

Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?

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In 2003, the Inter-American Juridical Committee of the Organization of American States released its final report pertaining to competition and cartels in the Americas. In the light of the work undertaken by this committee in that matter, this paper investigates the issue of export cartels in the Americas. It first analyses the rationality of export cartels and their various anticompetitive effects on international trade, on domestic markets and on developing countries, which make up the majority of the states in the American hemisphere. It also describes the treatment of export cartels in three major countries in the Americas: the United States, Canada and Brazil. It advocates for an informal harmonization of the national competition laws of American countries, held within the OAS framework, geared towards the explicit exemption system that comes with a notification requirement. This informal harmonization process would provide a remedy to the scarcity of empirical information on the activities of export cartels; it would facilitate legal proceedings instituted by developing countries against export cartels adversely affecting their domestic market; and it could contribute to the fostering of an inter-American awareness on competition law and economic integration issues.

I. INTRODUCTION

Competition law has become a topic that cannot be ignored in the activities of the major international organizations of the world. Currently, there is a favourable trend towards competition policy on the international scene, as evidenced, *inter alia*, by the *Recommendation of the Council Concerning*

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*Action against Hard Core Cartels*¹ of the Organization of Economic Cooperation and Development (OECD), by the creation of the International Competition Network,² and by the Working Group on the Interaction between Trade and Competition Policy within the context of the World Trade Organization (WTO).³ The Organization of American States (OAS) has followed this trend, and accordingly, its General Assembly (GA) has requested that the Inter-American Juridical Committee (IAJC) study competition law issues in the Americas.⁴ In 2003, the IAJC published its final report entitled *Competition and Cartels in the Americas*.⁵

The literature on hard core cartels is copious. The OECD defines a hard core cartel as “an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce”.⁶ This literature nonetheless neglects one type of cartel, which not only rests on a retrograde conception of the international system, but also which generates various anticompetitive effects: export cartels. Export cartels are associations of firms, operating in the same country, that cooperate with one another in various ways, such as fixing common prices in order to export their goods and/or services to the international market. The primary objective of this paper is to provide a comprehensive analysis

¹ OECD, *Recommendation of the Council Concerning Action against Hard Core Cartels*, C(98)35/FINAL (Paris: OECD, 1998) [OECD, 1998 *Recommendation*]. This recommendation does not cover export cartels. See section II(A) for more details.

² See its website: <<http://www.internationalcompetitionnetwork.org/>>.

³ The Working Group was created in 1996 to: “study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework”. See: WTO, *Ministerial Conference Singapore - Declaration*, WTO Doc. WT/MIN(96)/DEC at 20, online: WTO <<http://docs-online.wto.org>>. The Working Group is currently inactive because the General Council decided in 2004 that the issue of competition policy “will not form part of the Work Programme set out in that Declaration [*Declaration of Doha*, 2001] and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round”. See: WTO, General Council, *Doha Work Programme - Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L/579 (2004) at 3, online: WTO <<http://docs-online.wto.org>>.

⁴ See part III for a comprehensive discussion on competition law and cartels within the OAS framework.

⁵ OAS, Inter-American Juridical Committee, 63rd sess., *Competition and Cartels in the Americas*, CJI/doc.118/03 rev.2, reprinted in OAS, Inter-American Juridical Committee, *Annual Report of the Inter-American Juridical Committee to the General Assembly (2003)*, OEA/Ser.Q/VI.34, 171 [OAS, Inter-American Juridical Committee, *Competition and Cartels*]. The final report was published in a monograph in 2005. See: Joao Grandino Rodas & Jonathan T. Fried, *Competition and Cartels in the Americas* (Washington D.C.: General Secretariat of the Organization of American States, 2005).

⁶ OECD, 1998 *Recommendation*, *supra* note 1 at 2(a).

of export cartels within the OAS framework, and to offer a solution to address their adverse effects on developing countries, which make up the majority of the states in the American hemisphere.

This paper advocates for the adoption of an informal harmonization process, held within the OAS framework, which would include a series of non-binding guidelines. These guidelines would be geared towards creating an explicit exemption system, combined with a notification requirement, such as the one prevailing in the United States. Such a system will encourage American states to conform to its provisions. Although the majority of the literature calls for a ban of export cartel exemptions,⁷ this option is unlikely to succeed in the Americas for two important reasons. First, the United States, as evidenced by its position within the WTO framework, is the standard bearer of export cartel exemptions. Second, although the last two drafts of the Free Trade Area of the Americas (FTAA) provide that states agree not to exclude export cartels from the coverage of their national competition laws, the FTAA is now a dead letter.

The alternative put forth by this paper constitutes a realistic solution that could be implanted in the Americas. On the one hand, since the OAS operates on a consensus basis, requiring United States approval, they are much more likely to accept an informal harmonization process geared towards an exemption system that is similar to their own. On the other hand, this harmonization process has many advantages that militate for its adoption and implementation in the domestic law of OAS members. First, the process would be a remedy to the dearth of empirical information on the activities of export cartels, which is currently lacking. States will be able to gather such information and, in the medium or long-term, be able to make informed decisions on the desirability of preserving or prohibiting export cartels. Second, the process would facilitate legal proceedings instituted by developing countries against export cartels that are adversely affecting their domestic markets. In that regard, 32 out of 35 states in the Americas will be better off with this harmonization process.⁸ Third, the process would

⁷ See generally: Paul Victor, "Export Cartels: An Idea whose Time has Passed" (1991-1992) 60 *Antitrust L.J.* 571 at 581; Eleanor M. Fox, "Competition Law and the Millennium Round" (1999) 2 *J. Int'l Econ. L.* 665 at 675; Daniel K. Goldberg, "Competition Policy and International Treaty Negotiations: What Now?" (2003-2004) 39 *Tex. Int'l L.J.* 647 at 653; UNCTAD, *Closer Multilateral Cooperation on Competition Policy: The Development Dimension. Consolidated Report on Issues Discussed during the Panama, Tunis, Hong Kong and Odessa Regional Post-Doha Seminars on Competition Policy Held between 21 March and 26 April 2002*, 2002 at para. 55, online: UNCTAD <<http://ro.unctad.org/en/subsites/epolicy/gvaJuly/docs/DohaFinal-en.pdf>> [UNCTAD, *Closer Multilateral Cooperation*].

⁸ The OAS has 35 member states. Considering that Canada and the United States are developed countries and that Cuba, although remaining member of the OAS, has been excluded from its activities since 1962, this leaves 32 developing countries that could benefit from this harmonization process.

contribute to the development of an inter-American awareness on competition law and economic integration issues.

The paper is divided into five parts. Part I deals with the rationality of export cartels. It sets forth a list of the justifications for exempting export cartels from the coverage of national competition laws. Part II examines the various effects of export cartels. It demonstrates that these cartels not only distort international trade, but that they also indirectly affect domestic markets through the spill-over effects of tacit collusion. This part also illustrates the adverse effect of export cartels on developing countries that are generally price-takers, and are often powerless to prosecute export cartels adversely affecting their domestic markets. These states cannot effectively prosecute export cartels because they lack extra-territorial enforcement capacity, technical expertise, and evidence that is located abroad and usually kept secret provided there is not an explicit exemption system that comes with a notification requirement. Part III considers the legal activities of the OAS, including the FTAA, regarding competition law and cartels in the Americas. It underscores that, although the rapporteurs appointed by the IAJC to conduct the study on cartels did not conclude to the desirability of harmonizing national competition laws, this alternative has not been shelved. In that regard, one has to keep in mind that the harmonization process advocated by this paper is not only in accordance with section 99 of the *Charter of the Organization of American States*,⁹ but also with the Inter-American Program for the Development of International Law. Part IV offers a concise overview of the competition laws of three major countries in the American hemisphere, more specifically, focussing on their treatment of export cartels. This part analyzes Canadian law (explicit exemption system with no notification requirement), American law (explicit exemption system that comes with a notification requirement), and Brazilian law (implicit exemption system). Finally, part V highlights why an informal harmonization process is the best vehicle to achieve what the paper is calling for, and how it could be conducted within the OAS framework. It points out that this harmonization process is in accordance with section 99 of the *OAS Charter*, and with the Inter-American Program for the

⁹ 1948, 119 U.N.T.S. 49 (entered into force 13 December 1951) [*OAS Charter*] as amended by the *Protocol of Amendment to the Charter of the Organization of American States*, 27 February 1967, 721 U.N.T.S. 324 (entered into force 12 March 1970) [*Protocol of Buenos Aires*]; *Protocol of Amendment to the Charter of the Organization of American States*, 5 December 1985, 25 I.L.M. 527 (entered into force 16 November 1988) [*Protocol of Cartagena de Indias*]; *Protocol of Amendment to the Charter of the Organization of American States*, 14 December 1992, 33 I.L.M. 1005 (entered into force 25 September 1997) [*Protocol of Washington*]; *Protocol of Amendment to the Charter of the Organization of American States*, 10 June 1993, 33 I.L.M. 1009 (entered into force 29 January 1996) [*Protocol of Managua*].

Development of International Law. It also explains in more depth the three aforementioned advantages to this process.

II. THE RATIONALITY OF EXPORT CARTELS

This part addresses the rationality of export cartels. It begins with a taxonomy exercise, and then it points out that the traditional rationale for permitting export cartels rests on a retrograde conception of the international system. In addition, this part analyzes the rationality of export cartels in the light of two economic theories, the strategic trade policy and efficiency gains theories, and concludes by “creating” a new category encompassing other rationales.

A. The Taxonomy of Export Cartels

The Committee of Experts on Restrictive Business Practices (CERBP) of the OECD has set forth the most quoted taxonomy of export cartels.¹⁰ The first relevant element to consider before proceeding to categorization is the indented scope of an export cartel. The question to be asked is whether the cartel affects competition on foreign markets exclusively, or if it affects competition on both foreign and domestic markets. The former export cartel is defined as a “pure export cartel,” whereas the latter is defined as a “mixed export cartel.” The second relevant element in the categorization process is the nationality of cartel members. When an export cartel is composed of exporters from several countries, it is categorized as an “international export cartel.” If it is composed of exporters from a single country, it is defined as a “national export cartel.”

Another distinction to be drawn is the nature of the legal exemption giving rise to the birth to an export cartel. In that regard, the taxonomy proposed by Margaret Levenstein and Valerie Suslow is composed of three categories: explicit, implicit and no statutory exemptions.¹¹ A state has an explicit exemption system when a statute explicitly excludes export cartels from the scope of its national competition law. There are two types of explicit exemptions. There are explicit exemptions that come with a notification or an authorization requirement, such as in the United States, and those that do not, which is the case in Canada.¹² An implicit exemption exists when domestic competition law covers only the conduct of firms operating on the national market, which is the case in the majority of

¹⁰ OECD, Committee of Experts on Restrictive Business Practices, *Export Cartels* (Paris: OECD, 1974) at 7 [OECD, *Export Cartels*].

¹¹ Margaret C. Levenstein & Valerie Y. Suslow, “The Changing International Status of Export Cartel Exemptions” (2004-2005) 20 *Am. U. Int’l L. Rev.* 785 at 800-06.

¹² Export cartels in Canadian and American law are discussed in Part IV.

