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The Janus-Face of Competition Policies

*Kurt Stockmann**

I. THE EXPORT CARTEL PROBLEM

Professor Rahl's critical statement on competition policies unfortunately is accurate. Where such policies have been adopted and implemented, they are two-faced like the Roman god of time, one face looking at the domestic market and the other at the markets of the rest of the world. As far as the domestic market is concerned, the policies that are formulated are, in general, reasonably consistent with the adopted basic principles of effective competition. Of course, in many countries there are still regulations, exemptions, and exceptions that are not easily compatible with these principles, and implementation is sometimes even more difficult. In comparison to policies relating to foreign markets, however, there is much less hypocrisy and inconsistency, at least between the principles adopted and the policies formulated, with perhaps a little more in implementation.

In policies directed towards foreign markets, the incompatibility between the principles adopted and the policies formulated is blatant, and even worse, these policies are very often quite effectively implemented. Such competition related policies, whether they belong to the domain of competition policy itself or to trade policy, can justifiably be characterized as so shortsighted and egoistic that a comparable attitude would not be tolerated in any group of individuals. At best, such policies do not care whether another country's competition is restrained, thereby reducing or eliminating all the benefits attributed to effective competition. More often, such policies encourage, authorize, and even compel restraints of trade affecting other countries more or less seriously.

The Federal Republic of Germany is a typical, although not extreme

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(and in the field of competition related foreign trade policies even mild), example of such attitude towards foreign markets. The German Act Against Restraints of Competition ("ARC")¹ provides in Section 98(2) sentence 1 for the applicability of German antitrust law to all restraints of competition which have effects on the Federal Republic of Germany, even if they result from acts done outside this country. This sweeping rule based on the effects principle has been limited to some extent over the years by administrative and court practice. The Federal Cartel Office has been especially cautious to apply the law only in cases where the illegality of the act appeared clear and compliance with a decision likely or enforcement possible.² Still, the basic and accepted philosophy of the law remains to defend domestic competition against the rest of the world.

The other side of this rule is that, on principle, restraints of trade having anticompetitive effects only abroad but not on German territory, even if originating in Germany, do not fall under the law. Special rules apply to export cartels, as in most countries with an antitrust legislation. Under section 6(1) of the ARC, "pure" export cartels are exempt from the general ban on cartels if they have been notified to the cartel authority, while "mixed" export cartels require a formal authorization under section 6(2) of the ARC.³ The reasons given for this exemption closely resemble those proposed in support of other legislation: (1) to facilitate export activities, especially those of small and medium-sized firms otherwise unable to export effectively, and (2) to counterbalance competitive disadvantages of domestic enterprises in foreign markets where no or less strict antitrust laws apply, or where powerful foreign cartels or monopolists, particularly monopsonistic buyers, are operating.⁴

In 1967, the Federal Cartel Office expressed doubts about these justifications for an export cartel exemption, pointing to the fact that such cartels had frequently been used as the basis for additional illegal restraints of trade in domestic markets.⁵ Furthermore, the Minister of Ec-

¹ Gesetz gegen Wettbewebsbeschränkungen, BGB1.I 1761 (Sept. 24, 1980)[hereinafter ARC]. An English translation is reproduced at Stockmann & Strauch, 5 WORLD LAW OF COMPETITION (FEDERAL REPUBLIC OF GERMANY), pt. 9, app. 1 (1988).

² See Stockmann, *Foreign Application of European Antitrust Laws*, 1985 FORDHAM CORP. L. INST. 251, 266 (1986).

³ Under the ARC, pure export cartels include only "agreements and decisions which serve to protect and to promote exports, insofar as they are limited to regulation of competition in markets outside the area to which [the ARC] applies," while mixed cartels regulate competition in domestic markets as well as foreign markets. ARC, *supra* note 1, §§ 6(1), 6(2).

⁴ *Federal Government Justification of the Draft of an Act Against Restraints of Competition*, Bundestagsdrucksache II/1158, Annex I, at 22.

⁵ 1967 FED. CARTEL OFF. ANN. ACTIVITY REP. 26; 1972 FED. CARTEL OFF. ANN. ACTIVITY REP. 15.

onomics of the Federal Republic of Germany has offered at the United Nations Conference on Trade and Development (“UNCTAD”) to repeal the export cartel exemption under the ARC, provided that other nations would likewise repeal corresponding exemptions in their laws. Not surprisingly, no such consensus has been reached, primarily because no one has really tried.

