an international competition law approach due to enforcement problems and possible circumvention.

Export cartels also require an international approach because effects on different countries cause conflicts of law and political conflicts. The "prisoners dilemma" requires a mutual abandonment of export cartel exemptions as a public good. International cartels cannot be supervised and controlled by single countries applying national law. The prospects for global solutions depend on the development of the World Trade Organization. Without a successful implementation of a rule-oriented trade system, a return to a power-oriented bilateralism would also hinder global competition rules.

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202 *See, e.g.*, Sir Leon Brittan, *Competition Policy in the European Community: What's new in the Old World?*, 14 WORLD COMPETITION 5 (1991); Wolfgang Kartte (former President of the German Federal Cartel Office), *Ein Handelskodex der Grossen Sieben*, FRANKFURTER ALLGEMEINE ZEITUNG, Feb. 15, 1992, at 13; Nicolaides, *supra* note 177; L.J. Bergstrom, *Should the GATT be Modified to Incorporate a Restrictive Business Practices Provision?*, 17 WORLD COMPETITION L. & ECON. REV. (1993); Bernhard Dujim & Helen Winter, *Internationale Wettbewerbsordnung - Alternativen und ihre Probleme*, WIRTSCHAFT UND WETTBEWERB 465-474 (1993); Edwin A. Vermulst, *A European Practitioner's View of the GATT System*, 16 WORLD COMPETITION 5 (1993); Ernst-Ulrich Petersmann, *Proposals For Negotiating International Competition Rules In the GATT-WTO World Trade and Legal System*, AUSSWIRTSCHAFT 49 (1994); *OECD Committee Lacks Enthusiasm for Draft International Antitrust Code*, Antitrust & Trade Reg. Rep. (BNA), at 771 (Dec. 16, 1993).