European Union member countries.¹³ A no statutory exemption consists of a legal system where price fixing is prohibited, and where there is neither an implicit exemption system limiting the scope of the competition law to the national market, nor an explicit exemption system authorizing firms to fix the prices of commodities or services for export purposes. Luxembourg, Russia, Thailand, and Uruguay are some countries where such a system exists.¹⁴ Finally, it worth mentioning that one of the rapporteurs of the IAJC in charge of conducting the research on cartels in the Americas underscored that he is “not aware of any country [including non-American countries] prohibiting export cartels under its competition law.”¹⁵

B. The Rationales for Excluding Export Cartels from the Scope of Domestic Competition Law

Legally speaking, the traditional rationale for permitting export cartels in domestic competition law is based on a retrograde conception of the international system. Since national competition laws aim to protect the efficiency of the domestic market, anticompetitive behaviour that affects a foreign market is not meant to be covered by these domestic laws. For instance, in one of its famous case involving an export cartel, the Court of Justice of the European Communities held that an agreement, that “is specifically directed at exports of oil to a non-member country is not in itself likely to restrict or distort competition within the common market.”¹⁶ As will be discussed in part II, this conception simply disregards the various anticompetitive effects that export cartels might have on the international trade system, on domestic markets, and on developing countries. That being said, this legal rationale rests on a mercantilist paradigm¹⁷ under which the policy is nothing other than “enriching oneself at the expense of one’s trading partners.”¹⁸ That is precisely why Paul Victor considers that:

¹³ Levenstein & Suslow, *supra* note 11 at 805.

¹⁴ *Ibid.*

¹⁵ OAS, Inter-American Juridical Committee, 61st sess., *Cartels and Competition Law in the Americas: Hard Core cartels and Export Cartels*, CJI/doc.102/02, reprinted in *Annual Report of the Inter-American Juridical Committee to the General Assembly (2002)*, OEA/Ser.Q/VI.33, 77 at 80.

¹⁶ *Bulk Oil v. Sun International*, C-174/84, [1986] E.C.R. I-559 at I-589.

¹⁷ See generally: Simon J. Evenett, Margaret C. Levenstein & Valerie Y. Suslow, “International Cartel Enforcement: Lessons from the 1990s” (1997) *World Trade Organisation* 1221 at 1230; OAS, Inter-American Juridical Committee, 61st sess., *Cartels in the Sphere of Competition Law in the Americas*, CJI/doc.106/02, reprinted in *Annual Report of the Inter-American Juridical Committee to the General Assembly (2002)*, OEA/Ser.Q/VI.33, 83 at 95 [OAS, Inter-American Juridical Committee, *Cartels in the Sphere of Competition Law*].

¹⁸ Levenstein & Suslow, *supra* note 11 at 813.

while antitrust immunity for export cartels once may have made sense for countries looking only at their individual interests, it has no place in a global trading system based on the principle that we are all better off in a world without artificial trade barriers and one in which competition is maximized. Under such a system, export cartel antitrust immunity stands out as a remnant of the “beggar-thy-neighbour” policies of a bygone era. In short, it is an idea whose time has passed.¹⁹

In the same vein, Andrew Dick argues that “[e]xport cartels offer the benefits of interfirm cooperation – whether these take the form of lower average selling costs or increased rates of return on export sales – without the costs: any potential anti-competitive price effects will be borne by foreign rather than domestic consumers.”²⁰ [emphasis added.]

The OECD considers that “[t]he rationale for permitting export cartel is that it may facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade.”²¹ In so doing, the OECD merely reiterates the traditional assumption that:

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.²²

In order to achieve an exhaustive depiction of the rationality of export cartels, one has to propose an analysis that transcends this traditional assumption. This paper attempts to achieve this goal based on an analytical framework that rests on three elements: the strategic trade policy theory, the efficiency gains theory, and the miscellaneous rationales of export cartels.²³

According to the strategic trade policy theory, a state exempts export cartels from the scope of its national competition law with a strategic view of

¹⁹ Victor, *supra* note 7 at 581.

²⁰ Andrew R. Dick, *Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting?* (Los Angeles, University of California, 1990) at 6, online: University of California, Department of Economics <<http://www.econ.ucla.edu/workingpapers/wp601.pdf>> [Dick, *Export Cartels*].

²¹ OECD, *Glossary of Industrial Organization Economics and Competition Law* (Paris: OECD) at 43-44, online: OECD <<http://www.oecd.org/dataoecd/8/61/2376087.pdf>>.

²² Ulrich Immenga, “Export Cartels and Voluntary Export Restraints between Trade and Competition Policy” (1995) 4 *Pac. Rim. L. & Pol’y J.* 93 at 94.

²³ Regarding the strategic trade policy and/or efficiency gains theories, see: Dick, *Export Cartels*, *supra* note 20 at 2-3. For more information on the former theory, see generally: Paul R. Krugman, *Strategic Trade Policy and the New International Economics* (Cambridge, Mass.: MIT Press, 1986); David Richardson, “The Political Economy of Strategic Trade Theory” (1990) 44 *International Organization* 107; Daniel Sokol, “What Do We Really Know about Export Cartels and What is the Appropriate Solution?” (2008) 4 *Journal of Competition Law and Economics* 967, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1144003> at p. 3.

facilitating the exercise of market power by its national exporting firms. The Canadian Department of International Affairs and International Trade refers to this theory in one of its Policy Staff Papers, where it is stated that “[e]xport cartels are increasingly coming to be viewed as an instrument of strategic trade policy. A national government exempting its export cartels, it is argued, would permit cartels based in its territory to capture supra normal profits in international markets.”²⁴ More specifically, this theory stipulates that if a country has power on foreign markets, its national firms create a negative externality affecting one another if they behave in accordance with a perfect competition model. Andrew Dick explains that:

Collectively, competitive firms will export more than a monopolist would, leading to a less favorable external terms-of-trade and a lower industry rate of return. A policy permitting export cartels enables firms to internalize this negative externality and thereby exploit the industry’s national monopoly power. According to this theory [strategic trade policy theory], *cartel operation should be associated with a reduced export volume and a higher export price.* [Emphasis added]²⁵

According to this theory, export cartels are thus monopoly-promoting entities. Interestingly, this theory works in accordance with one of the rationales explaining why the United States government enacted the *Webb-Pomerene Act* in 1918.²⁶ At that time, it was believed that higher prices and improved sales terms would be obtained from foreign buyers because of the elimination of competition among American firms.²⁷ As of today, there is no probative empirical data that corroborates or invalidates the postulates of this theory on a general scale, although, as parts II and IV will illustrate, the available data for United States export cartels tend to prove the correctness of this theory.

According to the efficiency gains theory, an export cartel generates efficiency gains by reducing the costs related to selling in foreign markets. This theory includes multiple efficiency gains, such as the following:

- Through the centralization of sales activities, an export cartel avoids costly duplication of services.²⁸ More precisely, it allows members to enjoy lower rates related to export services, such as insurance and freight ;²⁹

²⁴ Canada, Department of Foreign Affairs and International Trade, Policy Staff Paper No. 94/3, *Competition Policy Convergence: The Case of Export Cartels* by William Ehrlich & I. Prakash Sharma (Ottawa: Department of Foreign Affairs and International Trade, 1994) at 2 [Policy Staff Paper No. 94/3].

²⁵ Dick, *Export Cartels*, *supra* note 20 at 2.

²⁶ 15 U.S.C. § 61-66 (2000). Part IV discusses in details this Act.

²⁷ OECD, *Export Cartels*, *supra* note 10 at 47. See also: David A. Larson, “An Economic Analysis of the Webb-Pomenere Act” (1970) 13 J.L. & Econ. 461.

²⁸ Dick, *Export Cartels*, *supra* note 20 at 2.

²⁹ OECD, *Export Cartels*, *supra* note 10 at 47.

- bearing in mind that these sales activities might involve fixed expenditures, coordination among members of the cartel generates economies of scale to be exploited and, assuming that a market is effectively competitive, these lower costs are related to foreign buyers in the form of lower prices;³⁰
- an export cartel may increase the line of merchandise that is offered for export.³¹

Unlike the strategic trade policy theory, the efficiency gains theory should result in an increase in the export volume and a diminution in the price of the exported goods or services. As of today, there is no probative empirical data that corroborates or invalidates the postulates of this theory in general.

Finally, it is proper to “create” a category for miscellaneous rationales. Cartels, including export cartels, are protean phenomenon just as any other complex social reality. Therefore, export cartels:

may be used by the home government to effectuate domestic economic policies, promote employment in export sectors, obtain hard currency from abroad, or implement international agreements and understandings ranging from the prevention of dumping and countervailing duties to the resolution of international trade disputes through voluntary export restraints implemented through an export cartel.³²

Another rationale that is frequently invoked is that national statutes exempting the activities of export cartels from their scope were enacted with a view of promoting and facilitating small and medium-size firms' exports.³³ These exemptions are believed to “level the playing field for small firms that would otherwise be disadvantaged in overcoming the hurdles of entering international markets.”³⁴ Accordingly, export cartels help smaller firms “to overcome the barriers to foreign trade, reduce the overhead costs of exports and resist the power of foreign buying cartels.”³⁵ It is worth underscoring

³⁰ Dick, *Export Cartels*, *supra* note 20 at 2.

³¹ OECD, *Export Cartels*, *supra* note 10 at 47.

³² Spencer Weber Waller, “The Ambivalence of United States Antitrust Policy towards Single-Country Export Cartels” (1989-1990) 10 *Nw. J. Int'l L. & Bus.* 98 at 100 [Waller, ‘Ambivalence of United States Antitrust Policy’].

³³ See: Immenga, *supra* note 22 at 105 where the author makes a comparative analysis of American, German, European and Japanese competition laws and concludes that they were all designed to: “improve or enable exports of small and medium-sized firms that otherwise lack individual export ability”.

³⁴ Levenstein & Suslow, *supra* note 11 at 792.

³⁵ Alexis Jacquemin, Tsuruhiko Nambu & Isabelle Dewez, “A Dynamic Analysis of Export Cartels: The Japanese Case” (1981) 91 *The Economic Journal* 685 at 685. For an analysis of export cartels in Japanese law, see also: Andrew R. Dick, “The Competitive Consequences of Japan's Export Cartels Associations” (1992) 6 *Journal of the Japanese and International*

that this particular rationale accounts for, *inter alia*, the enactment of the *Webb-Pomenere Act* in the United States.³⁶ American officials thought that this Act would be of assistance to small and medium-sized firms by promoting their exports in a world trade system that was over-cartelized; one should recall that on the eve of the Second World War, approximately 40% of world trade was cartelized.³⁷

III. THE ADVERSE AND ANTICOMPETITIVE EFFECTS OF EXPORT CARTELS

This part demonstrates that export cartels may be at best a zero-sum game. Even if it is assumed that they have efficiency-enhancing benefits, the various anticompetitive effects of export cartels may, at some point, nullify them. This part discusses the harmful effects of export cartels on the international trade system, on domestic markets, and on developing countries, which make up the majority of the American hemisphere. It points out that these effects militate for the ban of export cartels, although some might be efficiency-enhancing.³⁸ As specified earlier, this paper does not stand for a complete ban of export cartels. Rather, it takes the position that the OAS member states should harmonize their domestic competition laws towards the explicit exemption system with a notification requirement before envisaging a wholesale prohibition on export cartels.

A. The Effects of Export Cartels on the International Trade System

Information regarding the activities of export cartels is scarce. The OECD acknowledges that “[t]he worldwide economic harm from cartels is clearly very substantial, although it is difficult to quantify it accurately.”³⁹ Based on a 119 case sample, the OECD’s Competition Committee conducted a survey on cartels that operated between 1996 and 2000 in OECD member states.