The Fourth Amendment to the ARC,⁶ dated April 26, 1980, introduced rules which at first glance could be mistaken as steps to bring the two faces of competition policy closer together. First, section 98(2) sentence 2 extended the applicability of the ARC to “pure” export cartels (those having no anticompetitive effects on domestic territory), insofar as enterprises having their seats within the Federal Republic of Germany are participants. It becomes clear, however, that this change in the law was not intended to pay greater deference to foreign interests when one considers that the wording of section 6(1) remained unchanged, and one reads the other changes in the law relating to export cartels.

Under sections 12(2) and 12(3) of the ARC, the Federal Minister of Economics (the cartel authority under the ARC)⁷ in such cases may direct the participating enterprises to discontinue any abuse, direct the cartel participants to modify their agreements or decisions, or declare the cartel agreements or decisions to be of no effect, if (1) the agreements or decisions violate the principles concerning trade in goods and commercial services accepted by the Federal Republic of Germany in international treaties,⁸ or (2) the implementation of the agreements or decisions substantially impairs the predominating foreign trade interests of the Federal Republic of Germany.⁹

As to the first situation in which the Minister of Economics may take action, the rationale appears to be clear. Obviously, the cartel authority must have the power to prevent activities of exempted export cartels which are incompatible with international obligations of the Federal Republic of Germany; potential or actual negative effects on foreign markets as such are of no concern in this context. The second and new alternative situation in which the Minister may take action, however, is in substance not more concerned than the first with the detrimental effects export cartels may produce in other countries. In essence, the second alternative provides an instrument for the Minister of Economics to use

⁶ Viertes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BGBI. I 458 (Apr. 26, 1980).

⁷ ARC, *supra* note 1, § 44(1), no. 2.

⁸ *Id.* at §§ 12(2), no. 1, 12(1), no. 2.

⁹ This second alternative situation in which the Minister may take action was introduced by the Fourth Amendment to the ARC, *supra* note 6.

in situations where German trading interests may be threatened by a foreign country's negative reaction to a German export cartel directed at that foreign country's markets. Thus, the purpose of permitting the Minister of Economics to take action in these circumstances is not to prevent damage to competition in another country or to the principles of effective competition in domestic markets outside these markets. This means that the German rules and similar provisions in Swedish, Norwegian, and Finnish laws do not in fact merge the two faces of competition policies.

One may look a little more benevolently at the second situation in which action may be taken by reasoning that because the law provides a possibility for the Minister to react to a negative response by a foreign government to an export cartel, it may indirectly serve the interests of the affected country. This view, however, appears to be rather theoretical. As yet, there has been no situation in which the Minister of Economics has had to use these powers. This may be mainly due to the fact that affected countries often are not aware that their markets are the target of a foreign export cartel and thus appear to have no reason to complain. Another explanation relates to the phenomenon addressed by Professor Rahl, namely that competent authorities hesitate to take action against foreign export cartels even if they know about them because they fear that their foreign counterparts might attack their own export cartels in retaliation. The motivation for not taking action in such cases may also be the wish not to be so incoherent with one's own policies as to attack restraints of competition that are in all relevant aspects identical to the ones explicitly exempted under one's own law. It is noteworthy that such attitudes have also been adopted by countries which have repeatedly and strongly emphasized that they consider their law applicable to foreign export cartels if these cartels are only tolerated, encouraged, sponsored, or authorized.

Export cartel exemptions should be terminated for many reasons. First, the exemption in some countries goes further than is warranted even by its own purpose. In the Federal Republic of Germany, for example, small- and medium-sized firms unable to export individually do not need an exemption to cooperate because they do not restrain competition by cooperating and thus do not come under the cartel prohibition. To this extent, the exemption is not supported by its own rationale. Another inconsistency with the principles accepted for domestic markets lies, at least under German law, in the rationale to facilitate dealings with foreign monopolists or monopsonists. There is in the ARC, and rightly so, no exemption allowing domestic enterprises facing a domestic monopolist or monopsonist to cartelize.

