EXPORT CARTELS: A CALL FOR REGULATION

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ABSTRACT

Competition law has been put in place to monitor anti-competitive practices within various industries and amongst the actors involved in them. Cartels are considered to be the most harmful form of anti-competitive agreements as they not only harm the economy but also take away fair choice as well as the best price from the customers. Cartels are condemned by all existing antitrust regimes; however export cartels have been given the status of an exemption under the pretext of not having adverse effects within the domestic market. In the era of free economy, it would be imprudent to consider that export cartels will not have a spill over effect on domestic economy and not lead to price/quantity manipulation within the country. This oversight will be detrimental to the consumers in the long run. There is a need to collect sufficient information and data on export cartels with a multinational solution combating the menace of export cartels.

Keywords: Export, Cartel, Competition, Anti-competitive Agreements

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INTRODUCTION

Potash is of vital importance in agriculture as it is used in fertilizers for crops. The largest reserve of Potash is found in Canada, Russia and Belarus. Taking advantage of this, the producers of Potash in Canada created a cartel ‘Canpotex’ for managing their international sales whereas the producers in the remaining two nations created their own cartel and thus controlling together at least seventy percent of world export of Potash. Due to the tight control on the supply, the prices of Potash spiked drastically from $200 per K2O tonne in 1980s to $825 per K2O tonne in 2009.

India does not have a Potash reserve of its own and depends heavily upon imports of it. It imported over five million tons of Potash in the year 2009 alone at the cost of US $2.5 billion. Till July 2017, the import was expected to be four million tonnes. The government in India gives subsidy on fertilizers to the farmers. In a study on competition law it was noted that:

If we assume that India needs an average of 6.5 million tons of potash per year between 2011 and 2020, the overcharge it will pay each year will be on average US $ 1.2 billion, if it succeeds in getting an 18% discount (as China), and could reach $ 1.6 billion toward 2020 when the pressure of demand will be greatest.

Thus, if the Indian government keeps on paying an annual subsidy of $1.5 billion to make potash fertilizers more affordable for Indian farmers, from 80% to 100% of this subsidy will in fact finance the monopolistic rent that potash producers will enjoy on their sales to India thanks to the restrictive practices…

Stiff opposition from India and China who suffered from overpriced import of Potash at the hands of these cartels for years lead to subsequently Russian companies walking away from

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2 Price at the Saskatchewan mine gate
5 Supra
the cartel⁶ and a fall in the price of Potash in past couple of years. It is speculated that lower Potash prices would have an eventual spillover effect by reducing the cost of fertilizers and thereby bring down the cost of production of food grains and fruits.

The above case is an example of the curious nature of ambivalence that exists when competition law overlooks cartelization in an international scenario. In domestic markets cartels are considered to be the most pernicious form of restrictive agreements causing harm to not only consumers but to the economy in general and are as a result, condemned unanimously. A cartel is a group of firms that seeks to increase profits by restricting price and output competition among themselves. The fundamental result of the theory of cartels is that cartels are unstable, in the sense that they are not ‘self-enforcing.’⁷

Under the Indian competition law, a ‘cartel’ has been defined as ‘an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price, or, trade in goods or provision of service.’⁸

Horizontal agreements regarding price fixing, market or client allocation, limiting production and group boycotts are as a general rule considered the various ways in which cartels manifest themselves. The competition authorities worldwide agree that ‘if competition law is about one thing above all, it is the detection and punishment of hard core cartels.’⁹

There are various factors which led to formation of a cartel. In one of the cases¹⁰, the Competition Commission of India (CCI) highlighted them as:

Oligopolistic markets- Where in a market there are few small firms, it is easier establish and maintain a cartel.

1. Homogeneity- When the products sold are homogeneous, then it is easy to enter into a cartel agreement.
2. Inelastic demand of the product/ service.

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⁸ Sec 2 (c), Competition Act, 2002.
¹⁰ FICCI- Multiplex Association of India v. United Producers/ Distributors Forum (03.01.2013- CCI)
3. Lesser governmental regulation in the sector
4. High benefits inspite of high costs of creating or continuing a cartel. This price is fixed at a monopoly level so that if the producers do not keep the supply sufficiently low in relation to demand and thereby creating an artificial construct of shortfall in the market.\textsuperscript{11}
5. Geographically concentrated markets are more susceptible to have cartelization amongst the producers.

The competition authorities have enacted strict laws regarding detection and break up of cartels. Laws relating to anti-competitive agreements and abuse of dominance go a long way in controlling cartels. However, in most of the competition law regimes there are certain ‘exemptions’ laid down. These ‘exemptions’ give immunity to certain agreements/practices which otherwise would be considered anti-competitive within the domestic legal framework. One exemption which is either explicit or implicit in the majority of competition law frameworks is of ‘export cartel’. India exempts under Sec 3(5) of the Competition Act, 2002 these agreements from the competition law violation so long as such cartels ‘do not lead to injurious effects on the competition within the domestic market.’