Economies 275; Mitsuo Matsushita, “Export Control and Export Cartels in Japan” (1979) 20 Harv. Int’l L.J. 103.

³⁶ This justification is, however, not applicable in Japan. See: Jacquemin, Nambu & Dewez, *ibid.*

³⁷ United Nations, Department of Economic Affairs, *International Cartels: A League of Nations Memorandum* (Lake Success, United Nations, 1947) at 2.

³⁸ The United Nations Conference on Trade and Development (UNCTAD) has recently called for a complete ban of export cartels without even taking into account that some might have efficiency-enhancing benefits. That is evidence of an emergent concern and awareness on the international scene regarding the potential harmful effects of export cartels. See: UNCTAD, *Closer Multilateral Cooperation*, *supra* note 7 at 55.

³⁹ OECD, Competition Committee, *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws*, DAFNE/COMP(2002)7, (Paris: OECD, 2002) at 2.

The 16 larger cartels of this sample had a direct impact on international commerce exceeding USD 55 million.⁴⁰ This survey was conducted in accordance with the 1998 Recommendation, whose coverage does not include export cartels.⁴¹ In fact, export cartels are not perceived as a priority within the OECD framework:

The Committee urges such reviews by competition authorities, but given other recent and ongoing analysis of exclusions and authorisations [namely, export cartels], *the Committee does not regard further action in this area to be a priority in connection with its program for bringing about more effective action against hard core cartels.*⁴² [Emphasis added.]

Export cartels nevertheless represent an obstacle to the achievement of an international trade system where the free flow of goods and services is not hampered by anticompetitive agreements.

Export cartels distort international trade by restricting the volume of exports. As supported by case studies, they are generally formed of oligopolistic firms which aim to restrict rather than to promote their exports, thereby imposing a higher price on their exported commodities.⁴³ As indicated by the CERBP of the OECD:

[E]xport cartels may maintain or create barriers to trade by forcing customers to pay high, non-competitive prices or by limiting the quantity of exports. *In such cases they lead to a deliberalisation of international trade*, which jeopardises important economic goals, such as increasing economic efficiency and the optimum supply of commodities to consumers. This is true irrespective of the fact whether export cartels aim at increasing or at decreasing the participant's international ability to compete.⁴⁴ [Emphasis added.]

Unsurprisingly, certain countries recognize that export cartels distort international trade. For instance, the European Union is concerned about anticompetitive practices, including export cartels, because they “could clearly have an adverse impact on international trade including, but not limited to, market access effects.”⁴⁵ Japan took a noteworthy position within the WTO framework by stating that:

Since export cartels usually have a small impact on domestic markets, competition authorities, in general, are not in a position to regulate them. Even if they are, there

⁴⁰ *Ibid.*

⁴¹ OECD, 1998 Recommendation, *supra* n 1 at 3 where it is stated that: “the hard core cartel category does not include agreements, concerted practices, or arrangements that... (ii) are excluded directly or indirectly from the coverage of a Member country's own laws”.

⁴² OECD, *Hard Core Cartels* (Paris, OECD, 2000) at 28.

⁴³ Immenga, *supra* note 22 at 125. See also: Policy Staff Paper No. 94/3, *supra* n 24 at 26.

⁴⁴ OECD, *Export Cartels*, *supra* note 10 at 50.

⁴⁵ WTO, Working Group on the Interaction between Trade and Competition Policy, *Report of the Meeting of 2-3 October 2000 - Note by the Secretariat*, WTO Doc.WT/WGTCP/M/12 (2000), at 10, online: WTO <<http://docsonline.wto.org>> [WTO, Working Group on the Interaction between Trade and Competition Policy, *Report of 2-3 October 2000*].

still remains the problem of whether they are able to regulate, under national laws, practices that do not necessarily affect their domestic market. In addition, it is generally difficult for the authorities of importing countries to regulate such cartels. *Nevertheless, export cartels do distort trade. It would be most significant, therefore, under such circumstances, if the WTO, a multilateral body for international trade, can consider a common regulation against them, including even their prohibition.*⁴⁶ [Emphasis added.]

Additionally, because states are reluctant to ban their export cartel exemptions, these cartels “undermine international trade policies that promote greater market integration and freer international trade.”⁴⁷ This reluctance leads to the fostering of export cartel exemptions in bilateral or multilateral international trade agreements, such as in the *North American Free Trade Area Agreement between the Government of Canada, the Government of Mexico, and the Government of the United States*.⁴⁸ Chapter 15(B) of the *United States North American Free Trade Agreement Implementation Act* holds that:

No changes in United States antitrust laws, including the Export Trading Company Act of 1982 or the Webb-Pomerene Act, will be required to implement United States obligations under the NAFTA. These laws have contributed to the export competitiveness of United States industries and they remain appropriate in the context of a free trade area. Nothing in the Agreement requires any NAFTA government to take measures that would adversely affect such associations.⁴⁹

Furthermore, export cartels have harmful effects on international trade because they have an inherent inertia force on state representatives and they generate trade frictions. Firstly, applying the prisoner’s dilemma, export cartels have an inherent inertia force on state representatives who are unwilling to unilaterally relinquish their export cartel exemptions because of the presumed benefits that they may generate at the detriment of other countries.⁵⁰ In accordance with this observation, the Canadian Department of Foreign Affairs and International Trade considers that “[c]ountries may wish to repeal export cartel exemptions in their national laws, but are understandably reluctant to do so unless major trading partners likewise repeal their exemption and strengthen their enforcement regarding import

⁴⁶ WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Japan*, WTO Doc.WT/WGTCP/W/156 (2000) at 3(b), online: WTO <<http://docs-online.wto.org>>.

⁴⁷ Leveinstein & Suslow, *supra* note 11 at 797.

⁴⁸ 17 December 1992, Can T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

⁴⁹ *North American Free Trade Agreement Implementation Act*, NAFTA Administrative Action Statement, ch. 15(B) (3 September 1993), reprinted in Leveinstein & Suslow, *supra* note 11 at 797-98.

⁵⁰ Immenga, *supra* note 22 at 144. See also: Brendan Sweeney, “Export Cartels: Is there a Need for Global Rules” (2007) *J. Int’l Econ. L.* 1 at 8; Sokol, *supra* note 23 at pp. 3-4.

cartels”.⁵¹ Secondly, as a response to one country’s export cartels, another country may be induced to encourage that type of collusion in its own economy in order to “enable [its] domestic firms to participate on equal terms in international markets.”⁵² As a result, export cartels create trade frictions by establishing an international trend favourable to their worldwide duplication, whose outcome may be lawsuits that “raise legally and politically sensitive issues.”⁵³

B. The Effects of Export Cartels on Domestic Markets

Export cartels are exempted from the scope of national competition laws because it is believed that they have anticompetitive effects exclusively on foreign markets. Indeed, some laws, such as those in Canada, provide that if an export cartel has anticompetitive effects on the domestic market, it will lose the benefit of the statutory exemption.⁵⁴ Although this section discusses the anticompetitive effects of export cartels on domestic markets, it nevertheless admits that they might have some competition-promoting effects on these markets, as evidenced by some strategic alliances, joint ventures, and research and development cartels.⁵⁵ More generally, they may be of assistance to a specific country because they also constitute:

[A] form of social policy (employment, sunset industries, regional industrial policy), risk management (an attempt to manage macroeconomic fluctuations during downturns, limit volatility), and development policy (export promotion, technology transfers, knowledge dissemination, infant industry protection).⁵⁶

⁵¹ Policy Staff Paper No. 94/3, *supra* note 24 at 40.

⁵² Immenga, *supra* note 22 at 129.

⁵³ Victor, *supra* note 7 at 577.

⁵⁴ *Competition Act*, R.S.C. 1985, c. C-34, s. 45 (6). For a more detailed discussion on this provision, see section 4(A).

⁵⁵ See generally: Fasken Martineau DuMoulin, Antitrust/Competition & Marketing Bulletin, “Strategic Alliance or Cartel?”, 2003, online: Fasken Martineau DuMoulin

<<http://www.fasken.com/WEB/FMDWEBSITE.NSF/AllDoc/CA5FD259A9BDA44985256DF300521911?OpenDocument>>; Sang-Ho Lee, “R&D Spillovers, Technology Cartel, and Monopoly Regulation” (1998) 12 *International Economic Journal* 77; Jeffrey I. Bernstein & Pierre Mohnen, “International R&D Spillovers Between United States and Japanese R&D Intensive Sectors” (1998) 44 *Journal of International Economics* 315; Morton I. Kamien, Eitan Muller & Israel Zang, “Research Joint Ventures and R&D Cartels” (1992) 82 *American Economic Review* 1293; John Vickers, “Pre-emptive Patenting, Joint Ventures and the Persistence of Oligopoly” (1985) 3 *International Journal of Industrial Organization* 261; Policy Staff Paper No. 94/3, *supra* note 24 at 22-25.

⁵⁶ Jeffrey Fear, *Cartels and Competition: Neither Markets nor Hierarchies* (Boston: Harvard Business School, 2006) at 26, online: Harvard Business School <<http://www.hbs.edu/research/pdf/07-011.pdf>>.

On top of the scarcity of general literature on export cartels, the analysis of their domestic effects is also complicated by the fact that they are “difficult to evaluate and are not immediately apparent.”⁵⁷

A consensus appears to exist among the relevant literature to the effect that export cartels may affect domestic markets indirectly through spillover effects of tacit collusion.⁵⁸ Christian Schultz argues that export cartels facilitate tacit collusion by monitoring defections more efficiently.⁵⁹ Therefore, the question is how firms competing in both the export and domestic markets take advantage of this relaxing of constraints on tacit collusion, in order to maximize their benefits? If the export and domestic markets are similar, or if there are constant returns to scale, firms tend to reduce production in both markets.⁶⁰ In such a situation, an export cartel leads to an increase in domestic prices, thereby hurting domestic consumers.⁶¹ To empirically illustrate this conclusion, one may refer to Larson’s analysis of the *Webb-Pomerene Act* associations, where it is emphasized that:

The analysis of sulphur, potash and phosphate indicates that effective associations tend to involve anticompetitive domestic effects. [...] it is naive to expect association members to ignore the domestic market while they freely discuss prices and quotas for exports. The domestic market is almost always the more important market. *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.* [...]

My general conclusion is therefore that whenever a successful association is operating, there probably exists an anticompetitive market situation. The result is a net decline in social performance.⁶² [Emphasis added.]

Some papers written both before and after Larson’s analysis have reached the same conclusion, that is, export cartels have an inclination to generate spillover effects in domestic markets; they thus lead to less domestic competition.⁶³ Keeping the focus on the American legal system, what is more astonishing is that when the Congress enacted the *Webb-*

⁵⁷ Immenga, *supra* note 22 at 126.

⁵⁸ Christian Schultz, “Export Cartels and Domestic Markets” (2002) 2 *Journal of Industry, Competition and Trade* 233 at 233. See also: Philip Marsden, *A Competition Policy for the WTO* (London, Cameron May, 2003) at 88; Victor, *supra* note 7 at 577; Immenga, *supra* note 22 at 125-26; OECD, *Export Cartels*, *supra* note 10 at 50.

⁵⁹ Schultz, *ibid.*

⁶⁰ *Ibid.* at 234-35.

⁶¹ *Ibid.* at 234.

⁶² Larson, *supra* note 27 at 497-98.