Second, and this should again be brought to the attention of legislators, export cartels rarely otherwise correspond to the rationale of the relevant exemption. Simplifying only slightly, it may be said that the 1974 Organization for Economic Co-operation and Development ("OECD") Report on Export Cartels¹⁰ came to the conclusion that, as a rule, and judged by the rationale of the respective export cartel exemptions, the wrong kind of enterprises engage in the wrong kind of restraints. In other words, there are few export cartels composed of small- and medium-sized firms engaging in joint market research or establishing common distribution systems abroad, but many cartels operated by large enterprises are fixing prices and allocating territories internationally. In this respect, not much seems to have changed since 1974.

A last, and in my view most important, objection against export cartel exemptions relates to their unacceptable moral and political costs. Taking into account this aspect of export cartels, it does not matter that the share of lawfully cartelized exports in total exports of larger trading nations is generally modest.¹¹ What matters is that the world, especially developing countries, necessarily gets the impression that in this field, undisguised national egoisms and pure economic Darwinism are declared and implemented policies. Consequently, while governments more or less vigorously defend the highly praised benefits of competition in domestic markets, they permit and even encourage businesses to exploit their trading partners in other countries by cartelizing. Praising the benefits of competition and the market economy while allowing one's neighbor to be deprived of these benefits appears hypocritical, if not cynical.

The arguments that each sovereign country must define and look after its own interests, and that it should not be country B's business to protect competition in country A, are not very convincing. Of course, each sovereign country has the right to decide itself whether or not it wants an antitrust law. If a developing country wants an antitrust law, it is free to adopt the effects principle and to defend itself against restraints of competition originating from abroad and affecting its markets. Undeniably, such a step is recommended because it would solve some, if not the majority, of developing countries' problems in this field, especially if they do not join the group of countries mutually tolerating export cartels. Still, restraints of trade are a kind of trade pollution. Just as country B would consider measures taken by country A to prevent the pollution of a river flowing from country A to country B desirable, country B would

¹⁰ OECD COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICE, EXPORT CARTELS, para. 132 (1974)[hereinafter EXPORT CARTELS].

¹¹ *Id.* at para. 56.

also welcome measures taken by country A to prevent the pollution of competition in B. In the long run, as in the prevention of environmental pollution, "this-is-not-my-business" policies are economically, politically, and morally unacceptable in an increasingly integrated world because such policies entail costs which the world cannot afford to pay. Just as there are environmental problems that cannot be solved by individual countries, the problems of international trade and competition cannot be solved alone. Today, the second, ugly face of competition policies is still blind to this message.

More important in economic terms than "classical" export cartels are restraints of competition in connection with trade policies, especially the so-called voluntary export restraints which are at least incompatible with the spirit of, if not in violation of, GATT rules. In contrast to "classical" export cartels, voluntary export restraints are not, at least in the short run, designed to strengthen the position of the participants in foreign markets. Rather, they are designed as a trade policy instrument to protect the target market's home industry from what is considered overly effective import competition. Accordingly, such restraints are regularly suggested by the target countries and then encouraged, sponsored, or even required by the exporting country's government.

The damage such "voluntary"—another euphemism—export restraints can do is often underestimated, and the expected benefits are often overestimated. A study prepared by the OECD Secretariat in conjunction with the work of the OECD Committee on Competition Law and Policy confirms this impression.¹² It states that protectionist measures such as voluntary export restraints have been costly and that costs have increased to the extent that a measure has been successful in suppressing competition.¹³ Among the costs mentioned are increased concentration, increased collusion, and delayed effective adjustment of domestic firms. Little added employment has resulted for domestic firms, and the costs of each job saved to consumers has exceeded by many fold the value of the job.

The winners from such restrictions are the firms, but they benefit in a haphazard and unpredictable way. Among the foreign firms, the large ones regularly benefit, while the smaller ones do so only to a lesser extent or not at all. Domestic firms may profit in the short run at the expense of long-term competitiveness. Thus, on balance, such modern restraints of trade, used as trade policy instruments in contradiction to the rules of

¹² OECD COMMITTEE ON COMPETITION LAW AND POLICY, THE COSTS OF RESTRICTING IMPORTS: THE AUTOMOBILE INDUSTRY (1987).

¹³ *Id.* at para. 35.

GATT or at least in contradiction to its spirit, are as unacceptable as or because of their greater economic significance are even more unacceptable and costly than the "classical" restraints. What is to be done?