**MEANING OF EXPORT CARTEL**

A cartel, as mentioned earlier, operates when companies collude amongst themselves to fix prices of goods within the domestic market. Such cartels attract national antitrust law. The Organisation for Economic Co-operation and Development (OECD) describes an export cartel to be ‘an agreement or arrangement between firms to change a specified export price and/or to divide export market.’\textsuperscript{12} Export cartels allow companies to fix prices and coordinate conduct that if was done domestically would lead to an antitrust scrutiny. However, through these cartels, exporters are given immunity from the domestic law so long as their conduct affects international market only.\textsuperscript{13}

\textsuperscript{11} Id.
Export cartels must be distinguished from international cartels considering that while in case of export cartel the members/firms which are part of the cartel are from the same country; members of an international cartel may be from different countries. The practice of exempting export cartel is not a new one. There are various rationales for allowing such cartels as they are said to facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade.\(^{14}\) As mentioned in the World Trade Organization’s (WTO) Background Note on hard core cartels\(^ {15}\),

Export cartels fix prices or outputs in the participating firms' export markets but not in their home markets. Import cartels aim to regulate the price or other terms of goods or services that are imported into the participating firms' home markets. In contrast, international cartels generally fix prices, outputs or other dimensions of competition across a number of national markets, often including but not limited to the home countries of the participating firms. Another distinguishing feature is that export cartels are exempted from the national competition laws of many countries, in some cases on a condition of public registration, whereas international cartels often are illegal and typically are carried on in secret unless and until they are investigated and disclosed.

Such cartels however, lead to contradictory stand of antitrust enforcement on domestic and global levels.

**TYPES OF EXPORT EXEMPTION**

The phenomenon of export cartel has insufficient data and information available globally for it to be understood properly. In their paper titled ‘the changing international status of export cartel exemptions’\(^ {16}\) the authors have thrown light on classification of exemptions available to export cartels in different countries. There are mostly two types of such exemptions:

a. Explicit exemption- These exemptions are those that are granted by the statute itself. These are further divided into exemptions which require notifications or authorisations and those which do not require notifications. Countries such as the United States and

\(^{14}\) Supra 10


Australia have export exemption but require prior notification. Whereas Canadian competition law provides a good example of an explicit exemption without a notification requirement.

b. Implicit exemption- These exemptions exist when a national antitrust statute applies only to anti-competitive conduct affecting the domestic market. Most of EU members have implicit exemptions. Such an exemption is granted by negative implication, since the scope of the antitrust law is limited, and does not explicitly mention behaviour affecting foreign markets. 17

Other than the two obvious forms of exemptions mentioned above there are also several nations which do not have any statutory exemption given to export cartels in the first place. This occurs when price fixing is illegal, and there is not an implicit exemption, because the antitrust statute simply does not define the geographic scope of the market, nor is there an explicit exemption allowing price fixing for export-oriented activity.18 Indian export exemption can be classified as an explicit exemption, though there are no further regulations laid down nor any form of a formal notification requirement has been established. The Competition Act, 2002 does, however, distinguish between and exempts export cartels, as opposed to import cartel between enterprises located outside India with the aim of cartelizing in a relevant market within India.19

JUSTIFICATION FOR EXPORT EXEMPTION

The most common reason for allowing such agreements is that the effects of such collusive activities are not felt within the country. However, from the antitrust perspective, the effects of export cartels can be in both domestic and foreign market:

While empirical research on the effects of export cartels remains inconclusive no country has a strong incentive to ban export cartels unilaterally provided they do not adversely affect competition in domestic economies, either explicitly or implicitly. Implicit exclusions are as good as an explicit one as far as action by the home authorities is concerned. Studies have

17 Supra 12
18 Id
19 Abir Roy And Jayant Kumar, Competition Law In India, Eastern Law House, 2nd ed 2014.
shown that fifteen countries maintain these exemptions. It may well be inferred from this treatment of export cartels under a competition regime that the same activity would be illegal if it were pursued domestically but since the exported quantities affect foreign markets and generate revenue in the process, they are exempt from the competition regime of the country. Or in other words, while monopoly rents accrue to the home country, the consumer loss due to high prices is mostly felt in the foreign (importing) countries leaving little incentive for exporting countries to regulate such activity.20

Florian Becker’s in his article21, suggests strategic trade rationale for allowing export cartels. According to him strategic trade theory which became part of the trade policy debate in the 1980s had: One purpose ... for a firm to shift rents from another firm to its own through a change in the strategic interaction between the firms. Government policy is a mechanism to undertake such a rent shift. The incentive of a government to shift rents in favour of domestic firms is that such a policy improves a country’s terms of trade. In such settings, antitrust policy may be trumped by strategic trade objectives. Strategic trade suggests that a government created export cartel immunities to improve its terms of trade.