⁶³ Antoine A. Auquier & Richard E. Caves, “Monopolistic Export Industries, Trade Taxes, and Optimal Competition Policy” (1978) 89 *Economic Journal* 559 at 571-72; Frederic M. Sherer & David Ross, *Industrial Market Structure and Economic Performance* (Boston: Houghton Mifflin, 1990) at 313-14.

Pomerene Act in 1918, its intention was that “export cartels would not ‘adversely or intentionally’ affect domestic prices.”⁶⁴ Only six years later, however, an advisory opinion of the Federal Trade Commission (FTC) stipulated that such cartels that “incidentally or indirectly restrict” domestic prices would not infringe the Act.⁶⁵ The courts abided by this opinion by ruling that export cartels were not liable for ancillary restraints on domestic trade.⁶⁶ In the case *United States v. Minnesota Mining & Manufacturing Co. et al.*, the Massachusetts District court held that:

[I]t may very well be that every successful export company does inevitably affect adversely the foreign commerce of those not in the joint enterprise and does bring the members of the enterprise so closely together as to affect adversely the members’ competition in domestic commerce. Thus every export company may be a restraint. But if there are only these inevitable consequences an export association is not an unlawful restraint. The Webb-Pomerene Act is an expression of Congressional will that such a restraint shall be permitted. And the courts are required to give as ungrudging support to the policy of the Webb-Pomerene as to the policy of the Sherman Act. Statutory eclecticism is not a proper judicial function.⁶⁷

Although this case was decided in 1950, its standard was and remains incorporated in Title III of the *Guidelines for the Issuance of Export Trade Certificates of Review*⁶⁸ that specifies the standards by which firms ought to comply with before the Department of Commerce issues a certificate permitting them to join in an export association under the *Export Trading Company Act* of 1982.⁶⁹

In accordance with Schultz’s analysis, Catherine Ansari sums up the spill-over effects of export cartels as follows:

Joint activity in an export market may diminish or eliminate competition in a domestic market. This may occur either directly, by using exchanges of business information as a forum for discussion and agreement on output or sales policies, or indirectly, by regulating export sales that can lessen domestic competition and

⁶⁴ Andrew Dick, “Why Are Cartels Stable Contracts” (1996) 39 J.L. & Econ. 241 at 247 [Dick, “Stable Contracts”].

⁶⁵ United States, Federal Trade Commission, *Economic Report on Webb-Pomerene Associations: A 50 Year Review. Staff Report to the Federal Trade Commission* (Washington D.C.: United States Government Printing Office, 1967) at 102-06 [United States, Federal Trade Commission, *Economic Report on Webb-Pomerene Associations*].

⁶⁶ Dick, “Stable Contracts”, *supra* note 64 at 247.

⁶⁷ *United States v. Minnesota Mining & Manufacturing Co. et al.*, 92 F. Supp. 947 at 965 (D. Mass. 1950) [*Minnesota Mining*]. See also this case which followed the ruling of *Minnesota Mining: International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 716 F. Supp. 188 (D. Pa. 1989).

⁶⁸ 48 Fed. Reg. 15,937 (1983) [*Guidelines for the Issuance of Export Trade Certificates of Review*]. The first standard that firms ought to comply with is entitled “Substantial Lessening of Competition or Restraint of Trade” (IV(a)). The standard set out by the *Minnesota Mining* case is referred to by a footnote which appears immediately after the first sentence of section IV(a).

⁶⁹ 15 U.S.C. § 4001-21 (2000).

artificially maintain domestic prices. Any drastic change in the volume of United States exports, therefore, may spill over into the domestic market by creating a surplus, shortage or price disruption. Such effects are termed “spillover” because conduct in one market “spills over” into a second market.⁷⁰

In so doing, she reiterates in part what the CERBP of the OECD wrote about the effects of export cartels on domestic markets in 1974:

It is easy to conceive that the efforts to achieve a common export policy and the exchange of information on prices, costs, production lines, capacities, sale policies, etc., may influence the domestic competitive conduct of participating firms. Thus, the “side effect” of most pure export cartels may be a restraint of domestic competition mainly through conscious parallelism. This is all the more likely when it is realised that many export agreements probably impose a cost on the parties concerned in the form of exports foregone. Not only will price rigidity imposed by an export agreement tend to prevent member firms from meeting foreign competition but the agreed price level itself will tend to reflect some average of the costs of all members rather than those of the most efficient members. If the more efficient firms incur losses in export markets the assumption must be made that they obtain compensating advantages on the domestic market by means of the restraints of competition previously mentioned.⁷¹

As noted previously, one of the rationales for exempting export cartels from the scope of national competition laws is that they are believed to have anticompetitive effects in foreign markets, not in domestic markets; but reality has shown the opposite. Although governments, such as in the United States, are aware of these adverse impacts on their domestic market, they have not yet manifested any intention to reform their export cartel legislation accordingly.

C. The Effects of Export Cartels on Developing Countries

It must be underscored that out of the 35 member states of the OAS, only two of them may be classified as developed countries, namely, Canada and the United States. Therefore, although the other OAS member states are currently undergoing development processes at different levels and rates, the issue of whether or not export cartels have adverse effects on developing countries takes on crucial importance in the Americas.

Several authors and WTO member states call for a ban of export cartels invoking the argument that they are detrimental to developing countries.⁷²

⁷⁰ Catherine L. Ansari, “Limiting Spillover and Foreclosure through Title III of the Export Trading Company Act of 1982” (1983-1984) 52 *Fordham L. Rev.* 1300 at 1309-10.

⁷¹ OECD, *Export Cartels*, *supra* note 10 at 50.

⁷² Concerning ‘normal cartels’, Yinne Yu investigated the impact of private international cartels on developing countries. She estimated that the seamless steel tubes cartel had an impact on these countries’ consumers of USD 1.4 billion: Yinne Yu, “*The Impact of Private International Cartels on Developing Countries*” (A.B. Honors Thesis, Stanford University, Department of Economics, 2003), [unpublished], online: Stanford University <http://www-econ.stanford.edu/academics/Honors_Theses/Theses_2003/Yu.pdf>. In

Some authors propound that developed countries should not only ban their export cartel exemptions, but also embark on a policy of active prosecution of their own cartels, thereby allowing developing countries—which lack extra-territorial enforcement capability—to “outsource” enforcement.⁷³ In exchange, developing countries should ensure greater market access to exports of developed countries’ firms.⁷⁴ Aditya Bhattacharjea does not call for a ban of export cartels, but rather advocates for a different approach towards anti-cartel enforcement⁷⁵. He puts forward the idea that, because developing countries lack technical expertise and enforcement capacity, the “rule of reason”⁷⁶ does not constitute a desirable procedural mechanism. His paper suggests a “novel approach, based on parallels with anti-dumping procedures, which would strengthen their hands.”⁷⁷

In the WTO framework, Trinidad and Tobago, on behalf of the Caribbean Economic Community (CARICOM), insisted that export cartels inflict harm, especially on developing countries.⁷⁸ Thailand went further by declaring that “the use of export cartels as a strategic trade policy to extract

another study, based on a sample of 14 international cartels out of the 39 that were known at that time, it was estimated that the impact of international cartels on developing countries amounted to 1.7% of their gross national product. See: UNCTAD, *Closer Multilateral Cooperation*, *supra* note 7 at para. 25.

- ⁷³ Bernard Hoekman & Petros C. Mavroidis, “Economic Development, Competition Policy and the WTO” (Paper presented at the roundtable Informing Doha Process: New Trade Research for Developing Countries, Cairo, 20-21 May 2002) at 26, online: World Bank: <http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/11/22/000094946_02111404425138/additional/117517322_20041117162035.pdf>. On this outsourcing enforcement issue, see also: Florian Becker, “The Case of Export Cartel Exemptions: Between Competition and Protectionism” (2007) 3 *Journal of Competition Law & Economics* 97 at 111-12.
- ⁷⁴ In that regard, Bernard Hoekman and Kamal Saggi argue that developed countries can ban their export cartels exemptions unilaterally. However, realism: “suggests that the principle of reciprocity will require LICs [low-income countries] to make concessions in order to obtain such a policy change. The most obvious deal would involve LICs offering a mix of market access commitments and transfers in return of HIC [high-income country] agreement to discipline export cartels (and similar practices)”. See: Bernard Hoekman & Kamal Saggi, “Tariff Bindings and Bilateral Cooperation on Export Cartels” (2007) 83 *Journal of Development Economics* 141 at 153.
- ⁷⁵ Aditya Bhattacharjea, “Export Cartels—A Developing Country Perspective” (2004) 38 *J. World Trade* 331.
- ⁷⁶ The rule of reason is based on the assumption that not all big corporations or monopolies are *per se* “evil” and it is to the judiciary to decide whether or not they infringe antitrust laws. See generally: Robert H. Bork, “The Rule of Reason and the Per Se Concept: Price Fixing and Market Division” (1965) 74 *Yale L.J.* 775
- ⁷⁷ Bhattacharjea, *supra* note 75 at 331.
- ⁷⁸ WTO, Working Group on the Interaction between Trade and Competition Policy, *Report of 2-3 October 2000*, *supra* note 45 at para. 25.

'rents' from foreign countries is unacceptable".⁷⁹ Thailand, China⁸⁰, Indonesia⁸¹, India⁸² and Egypt⁸³ have also called for a ban of export cartels in developed countries, but they have nonetheless brought into play the principle of "special and differential treatment" to legitimize their own export cartels on the grounds that they are constituted of small firms and, as such, these countries wish to "ensure their [firms'] viability and development so that they can become increasingly efficient and competitive."⁸⁴

Despite all of these statements calling for a ban of export cartels or for a substantial reform of their legal framework, the question remains: What are the alleged prejudices that developing countries suffer from the activities of export cartels? First, export cartels operating from developed countries are injurious to developing countries because the latter's industries are usually "price-takers" as they do not have any control over the prices established by the cartels and are thus obliged to accept them without any possibility of negotiating them.⁸⁵ The developing countries which are inflicted with these raised prices are "often powerless to attack the cartel itself, because any evidence of the agreement will likely only be found in another jurisdiction."⁸⁶

⁷⁹ WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Thailand—Core Principles*, WTO Doc. WT/WGTCP/W/213 (2002) at para. 2.1., online: WTO: <http://docsonline.wto.org/gen_home.asp> [WTO, *Communication from Thailand*].

⁸⁰ WTO, Working Group on the Interaction between Trade and Competition Policy, *Report of the Meeting of 26-27 September 2002*, WTO Doc. WT/WGTCP/M/19 (2002) at para. 78, online: WTO: <http://docsonline.wto.org/gen_home.asp>.

⁸¹ *Ibid.* at para. 53.

⁸² WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from India— Non-Discrimination in the Context of Competition Policy: National Treatment*, WTO Doc. WT/WGTCP/W/216 (2002) at para. 3, online: WTO: <http://docsonline.wto.org/gen_home.asp> [WTO, *Communication from India*].

⁸³ WTO, Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of 26-27 May 2003— Note by the Secretariat*, WTO Doc. WT/WGTCP/M/22 (2003) at para. 33, online WTO: <http://docsonline.wto.org/gen_home.asp>.

⁸⁴ WTO, *Communication from India*, *supra* note 82 at para.11. Thailand also advocates for the principle of "special and differential treatment". See: WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from Thailand*, *supra* note 79 at para. 3.2. In that regard, Bernard Sweeney considers that "some exemption for developing states seems justified. However, the exemption should only apply in so far as the export cartel is exporting to a developed state. Where the cartel is trading with another developing state, no exemption should apply". (Sweeney, *supra* note 50 at 112).