II. STEPS TOWARDS A POSSIBLE SOLUTION

At the international level, it seems to be clear that no fast and simple solution is in sight. Vested interests in the existing situation are too important to be easily overcome. Patience and persistence will be necessary as much as the will to act simultaneously in many places.

First of all, an international law solution is not at hand, and to me, it does not appear that it would be useful to attempt to interpret actual customary international law in a way that would allow countries to act against the restraints of competition described above. Too much public international law has already been found where it does not exist in reality, and attempts in this direction may even be counterproductive.

Although this may appear Utopian at the moment, I think that taking up the discussion about an international multilateral agreement about private restraints of trade would be more fruitful. An example of such agreement might be a new charter to replace the Havana Charter,¹⁴ which died in 1950. Although the obstacles to achieve such agreement seem to be insurmountable at the moment, if the discussion is not kept alive, or rather revived, such an agreement will never come. Without such a binding agreement containing elaborate substantive as well as procedural rules, including rules for effective enforcement, no comprehensive and permanent improvement of the situation seems possible.

Reviving this discussion would not only serve this purpose but could also stimulate thinking in other places, including the universal level of the United Nations and its suborganizations, especially UNCTAD, more restricted bodies like the OECD, regional groupings like the European Communities, and individual countries. The Scandinavian countries, for example, have often shown a remarkable susceptibility to such incentives in the past. Admittedly, the UNCTAD Restrictive Business Practices Code ("RBP Code")¹⁵ so far has had no tangible effects on countries' conduct to date, and it seems doubtful whether it should be made a binding instrument in its present form. However, the RBP Code contains a number of rules and principles that could be used as a basis for further

¹⁴ HAVANA CHARTER FOR AN INTERNATIONAL TRADE ORGANIZATION, U.N. Doc. E/Conf.2/78 (1948).

¹⁵ *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, U.N. Doc. TD/RBP/CONF 10/Rev. 1, endorsed by, G.A. Res. 63, 48 U.N. GAOR Supp. (No. 61c) at 223, U.N. Doc. A/RES/35/63 (1980)[hereinafter RBP Code].

discussions, and in this respect, it appears to me to be a quite appropriate starting point. The fact that the necessary political will to do this is lacking at the moment must not be accepted as a reason for resignation. All those who have worked with the United Nations and its suborganizations know that patience and persistence are the primary qualities required to succeed.

The OECD is another international organization which is concerned with international trade and international competition. A revival of the discussion at the universal level would certainly have an additional stimulating effect on this organization. The OECD has already worked in this area, and the results of this work deserve to be mentioned in this context, not only because they are the basis of continuing efforts of this organization itself, but also because they may influence and stimulate discussions in a broader environment. Thus, the OECD Recommendation on Cooperation Between Member Countries in Antitrust Matters,¹⁶ which has been modified and in my view improved several times, is a useful instrument as far as it goes and as far as it is applied. This is the case as regards the exchange of information. The more ambitious conciliation procedure has never been used, although it would allow discussion of the problems connected with an export cartel authorized by one member country and affecting competition in another member country. One of the reasons for not using this instrument appears to be that no member country is willing to use it first. This attitude might change, however, with a growing awareness that something has to be done to find mutually acceptable standards to deal with these issues.

Furthermore, the OECD published a critical report on export cartels as early as 1974,¹⁷ and more recently it reported in economic terms on the even more relevant interaction between competition and trade policies, thereby addressing the highly sensitive issue of voluntary export restraints as well.¹⁸ In its report on competition and trade policies, the OECD takes a critical attitude toward such restraints, emphasizing the desirability of arriving at internationally agreed criteria to deal with them, and stressing the need for competitive considerations to play a greater role in the formulation of trade policies at the international level. In 1986, the OECD also adopted a Recommendation for Cooperation Between Member Countries in areas of potential conflict between compe-

¹⁶ On May 21, 1986, the OECD Council adopted the *Revised Recommendation Concerning Cooperation Between Member Countries on Restrictive Business Practices Affecting International Trade*, OECD Doc. C(86)44 (1986).

¹⁷ EXPORT CARTELS, *supra* note 10.

¹⁸ OECD, COMPETITION AND TRADE POLICIES: THEIR INTERACTION (1984).

tition and trade policies,¹⁹ addressing many of the features of the “second face” of these policies and instructing the Committee on Competition Law and Policy to continue its work in this field. At present, this committee is undertaking a study based on an indicative checklist for the assessment of trade policy measures which was annexed to the recommendation.