Hence, it seems that government considered benefits of export cartels on the domestic trade. However, what Becker fails to address ‘is any empirical evidence that suggests whether such an approach creates any gains from such a policy and at what cost’.22 Export cartels are most often discussed theoretically as if they have no effect on the domestic market. This can be considered to be an ‘unrealistic description.’ When the members of an export cartel also account for the larger domestic production, their decision relating to export is most likely to have influence on the domestic market as well and therefore, on the domestic prices. Exchange of information relating to such export cartels can also create conscious parallelism within the concerned domestic market. Export cartels can also have indirect spill over effect of tacit collusion leading to encouragement of hard-core cartels within the exporting countries. According to David Larson’s analysis of American antitrust exemptions for export cartels,

21 Florian Becker, Thee Case of Export Cartel Exemptions: Between Competition and Protectionism, 3 J. Competition L & Econ.97, 100 (2007).
22 Supra 11
it would be naïve to expect association members to ignore the domestic market while they freely discuss prices and quotas for exports…We are left with the conclusion that the creation of an export association provides an excellent chance for large oligopolists to peacefully coexist both at home and abroad.23

Further, the indirect spill over effect can also occur if an export cartel which has a strong market presence within the international market creates a worldwide shortage or artificially raise the prices worldwide way above the competitive level thereby indirectly increasing the domestic prices of the products as well. Therefore, export cartels eventually will have some effect on the local markets.

Export cartels may reduce or enhance consumer and aggregate welfare depending upon the circumstances. The relevant circumstances include the character of the cartel and the markets in which it operates. Where the cartel is comprised of small to medium sized businesses and its aim is to increase the value of exports by reducing costs or improving products, the cartel is likely to be welfare enhancing. Such cartels may increase the level of competition in the foreign market thus benefiting foreign consumers as well as the cartel members. There is no reduction in consumer welfare in either the exporting or the importing state. In competition terms, these cartels are a legitimate organisational structure. They present no global competition problem.24

In case where firms which enter into export cartel have large share of the foreign market, the cartel ‘has the capacity to extract supra-competitive benefits in the importing state’. Loss of consumer welfare may also occur of the importing state without any increase in producer welfare.

OPTIONS FOR REGULATION OF EXPORT CARTEL

It is ironic that though the antitrust law is growing stronger and more complex, export cartels are given the benefit of a special treatment in the era of globalisation and inter-dependence.


The numbers of export cartels reported globally are very less. Apart from government’s attitude towards export cartels, there exists an obvious difficulty in detecting, investigating as well as prosecuting foreign export cartel members. Due to the lack of empirical evidence and public information on foreign government’s policy, most countries take the step of not extending the competition law on export activities leading to further un-reporting. Out of the countries which are members of Organization for Economic Co-operation and Development (OECD), only Japan, Germany, the United Kingdom and the United States have set up a registration mechanism for such export agreements.

There are number of solutions to curb export cartels. These range from a categorical ban on them along with immunities imposed by an international organisation to a more gradualist approach i.e. allowing each country an export cartel exemption in up to three industries. A complete or partial ban is difficult to execute as ‘export cartels are case-specific and some export cartels may have ancillary justifications for their conduct. Hence, ‘a general ban on immunities may not optimize global welfare.’

Another approach is through a multilateral body such as World Trade Organization (WTO) which can be a good choice to consider as a regulatory body to monitor and prohibit export cartels. Some already existing WTO provisions can be used to combat export cartels. For instance, GATT Article XI prohibits both import and export quotas. Both the China – Raw Materials and China – Rare Earths cases addressed the issue of export quotas and ultimately ruled they were inconsistent with Article XI. Another more innovative approach is to create a new set of remedies within the WTO to address overcharges by creating a reverse anti-dumping style remedy. This could ‘lighten the evidentiary burden of prosecuting both multi-

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country international cartel and single-country export cartel’. Where the export price exceeds the normal value, the importing country could retaliate against the exporting firm.\(^{30}\)

**CONCLUSION**

Overall, the effects of export cartels is mutually welfare reducing. Export exemptions further prevents those who have the information on such cartels to assist those in other nations who have been harmed by them to further investigation and punishment. Since they undermine international trade law as well, the issue relating to these cartels should be tackled by not only competition law but also by international trade law. It’s the author’s submission that a more nuanced approach incorporating both these fields of law is required to tackle export cartels globally. Already European Union and Japan have forwarded the view that export cartels distort trade and should be banned. From the Indian perspective specially, since no clarity or study exists upon the existence, effects or treatment of export cartels, it is imperative for Competition Commission of India to bridge the gaps and take urgent actions. With recent uncovering of export cartels such as Potash cartel, it is clear that the unaddressed issue of export cartel is not going to vanish on its own; it needs to be made part of the international agenda for a more pragmatic solution than the present oversight.

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