⁸⁵ Marsden, *supra* note 58 at 87.

⁸⁶ *Ibid.* In that regard, Florian Becker argues that: "[e]ven if an LDC [least developed country] were to attempt to investigate or prosecute a foreign export cartel on the basis of the effects doctrine, the evidence of anticompetitive conduct lies abroad, as well as any valuable assets

Second, the less competition an export cartel faces on its domestic market, the more it is able to exert market power.⁸⁷ Accordingly, countries endowed with less developed industries are more likely to be injured by export cartels than countries benefiting from a strong and diverse industrial economy.⁸⁸ In the same vein, Aditya Bhattacharjea believes that “[t]he evidence on cartels suggests that they are found mainly in oligopolistic industries producing homogeneous products, which makes it more than likely that the import-competing industry (if one exists) is also oligopolistic, especially in developing countries.”⁸⁹

Third, as indicated by the CERBP of the OECD, export cartels affect adversely developing countries for the following reasons:

Firstly, export cartels may affect the price and supply of inputs used in exporting industries of developing countries by discriminatory practices and by the refusal to sell certain materials or equipment to developing countries. Secondly, export cartels of enterprises in developed countries may engage in monopolistic practices against their less powerful competitors in developing countries. Thirdly, export interests of developing countries may be adversely affected by international market allocations binding also subsidiaries of cartel members in the developing countries concerned.⁹⁰

Yet as emphasised by Margaret Levenstein and Valerie Suslow, policy-makers around the world need to be vigilant before implementing a policy prohibiting export cartels.⁹¹ They argue that the mere fact export cartels have harmful effects, including harm to developing countries, does not constitute a sufficient ground for banning them. Such a policy could have unintended effects:

For many small firms, especially from countries that have historically been less involved in global markets, entry into global markets is an overwhelming challenge. Cooperation among firms that increases the number of participants in global markets makes competition more, not less, effective. Especially for smaller countries, where the alternative to a cooperative association is merger, elimination of cooperation as a legal possibility could lead to consolidation and the lessening of competition in the domestic market.⁹²

However, these unintended effects do not warrant any further consideration within the context of an informal harmonization process geared towards the explicit exemption system that comes with a notification

that could be used to enforce a judicial or administrative decision on damages for the violation of antitrust laws”(Becker, *supra* note 73 at 112).

⁸⁷ Immenga, *supra* note 22 at 126.

⁸⁸ *Ibid.*

⁸⁹ Bhattacharjea, *supra* note 75 at 351.

⁹⁰ OECD, *Export Cartels*, *supra* note 10 at 52.

⁹¹ Levenstein & Suslow, *supra* note 11 at 813.

⁹² *Ibid.*

requirement. The avoidance of these unintended effects constitutes another factor militating for this type of harmonization.

IV. CARTELS WITHIN THE CONTEXT OF THE ORGANIZATION OF AMERICAN STATES

This part discusses the treatment of cartels by the OAS. More precisely, it describes the major transitions this treatment has undergone with a particular focus on export cartels. It is divided in two sections. The first section deals with cartels within the IAJC framework; the second deals with export cartels within the FTAA framework.

A. Cartels and the Inter-American Juridical Committee

The IAJC was created by the *OAS Charter* in 1948. Section 99 of the *OAS Charter* holds that:

The purpose of the Inter-American Juridical Committee is to serve the Organization as an advisory body on juridical matters; to promote the progressive development and the codification of international law; and to study juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation [emphasis added].⁹³

In accordance with this section of the *OAS Charter*, this paper is not only attempting to address an important issue for the developing countries of the Americas— as highlighted by the two rapporteurs of the IAJC, cartels constitute a topic of a vital interest for these countries⁹⁴ — but also to explore the desirability of an eventual harmonization of domestic competition laws regarding the regulation of export cartels. Furthermore, section 100 of the *OAS Charter* holds that the IAJC shall undertake the studies assigned to it by other organs of the OAS, such as the GA or the Meeting of Consultation of Ministers of Foreign Affairs.⁹⁵ In conformity with sections 99 and 100, the GA's *Resolution 1772* requested of the IAJC:

[T]o pursue its studies on the subject of the legal dimension of integration and international trade, to limit that study for now to the subject of competition law and the different forms of protectionism in the Americas, and to conduct a preliminary comparative analysis of existing laws and regulations on competition or protectionism in member states, in such a way as to include a document on the

⁹³ *OAS Charter*, *supra* note 9 at Article 99..

⁹⁴ Rodas & Fried, *supra* note 5 at page 1 of Foreword.

⁹⁵ *OAS Charter*, *supra* note 9.

subject in its next annual report, bearing in mind the efforts already under way in the Organization and in other international institutions.⁹⁶

The GA reiterated this request in its resolutions 1844 and 1916.⁹⁷

Resolution 1772 requested the IAJC *continue* to study the legal aspects of the economic integration in the Americas because it had already undertaken this task following various meetings of the Ministers of Foreign Affairs. Consequently, the IAJC incorporated into its agenda, through *Resolution 14* of 2000,⁹⁸ the theme of competition law and policy as part of its research into the legal dimension of the integration of international trade. In the same year, the IAJC recognized that it would necessarily have to adopt a comparative approach to carry out the study of competition law in the Americas since disparity between the national laws of OAS members states could arise as a result of their different legal systems (civil or common law).⁹⁹ That is exactly why the IAJC recalls that: “undertaking studies of such scope is not only an interesting challenge but, *as stated in article 99 of the Organization of American States, is precisely one of the main roles of the Inter-American Juridical Committee*” [emphasis added].¹⁰⁰

Adopted in its 61st session, the IAJC’s *Resolution 45* requested, *inter alia*, that (1) member states provide rapporteurs, namely Joao Grandino Rodas and Jonathan Fried,¹⁰¹ with information on their legislations, relevant case law and practices based on a questionnaire regarding competition law

⁹⁶ OAS, General Assembly, 31st Sess., *Annual Report of the Inter-American Juridical Committee*, AG/RES. 1772 (XXXI-O/01), OEA/Ser.P/XXXI-O.2 (2001) at s. 9 [OAS, General Assembly, *Resolution 1772*].

⁹⁷ OAS, General Assembly, 32nd Sess., *Annual Report of the Inter-American Juridical Committee*, AG/RES. 1844 (XXXII-O/02), OEA/Ser.P/XXXII-O.2 (2002) at s. 7; OAS, General Assembly, 33rd Sess., *Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee*, AG/RES. 1916 (XXXIII-O/03), OEA/Ser.P/XXXIII-O.2 (2003) at s. 3.

⁹⁸ OAS, Inter-American Juridical Committee, *Competition Law and Policy in the Americas*, CJI/RES.14 (LVII-O/00), reprinted in OAS, Inter-American Juridical Committee, 57th Sess., *Annual Report of the Inter-America Juridical Committee to the General Assembly*, OEA/Ser.Q/VI.31, CJI/doc.45/00 (2000) at 89 [OAS, Inter-American Juridical Committee, *Resolution 14*].

⁹⁹ OAS, Inter-American Juridical Committee, *Considerations Relevant to a Proposal to Include the “Competition Law” as a Topic to be Studied by the Inter-American Juridical Committee*, CJI/doc.23/00, reprinted in OAS, Inter-American Juridical Committee, 57th sess., *Annual Report of the Inter-America Juridical Committee to the General Assembly*, OEA/Ser.Q/VI.31, CJI/doc.45/00 (2000) at 89 at 90, online: OAS <<http://www.oas.org/cji/eng/INFOANUAL.CJL.2000.ING.pdf>>.

¹⁰⁰ *Ibid.* at 94.

¹⁰¹ The rapporteurs were appointed by the following resolution of the IAJC: OAS, Inter-American Juridical Committee, *Resolution 14*, *supra* note 98 at 89.

as well as cartels issues;¹⁰² (2) that rapporteurs prepare a consolidated and final report, based on the information obtained through the questionnaire, to be discussed in the next session with a view to adopting appropriate recommendations and final observations and publishing a final report to be distributed to member states.¹⁰³

Entitled *Competition and Cartels in the Americas*, the final report of the two rapporteurs was presented to IAJC in 2003 and was published in its annual report.¹⁰⁴ It is now available in the four official languages of the OAS in the form of a monograph.¹⁰⁵ In its *Resolution 2042*, the GA mentioned that the IAJC's work concerning competition law and cartels was complete and recommended that member states "consider the recommendations made by the Inter-American Juridical Committee on this topic, both in the aforementioned document [*Competition and Cartels in the America*] and in its resolution CJI/RES. 58 (LXIII-O/03), "Cartels in the Scope of the Competition Law in the Americas".¹⁰⁶

B. The Rationales Underlying the Study of the IAJC and its Conclusions

The first rationale is that competition law constitutes a prerequisite to reach a free-market based liberalization, which in turn fosters economic growth. In its resolution entitled *Juridical Dimension of Integration and International Trade*, the IAJC reaffirmed: "[T]he positive contribution of liberalization of trade and investment to development and economic growth throughout the Americas, including through bilateral and sub-regional agreements".¹⁰⁷ Accordingly, in its resolution entitled *Competition Law and Policy in the Americas*, it incorporated the theme of competition law as the legal component of the integration and international trade topic.¹⁰⁸ The

¹⁰² OAS, Inter-American Juridical Committee, *Inter-American Juridical Committee Questionnaire on Competition Policy and Cartels*, CJI/Doc.113/02 rev. 3., reprinted in OAS, Inter-American Juridical Committee, 61st sess., *Annual Report of the Inter-American Juridical Committee to the General Assembly*), OEA/Ser.Q/VI.33, CJI/doc.115/02 (2002) at 99.

¹⁰³ OAS, Inter-American Juridical Committee, *Cartels in the Sphere of Competition Law*, *supra* note 17 at 4.

¹⁰⁴ OAS, Inter-American Juridical Committee, *Competition and Cartels*, *supra* note 5.

¹⁰⁵ See Rodas & Fried, *supra* note 5.

¹⁰⁶ OAS, General Assembly, 34th Sess., *Observations and Recommendations on the Annual Report of the Inter-American Juridical Committee*, AG/RES. 2042 (XXXIV-O/04), OEA/Ser.P/XXXIV-O-2 (2004), at s. 3 [OAS, General Assembly, *Resolution 2042*].

¹⁰⁷ OAS, Inter-American Juridical Committee, 56th Sess., *Juridical Dimension of Integration and International Trade*, CJI/RES.1 (LVI-o/00), reprinted in OAS, Inter-American Juridical Committee, 57th Sess., *Annual Report of the Inter-America Juridical Committee to the General Assembly*), OEA/Ser.Q/VI.31, CJI/doc.45/00 (2000) 86 at 87.

¹⁰⁸ OAS, Inter-American Juridical Committee, *Resolution 14*, *supra* note 98 at 89..

rationale was that competition law fosters the economic growth of the OAS member states by maximizing the benefits of a free-market based liberalization.¹⁰⁹ As a result, the IAJC requested that the rapporteurs pay special attention to “such international aspects as export cartels” that can be harmful to a free-market based liberalization.¹¹⁰ Reiterating the rationale found in its resolution entitled *Cartels in the Scope of the Competition Law in the Americas*, the IAJC nevertheless went further by urging member states:

[T]o give top priority to the adoption and the application of competition laws, and reach agreements on extending the inquiries, cooperation and exchange of information on matters relating to competition.