The European Communities—in some respects everything but a model in our field of concern, and more Janus-faced than many countries—have occasionally demonstrated some understanding with regard to specific aspects of the distortion of international competition, especially with respect to voluntary export restraints.²⁰ What seems most important at the moment is that member countries should clearly oppose any attempt to reinforce the international side of the Janus face. In addition, they should oppose the creation, in conjunction with the single European market to come in 1992, of a “Fortress Europe” through vigorous protection of competition internally and exportation of restraints of trade. Fortunately, those member countries depending to a large extent on exports seem to be firmly determined to do so, although certainly not for entirely altruistic reasons.

Efforts at the international level are not sufficient to improve the situation. Countries must realize individually that in a world that is getting more and more interdependent economically, “beggar-my-neighbor” competition policies do not pay either economically or politically in the long run. Keeping this in mind, countries should review and eventually repeal “classical” export cartel exemptions and revise their attitudes towards other restraints of international trade in their trade policies, especially voluntary export restraints. As it may be difficult politically to do this unilaterally, countries should engage where possible in multilateral or bilateral negotiations in order to come to agreements on the termination of such policies. Bilateral negotiations may be easier in the beginning, as the existing bilateral cooperation agreements in antitrust matters indicate.²¹

Further efforts at the national level, which do not conflict with cor-

¹⁹ *Recommendation for Cooperation Between Member Countries in Areas of Potential Conflict Between Competition and Trade Policies*, OECD Doc. C(86)65 (adopted Oct. 23, 1986).

²⁰ *Commission Opinion Relating to Imports into the Community of Japanese Products Coming Under the Treaty of Rome*, 15 J.O. EUR. COMM. (No. C 111) 13 (1972); *Second Report on Competition Policy*, Commission of the European Communities, at para. 17 (1973).

²¹ Currently, there are bilateral cooperation agreements between the United States and Australia, the United States and Canada, the United States and the Federal Republic of Germany, and France and the Federal Republic of Germany. See B. HAWK, III UNITED STATES, COMMON MARKET, AND INTERNATIONAL ANTITRUST: A COMPARATIVE GUIDE, apps. 33,34; Stockmann & Strauch, *supra* note 1, apps. III, IV.

responding endeavors at the international level, should be directed towards developing countries. Developing countries are not protected against restraints of competition emanating from foreign countries by the laws of those countries,²² and most developing countries have no anti-trust laws of their own, or the laws they do have are ineffectively drafted or applied. The interest of many developing countries in receiving technical assistance and advice in the antitrust field is growing rapidly. By encouraging developing countries to adopt antitrust laws and enforce them effectively, more developed countries could help developing countries solve some of their current problems relating to international trade. With effective antitrust measures in place, developing countries could take action against foreign export cartels directed at their markets or at least improve their bargaining position if they decided to join those who do not implement such laws in practice vis-à-vis the countries from which the restraints emanate. Such policies would also lead to an increased understanding in developing countries of the problems of international trade and its competitive aspects, thereby improving the basis for truly international solutions through binding multilateral agreements.

This list of possible specific actions is by no means exhaustive and does not represent the complete picture of the ways and means to achieve a coherent, universally accepted order of world competition. It merely attempts to describe some of the desirable and, in my view, necessary steps towards arriving at a situation in which competition policies have only one face. As civil servants and politicians often are not free enough to speak or write about these issues as frankly and radically as they might wish, it appears to me that the academic world has to play a particularly important and challenging role. The collection of empirical evidence beyond what is now available, and an analysis of the economic, social, political and moral implications of the actual situation would help prepare the groundwork for the necessary changes. Those who engage in such work will surely encounter sympathy and find assistance in many places, including both international organizations and national administrations.

Professor Rahl has been one of those most engaged in such efforts. He has spoken and written about competition policies for many years in many places, thereby increasing awareness and understanding of the issues in many countries. As this is what we need most at this time, it is to be hoped that he finds many as competent and convincing followers.

²² *First Draft of a Model Law or Laws on Restrictive Business Practices to Assist Developing Countries in Devising Appropriate Legislation*, U.N. Doc. TD/B/C.2/AC.6/16/Rev. I (1979).