...

[W]hen pursuing the objectives established in paragraph 3 [above], to pay special attention to the challenges faced by smaller, and less developed, member states, so that they can develop the capacity required to maintain effective administration, application, and international cooperation in this area [emphasis added].¹¹¹

The second rationale underlying the IAJC’s study is that export cartels—as well as other types of cartels—may have a trade-distorting effect. Because export cartels are usually operating without a formal registration process, information regarding their activities is lacking, or at least difficult to gather. Nonetheless, the final report of the rapporteurs points out that some scholars have recognized that export cartels can potentially have a trade-distorting effect.¹¹² Some case studies corroborate these statements, such as Michael Wise’s argument that Mexico has been harmed by the activities of various export cartels.¹¹³ The final report also points out that some

¹⁰⁹ *Ibid.* at 88.

¹¹⁰ *Ibid.* at 89.

¹¹¹ OAS, Inter-American Juridical Committee, *Cartels in the Scope of the Competition Law in the Americas*, CJI/RES.58 (LXIII-O/03), reprinted in OAS, Inter-American Juridical Committee, 63rd Sess., *Annual Report of the Inter-American Juridical Committee to the General Assembly*, OEA/Ser.Q/VI.34, CJI/doc.145/03 (2003), 170 at 170 [OAS, Inter-American Juridical Committee, *Resolution 58*]. The preamble reiterates this first rationale as follows:

CONVINCED that the adoption and effective application of laws and policies on competition can contribute significantly to the economic growth of the member States;

ACKNOWLEDGING that the increasing integration of the economic activity in the Americas requires further cooperation between the member States with regard to administration and application of the competition laws.

¹¹² Rodas & Fried, *supra* note 5 at 14, citing as an example Sadao Nagaoka, *International Trade Aspects of Competition Policy* (Cambridge: National Bureau of Economic Research, 1998) online: National Bureau of Economic Research <<http://www.nber.org/contact/>>; See e.g. Evenett, Levenstein & Suslow, *supra* note 17.

¹¹³ Micheal Wise, “Review of Competition Law and Policy in Mexico” (1999) 1 *Journal of Competition Law and Policy* 1 at 25.

international organizations have reached the same conclusion.¹¹⁴ In order to support this statement, the rapporteurs refer to The Working Group on the Interaction between Trade and Competition Policy branch of the WTO that contends that export cartels result in discrimination between the domestic and the export market and could have a negative effect on other WTO members.¹¹⁵ Interestingly enough, in another document, the rapporteurs refer to a text written by the Joint Group on Trade and Competition of the OECD which takes the position that domestic competition laws that permit export cartels end up in *de jure* discrimination.¹¹⁶ The Joint Group explains that:

[I]t can be argued that this differing treatment of different types of cartels is not discrimination. Competition laws are meant to protect domestic consumers, or put another way, such laws do not protect foreign consumers. The justification for permitting export cartels is that, in principle, they do not harm domestic consumers. Moreover, one could argue that there is not a contravention of the national treatment principle if foreign and domestic enterprises are treated equally in terms of their participation in export cartels. On the other hand, there may be cross-subsidization effect in favour of domestic producers from export cartels. That is, excess profits resulting from an export cartel could be considered as a subsidy for domestic producers that is not available to foreign producers of the same product.¹¹⁷

In the light of these rationales, the IAJC suggested some conclusions. It did so not only through a concise document entitled *Competition and Cartels in the Americas: Suggested Conclusions to Document CJI/doc.118/03*,¹¹⁸ but also, at least implicitly, through its final report¹¹⁹. The concise document states the first three conclusions as follows:

[E]verything pertaining to the Law of Competition and Cartels is so far, in the inter-American scope, in the sphere of internal, domestic or sole jurisdiction of the States,

¹¹⁴ Rodas & Fried, *supra* note 5 at 14.

¹¹⁵ WTO, (1999) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/3 at para. 26, online: WTO <http://docsonline.wto.org/gen_home.asp>. The Working Group reiterated that export cartels can potentially harm the competition in countries in subsequent reports. See WTO, Report (2001) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/5 at para. 62, online: WTO <http://docsonline.wto.org/gen_home.asp>; WTO, Report (2003) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WTO Doc. WT/WGTCP/7 at para. 50, online: WTO <http://docsonline.wto.org/gen_home.asp>.

¹¹⁶ OECD, Joint Group on Trade and Competition, *Applying Core Principles in a Multilateral Framework on Competition*, Doc. No. COM/DAFFE/TD (2002).

¹¹⁷ *Ibid.* at 59.

¹¹⁸ OAS, Inter-American Juridical Committee, *Competition and Cartels in the Americas: Suggested Conclusions to Document CJI/doc.118/03*, CJI/doc.123/03, reprinted in OAS, *Annual Report of the Inter-American Juridical Committee to the General Assembly*, OEA/Ser.Q/VI.34, CJI/doc.145/03 (2003) at 230 [OAS, Inter-American Juridical Committee, *Conclusions*].

¹¹⁹ Rodas & Fried, *supra* note 5.

since there is nothing in the Charter of the OAS nor in any other inter-American convention that establishes that free competition is mandatory nor the capacity of the Organization to impose sanctions for acts against it.

...

States of the Inter-American System are politically willing, at least in part, to include matters relating to free competition and cartels in the sphere of applicable International Law in the Americas by means of a convention, which would be FTAA. This political willingness, according to the principle of International Law implicit in the Convention of Vienna on the Law of Treaties, obliges them to negotiate in good faith, that is, with the intention of effectively reaching an agreement on the matter.

...

[T]he aforementioned negotiation would very likely be successful if the agreement substantially complies with the national legislation of the relevant States, provided that this correspondence expresses General Principles of Law, which is a third source of International Law under consideration, after the Treaties and Custom, in article 38 of the Statutes of the International Court of Justice [emphasis added].¹²⁰

The fourth and last conclusion is that each member state must set up an independent organ, either belonging to the executive or the judiciary, responsible: “for striving for free competition and sanctioning acts against it and whose resolutions can be appealed in Higher Courts”.¹²¹ Finally, the IAJC specified that “it could be said that the issue in question is to be internationally regulated by convention and with an inter-American territorial coverage, *discarding for the time being, therefore, the possibility of achieving uniformity in national laws on this matter* [emphasis added].”¹²²

Notwithstanding this observation, this paper does not automatically become purely theoretical. One must recall that the FTAA is currently a dead letter. Although the OAS member states might have a political willingness to regulate cartels—including export cartels, through the FTAA, there is no hint that such regulation will be successfully adopted in this decade. This political willingness could be redirected towards the informal harmonization process advocated for by this paper which is the most likely proposal to gain consensus among OAS member states, especially the United States, whose power is difficult to counterbalance within the OAS framework.

Further, the final report¹²³ promotes, at least implicitly, the harmonization option. The main conclusion of the final report admittedly encompasses a much more narrower objective, that is the promotion of

¹²⁰ OAS, Inter-American Juridical Committee, *Competition and Cartels in the Americas: Suggested Conclusions to Document*, *supra* note 118 at 230-31.

¹²¹ *Ibid.* at 231.

¹²² *Ibid.* at 230.

¹²³ Rodas & Fried, *supra* note 5.

competition law with a view to fostering the building of an inter-American competition culture so that countries lacking a domestic competition law progressively acknowledge its importance as a mean to guarantee a free-market based liberalization around the American hemisphere.¹²⁴ Nevertheless, after having examined the emergent trend towards bilateral and/or multilateral co-operation in the field of antitrust enforcement, the rapporteurs point out that several scholars think that harmonization is a desirable avenue. They even refer to one scholar who considers harmonization an inevitable outcome if states desire to co-operate effectively in antitrust matters: The case for seeking convergence of competition laws is made by Mitsuo Matsushita as he argues that no matter how closely States cooperate in the enforcement of competition laws, there is clearly a limit to the effectiveness of such cooperation if there is a great divergence in the substance of competition laws among States.¹²⁵

Matsushita cautions that:

[c]ooperation may be hampered if there is inconsistency between provisions of competition laws of different States. In light of this convergence or harmonization of competition laws is, to a degree, indispensable in order to effectuate cooperative relationship among States in the enforcement of competition laws.¹²⁶

C. Export Cartels and the FTAA

In order to improve the effectiveness of the FTAA negotiations, the American countries set up nine negotiating groups, including the Negotiating Group on Competition Policy (NGCP). Adopted in March 1998 during the Fourth Ministerial Meeting held in San Jose, Costa Rica, the *San Jose Ministerial Declaration* declared that the NGCP has been instituted in order to fulfil the following competition policy objectives:

a. General Objectives

To guarantee that the benefits of the FTAA liberalization process not be undermined by anti-competitive business practices.

b. Specific Objectives

To advance towards the establishment of juridical and institutional coverage at the national, sub-regional or regional level, that proscribes the carrying out of anti-competitive business practices;

¹²⁴ *Ibid.* at 57.

¹²⁵ *Ibid.*

¹²⁶ Mitsuo Matsushita, "Globalizing the World Economy and Competition Law and Policy" in Yang-Ching Chao *et al.*, ed., *International and Comparative Competition Laws and Policies* (The Hague: Kluwer Law International, 2001) 249 at 257.

To develop mechanisms that facilitate and promote the development of competition policy and guarantee the enforcement of regulations on free competition among and within countries of the Hemisphere.¹²⁷

Among the three FTAA drafts, the first¹²⁸ is the only one which implicitly prohibits export cartels. Section 1.3.1 of this first draft holds that:

1.3.1 The Parties may not establish exclusions or exceptions to the enforcement of the principles and measures of competition established in this Chapter [for sectors in which competition is technologically possible, except those adopted in the areas later agreed by the Parties].¹²⁹

Section 1.5.1 (a), then, implicitly includes export cartels in what section 1.3.1 calls the “principles and measures of competition established in this Chapter” by holding that fixing or manipulating prices or conditions of purchase or sale, including imports and exports, constitutes anticompetitive practices.¹³⁰

The second¹³¹ and the third¹³² drafts explicitly address the issue of export cartels. Section 1.3 of the second draft provides for the non-exclusion of export cartels from national or sub-regional measures by holding that:

[1.3 Any exclusions or exceptions from the coverage of national or subregional competition measures shall be transparent and [should] be reviewed periodically by the Party or subregional entity to evaluate if they are necessary to achieve their overriding policy objectives. [After the entry into force of this Agreement, the Parties shall make a notification to the Committee provided for in point 3.5 [3.2] of any new or extended exclusion or exception.]]

[The Parties agree not to exclude from the coverage of national or subregional competition measures, the export cartels][Emphasis added].¹³³

Article 7.5 of the third draft, included in Section 7: *Exclusions, Exceptions [or Authorization]*, provides—with a wording similar to section 1.3(2) of the second draft—for the non-exclusion of export cartels from

¹²⁷ FTAA, *Ministerial Declaration*, Fourth Trade Ministerial Declaration, San Jose (Costa Rica), March 19 1998, Annex 2, online: Free Trade Area of Americas <http://www.ftaa-alca.org/Ministerials/SanJose/SanJose_e.asp>.

¹²⁸ FTAA, *Free Trade Area of the Americas: First Draft Agreement*, 3 July 3 2001, FTAA.TNC/w/133/Rev.1, online: Free Trade Area of Americas <http://www.ftaa-alca.org/ftaadrafts_e.asp> [*FTAA First Draft*]. Note that the section is set between square brackets in the original which indicates that divergent points of views exist on its wording and/or scope.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ FTAA, *Free Trade Area of the Americas: Second Draft Agreement*, November 1 2002, FTAA.TNC/w/133/Rev.2, online: Free Trade Area of Americas <http://www.ftaa-alca.org/ftaadrafts_e.asp> [*FTAA Second Draft*].

¹³² FTAA, *Free Trade Area of the Americas: Third Draft Agreement*, November 21 2003, FTAA.TNC/w/133/Rev.3, online: Free Trade Area of Americas <http://www.ftaa-alca.org/ftaadrafts_e.asp> [*FTAA Third Draft*].

¹³³ *FTAA Second Draft*, *supra* note 128. Note the square brackets.

national or sub-regional competition laws or regulations: “[7.5 *The Parties agree not to exclude export cartels from the coverage of national or subregional competition laws or regulations*] [emphasis added]”.¹³⁴

Since the FTAA is now a dead letter, these interesting and praiseworthy developments within the American hemisphere must be replaced with a realistic legal mechanism which will allow American countries to assess accurately and comprehensively the pros and cons of export cartels. In the current legal, political, social and economic context that prevails in the American hemisphere, an informal harmonization process held within the OAS framework geared towards the explicit exemption system that comes with a notification requirement appears the most suitable legal option.

V. EXPORT CARTELS IN CANADIAN, AMERICAN AND BRAZILIAN LAW

This part offers a portrayal of the relevant law concerning the legal treatment of export cartels in Canada, the United States and Brazil, the three main players in the Americas. The section on American law explains why the United States is favourable to the preservation of export cartels and, as a consequence, why the informal harmonization process geared towards the explicit exemption system that comes with a notification requirement is the most suitable legal mechanism to deal with export cartels in the American hemisphere.

A. Export Cartels in Canadian Law

An export cartel exemption has been available in Canada since 1960.¹³⁵ Before the *Competition Act*¹³⁶ repealed the entire statute in 1986, section 32(1) of the *Combines Investigation Act*¹³⁷ set out a general prohibition against cartels. Section 32(4) then exempted those cartels which related “only to the export of products from Canada”. Section 32(5) provided that this exemption did not apply if the export agreement:

¹³⁴ *FTAA Third Draft*, *supra* note 129. It is worth noting that this section is also set between square brackets.

¹³⁵ See: *An Act to Amend the Combines Investigation Act and the Criminal Code*, S.C. 1960, c. 45, s. 13 [*Combines Investigation Act, 1960*] which modified the original wording of section 32 of *An Act to Provide for the Investigation of Combines, Monopolies, Trusts and Mergers*, R.S.C. 1952, c. C-314 [*Combines Investigation Act*]. For general information on Canadian competition law, see generally: Michael C.J. Flavell, *The Canadian Competition Law Handbook* (Scarborough: Carswell, 1997); Yves Bériault, Madeleine Renaud & Yves Comtois, *Droit de la concurrence au Canada* (Scarborough: Carswell, 1999); Micheal Trebilcock *et al.*, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002).

¹³⁶ *Supra* note 54.

¹³⁷ *Supra* note 133.

has resulted or is likely to result in a reduction or limitation of the volume of exports of a product;

has restrained or injured or is likely to restrain or injure the export business of any domestic competitor who is not a party to the conspiracy, combination, agreement or arrangement;

has restricted or is likely to restrict any person from entering into the business of exporting products from Canada: or

has lessened or is likely to lessen competition unduly in relation to a product in the domestic market [emphasis added].

Section 45(1) of the *Competition Act* constitutes the general prohibition of cartels in current Canadian law¹³⁸. Subsections 5 and 6 hold that:

(5) Subject to subsection (6), in a prosecution under subsection (1) the court shall not convict the accused if the conspiracy, combination, agreement or arrangement relates only to the export of products from Canada.

(6) Subsection (5) does not apply if the conspiracy, combination, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted in or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition unduly in the supply of services facilitating the export of products from Canada [emphasis added].

A comparison of the wordings of section 32(5) of the *Combines Investigation Act* and of section 45(6) of the *Competition Act* leads to the conclusion that: “[t]he export exemption in the current *Competition Act* is broader than its predecessor statute in two respects”.¹³⁹ First, section

¹³⁸ Section 45(1) states the following.

- (1) Every one who conspires, combines, agrees or arranges with another person
 - (a) to limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any product,
 - (b) to prevent, limit or lessen, unduly, the manufacture or production of a product or to enhance unreasonably the price thereof,
 - (c) to prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, storage, rental, transportation or supply of a product, or in the price of insurance on persons or property, or
 - (d) to otherwise restrain or injure competition unduly
- is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years or to a fine not exceeding ten million dollars or to both.

¹³⁹ Policy Staff Paper No. 94/3, *supra* note 24 at 28.

32(5)(d) of the *Combines Investigation Act* provided that the exemption did not apply if the export agreement “lessened or is likely to lessen competition unduly in relation to a product in the domestic market”.¹⁴⁰ Parliament decided not to incorporate this wording in the *Competition Act* because it was believed that to put the emphasis on competition in the Canadian market restrained firms from freely availing themselves of the exemption.¹⁴¹ In 1984, on the eve of the adoption of the *Competition Act*, Judy Erola, Minister of Consumer and Corporate Affairs Canada, declared that:

paragraph (d) which contains the substance of the charging subsection 32(1), is dropped and is replaced by the narrower restriction in subsection 32(4.1) [former section 45(6)(c) of the *Competition Act*]. Paragraph (d) apparently had introduced uncertainty as to the application of the export exemption since it caught unintended spillover effects in the domestic market. If, however, there is an ancillary agreement in respect of the domestic market then the export exemption does not apply [emphasis added].¹⁴²

Second, section 32(5)(a) of the *Combines Investigation Act* held that a reduction of the *volume of exports* constituted an infringement of the exemption whereas the current law, section 45(6)(a) of the *Competition Act*, holds that a reduction in the *real value of exports* constitutes such an infringement. The legislative intent was to gear the inapplicability of the exemption towards a reduction of the dollar value of exports.¹⁴³ The former prohibition was interpreted as prohibiting export agreements that raised the dollar value of exports but reduced their volume.¹⁴⁴ Such an agreement is not, under the *Competition Act*, outside the scope of the exemption.¹⁴⁵ In that regard, Judy Erola asserted that:

[t]he amendment to paragraph (a), in substituting “real value” in place of “volume” as now provided, has the effect of broadening the exemption. Thus, if an export agreement has the effect of increasing prices and lowering the volume of exports, it can still be desirable if the real value of exports is, nevertheless, increased [emphasis added].¹⁴⁶

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² Canada, Consumer and Corporate Affairs, *Combines Investigation Act Amendments 1984: Clause-by-Clause Analysis* (Ottawa: Consumer and Corporate Affairs, 1984) at 41 (Minister of Consumer and Corporate Affairs: The Honourable Judy Erola) [Canada, Consumer and Corporate Affairs, *Combines Investigation Act*].

¹⁴³ Robert S. Nozick, ed., *The 2006 Annotated Competition Act: Statutes of Canada Annotated* (Toronto: Carswell, 2005) at 91.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ Canada, Consumer and Corporate Affairs, *Combines Investigation Act*, *supra* note 138 at 41.

In other words, this modification “means that an export cartel can raise prices and reduce output.”¹⁴⁷ It also implies that export cartels are seen as an instrument of strategic policy and that as long as they: “[C]an snatch miasmatic rents from foreigners to ‘us’, we continue to compromise our competition policy at the cost of ignoring possible inefficiencies due to the misallocation of resources caused by reduced output and higher relative prices in Canada.”¹⁴⁸ Hence, export cartels are diametrically opposed to the spirit of free trade agreements and that could lead to their ban in a future legal reform in Canada.¹⁴⁹

There is only one case involving an export cartel in Canadian case law: *R. c. Manigo Inc.*¹⁵⁰ This case involved a consortium, Exportation Gaspé Cured Inc., consisting of 14 producers of salted cod. In accordance with the consortium’s agreement, the members had to sell their production to an Italian corporation, Canada Fish. One of the members sold its production to a different company and the consortium wanted to keep this member from doing so. Applying the *Combines Investigation Act*, the Superior Court of Quebec held that the exemption of section 32(4) was inapplicable in this case since the export agreement violated section 32(5)(c) which holds that an export agreement shall not restrict another person from “entering into the business of exporting products from Canada”.

B. Export cartels in American law

A comprehensive analysis of United States export cartels legislation¹⁵¹ has to encompass three specific Acts: the *Webb-Pomerene Act*,¹⁵² the *Export Trading Company Act*¹⁵³ and the *Foreign Trade Anti-Trust Improvements Act*.¹⁵⁴

¹⁴⁷ Policy Staff Paper No. 94/3, *supra* note 24 at 28.

¹⁴⁸ *Ibid.* at 29.

¹⁴⁹ Bériault, Renaud & Comtois, *supra* note 133 at 134.

¹⁵⁰ *R. c. Manigo inc.*, [1988] J.Q. no 101 (Qc. Sup. Ct.) (QL).

¹⁵¹ For a general discussion on United States competition policy, see: Ky P. Ewing, *Competition Rules for the 21st Century: Principles from America’s Experience* (The Hague: Kluwer Law International, 2003). For a discussion on the treatment of cartels in American law, see: Thomas E. Kauper, “The Treatment of Cartels under the Antitrust Laws of the United States” in Chia-Jui Cheng, Lawrence S. Liu & Chih-Kang Wang, eds., *International Harmonization of Competition Laws* (Dordrecht, The Netherlands: Martinus Nijhoff, 1995) 75.

¹⁵² *Supra* note 26. For an analysis of the Act, see generally: James D. Whitney, “The Causes and Consequences of Webb-Pomerene Associations: A Reappraisal” (1993) 38 *Antitrust Bull.* 395; Wilbur L. Fugate, “The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act” (1982) 15 *Vand. J. Transnat’l L.* 673; Larson, *supra* note 27.

¹⁵³ *Supra* note 69.

¹⁵⁴ 15 U.S.C. § 6a (2000).

The *Webb-Pomerene Act* was enacted in 1918. Its section 62 exempts export associations from section 1 of the *Sherman Act*¹⁵⁵ - which constitutes the general prohibition of cartels in American law - provided they comply with certain substantive and procedural requirements. The exemption is limited to the export of goods.¹⁵⁶ On the one hand, section 62 sets forth the following substantive requirements:

- the export association shall not restrain trade within the United States;
- it shall not restrain the export trade of any domestic competitor that is not a member of the association;
- it shall not, artificially or intentionally, enhance or depress prices within the United States of commodities exported by the association, or act in a manner which substantially lessens competition or trade within the United States.

On the other hand, section 65 provides for certain procedural requirements:

- within thirty days of its creation, the association shall register with the FTC;
- every January 1st, the association shall file annual reports to the FTC.

Failure to comply with these procedural requirements will result in the loss of the exemption of sections 62 and 63.¹⁵⁷ The FTC does not perform an approving function.¹⁵⁸ An export association simply takes the chance that its activities are within the scope of the exemption.¹⁵⁹

The case law and the FTC have subsequently delimited the scope of the *Webb-Pomerene Act*. The case law has established that the exemption of the Act is confined to goods originating in the United States;¹⁶⁰ that foreign firms may not be members of an export association covered by the Act

¹⁵⁵ 15 U.S.C. §§ 1-7. Section 1 holds that:

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, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

¹⁵⁶ *Webb-Pomerene Act*, *supra* note 26 at § 61.

¹⁵⁷ *Ibid.* at § 65. Section 63 deals with the acquisition of stock of an export trade corporation.

¹⁵⁸ Kauper, *supra* note 142 at 93.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Minnesota Mining*, *supra* note 67.

although foreign owned American firms may still qualify for the exemption;¹⁶¹ that an association shall not enter into agreements with foreign firms in order to set prices, divide or allocate markets;¹⁶² and that the exemption is not meant to insulate transactions initiated, controlled and financed by the American government.¹⁶³ We refer the reader back to section 2(B) which dealt with the domestic effects of such associations in American law. Suffice to recall that, six years after the enactment of the *Webb-Pomerene Act*, the FTC published an advisory opinion that stipulated that an export cartel that “incidentally or indirectly restricts” domestic prices would not infringe the Act.¹⁶⁴ The case law agreed with this opinion by ruling that export cartels were not liable for ancillary restraints on domestic trade.¹⁶⁵ It is noteworthy that the standard of the *Minnesota Mining* case was incorporated in Title III of the *Guidelines for the Issuance of Export Trade Certificates of Review*¹⁶⁶ examined subsequently.

In one of its brochures, the FTC listed the permitted and prohibited practices that are undertaken under the *Webb-Pomerene Act*.¹⁶⁷ According to this brochure, associations may engage in the following activities:

1. they may stipulate that all export sales of members are to be made through the association although this covers a large percentage of industry sales;¹⁶⁸
2. they are permitted to reasonably restrict a member’s right to withdraw from the association and to reasonably restrict members who withdraw from competing with the association for a limited period;¹⁶⁹

¹⁶¹ *International Raw Materials, Inc. v. Stauffer Chem. Co.*, 978 F. 2d 1318 (3d Cir. 1992). For comments on this case, see: Cicek Zoroglu, “Webb-Pomerene Act - Foreign-Owned Firms Allowed to Participate in Webb-Pomerene Associations, *International Raw Materials, Ltd. v. Stauffer Chemical Co.*, 978 F.2d 1318 (3d Cir. 1992)” (1994) 17 *Suffolk Transnat’l L. Rev.* 506.

¹⁶² *United States v. United States Alkali Exports Ass’n*, 325 U.S. 196 (1945).

¹⁶³ *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199 (1968).

¹⁶⁴ U.S., Federal Trade Commission, *Economic Report on Webb-Pomerene Associations*, *supra* note 65 at 102-06.

¹⁶⁵ Dick, “Cartels Stable Contracts”, *supra* note 64 at 247; *Minnesota Mining*, *supra* note 67.

¹⁶⁶ *Supra* note 68.

¹⁶⁷ U.S., Federal Trade Commission, *Brochure for Exporters, Activities and Practices* (1982), cited in Fugate, *supra* note 143 at 689 [U.S., Federal Trade Commission, *Brochure*].

¹⁶⁸ *Ibid.* at 1.

¹⁶⁹ *Ibid.*

3. they may fix the prices and terms of export sale regardless if orders are placed on the association's own account or on behalf of the members;¹⁷⁰
4. provided that the United States market is excluded from the agreements, associations may allocate exclusive trade areas therein;¹⁷¹
5. provided there is no discrimination, they may assign export quotas to the members;¹⁷²
6. they are permitted to select their own exclusive distributors or brokers.¹⁷³

The Brochure also prohibits several activities, including the following:¹⁷⁴

1. an export association's agreements shall not restrict domestic producers' exports;
2. such agreements shall not limit the right of domestic producers to compete within the United States;
3. such agreements shall not unlawfully restrict actual or potential imports to United States.

The majority of studies that investigated whether the *Webb-Pomerene Act* has fulfilled its fundamental objective of increasing United States exports has reached the conclusion that the Act has failed in that regard.¹⁷⁵ For instance, during its first fifty years of existence, export associations set up in accordance with the Act accounted for only 2.5% of United States exports,¹⁷⁶ which declined to 1.5% by 1976.¹⁷⁷ Accordingly, it is hardly surprising that some policy makers in the Department of Justice have advocated repealing the export association exemption, claiming it contradicts the fundamental philosophy behind American antitrust law.¹⁷⁸ Finally it is worth noting that, as of May 9 2005, the seven Webb-Pomerene

¹⁷⁰ *Ibid.* at 3.

¹⁷¹ *Ibid.* at 3-4.

¹⁷² Fugate, *supra* note 143 at 690.

¹⁷³ U.S., Federal Trade Commission, *Brochure*, *supra* note 158 at 1-4.

¹⁷⁴ *Ibid.* at 5-7.

¹⁷⁵ See generally: Larson, *supra* note 27; OECD, *Export Cartels*, *supra* note 10 at 28-31, 46-49.

¹⁷⁶ Dick, *Export Cartels*, *supra* note 20 at 10.

¹⁷⁷ U.S., Federal Trade Commission, *Economic Report on Webb-Pomerene Associations*, *supra* note 65 at 36; U.S., Federal Trade Commission, *Webb-Pomerene Associations: Ten Years Later* (Washington, D.C.: U.S. Government Printing Office, 1978) at 15.

¹⁷⁸ U.S., *International Aspects of Antitrust, Review of the Webb-Pomerene Act of 1918, Hearings on S. Res. 26 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary*, 90th Cong. (1967) 122 at 122-24.

Associations registered to the FTC were: the American Cotton Exporters Association, the American Natural Soda Ash Corp., the American-European Soda Ash Shipping Association, Inc., the California Dried Fruit Export Association, the Overseas Distribution Solutions, L.L.C., the Paperboard Export Association of the United States and the Phosphate Chemicals Export Association, Inc.¹⁷⁹

Faced with the the *Webb-Pomerene Act's* failure to increase American exports, Congress enacted the *Export Trading Company Act* to not only promote exports, but also allow banks to invest in export trading companies.¹⁸⁰ The Act was also drafted: "to create more certainty in the application of antitrust laws for those people who are about to engage in export trade activities."¹⁸¹ Seven major differences distinguish the *Export Trading Company Act* from the *Webb-Pomerene Act*.¹⁸²

Unlike the *Webb-Pomerene Act* where the FTC does not perform any approving function, the *Export Trading Company Act* empowers the

¹⁷⁹ U.S., Federal Trade Commission, *Export Trade Associations Registered Pursuant to the Webb-Pomerene Act (15 U.S.C. Sec. 61 et seq.) as of May 9, 2005*, 2005, online: Federal Trade Commission

<<http://www.ftc.gov/os/statutes/webbpomerene/2005/050509listindex.pdf>>. As of 2009, this is the most recent listing of associations registered to the FTC pursuant to the *Webb-Pomerene Act*.

¹⁸⁰ Fugate, *supra* note 143 at 698. It is the *Bank Export Services Act* which authorizes banks to invest in export trading companies. See Title II of the *Export Trading Company Act: Bank Export Services Act*, Pub. L. No. 97-290, 96 Stat. 1233. For a discussion on the *Export Trading Company Act*, see generally: Kermit Butch Almstedt, "The Legislative History of the Export Trading Company Act of 1982" in Joseph P. Griffin, ed., *The Export Trading Act of 1982* (Washington, D.C.: The International Law Institute, Georgetown University Law Center, 1982) 1; James V. Lacy, "The Effect of the Export Trading Company Act of 1982 on U.S. Export Trade" (1987) 23 *Stan. J. Int'l L.* 177; William W. Nye, "An Economic Profile of Export Trading Companies" (1993) 38 *Antitrust Bull.* 309; Cornelius J. Golden, Jr. & Charles E.M. Kolb, "The Export Trading Company Act of 1982: An American Response to Foreign Competition" (1983) 58 *Notre Dame L. Rev.* 743; Barry E. Hawk, "International Antitrust Policy and the 1982 Acts: The Continuing Need for Reassessment" (1982-1983) 51 *Fordham L. Rev.* 201; George E. Garvey, "Exports, Banking and Antitrust: The Export Trading Company Act - A Modest Tool for Export Promotion" (1983-1984) 5 *Nw. J. Int'l L. & Bus.* 818; Spencer Weber Waller, "The Failure of the Export Trading Company Program" (1992) 17 *N.C.J. Int'l L. & Com. Reg.* 239 [Waller, "Failure"]; William Reinsch, "The Export Trading Company Act of 1981", (1982-1983) 14 *Law & Poly Int'l Bus.* 47; Dennis Unkovic & Nancy Jean LaMont, "The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion" (1982-1983) 87 *Dick. L. Rev.* 205; Donald Zarin, "The Export Trading Company Act: Reducing Antitrust Uncertainty in Export Trade" (1982-1983) 17 *Geo. Wash. Int'l L. Rev.* 297; Ansari, *supra* note 70.

¹⁸¹ Sherman E. Unger, "The Role of the Commerce Department" in Joseph P. Griffin, ed., *The Export Trading Company Act* (Washington D.C.: The International Law Institute, Georgetown University Law Center, 1982) 11 at 12. In that regard, see also: Kauper, *supra* note 142 at 94.

¹⁸² The first one is the author's whereas the six others are from James V. Lacy, *supra* note 171 at 185.

Secretary of Commerce with such a function. Before benefiting from the exemption of antitrust laws, the export association must apply for an issuance of certificate.¹⁸³ The Secretary of commerce, in concurrence with the Attorney General, is empowered to issue such a certificate to the export association.¹⁸⁴ Just as in the *Webb-Pomerene Act*, an export association shall submit annual reports to the Secretary.¹⁸⁵ The *Export Trading Company Act* provides four criteria used in assessing the validity of the application. It also provides that the Secretary of Commerce has the power of issuing guidelines in that regard¹⁸⁶, which he did.¹⁸⁷ Section 4013 sets forth the four criteria:

(a) Requirements. A certificate of review shall be issued to any applicant that establishes that its specified export trade, export trade activities, and methods of operation will

(1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,

(2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,

(3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and

(4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.

It is worth pointing out that certification criteria (1), (2) and (4) are incorporated in the *Webb-Pomerene Act* whereas criterion (3) is a new standard.¹⁸⁸ Regarding the impact of export trading company activities on the United States market, we refer the reader back to section 2(B). Suffice it to say that the *Guidelines for the Issuance of Export Trade Certificates of Review* encompasses the standard of the *Minnesota Mining* case, that is, export cartels are not liable for ancillary restraints on domestic trade.¹⁸⁹

¹⁸³ *Export Trading Company Act*, *supra* note 69, § 4012.

¹⁸⁴ *Ibid.*, § 4013.

¹⁸⁵ *Ibid.*, § 4018.

¹⁸⁶ *Ibid.*, § 4017.

¹⁸⁷ *Guidelines for the Issuance of Export Trade Certificates of Review*, *supra* note 68.

¹⁸⁸ *Fugate*, *supra* note 143 at 700.

¹⁸⁹ *Guidelines for the Issuance of Export Trade Certificates of Review*, *supra* note 68 at IV(A) which stipulates, *inter alia*:

An evaluation of whether proposed export conduct will be likely to substantially restrain the export trade of a competitor of the applicant will focus on the purpose and effect of the conduct. For example, conduct that is predatory, or that denies an export competitor access to an essential facility and thus prevents it from competing for exports would not be certified. However, instances of

Finally, if a certificate is granted to an export association, it benefits from the protection conferred by section 4016 which provides that:

(a) Protection from civil or criminal antitrust actions. Except as provided in subsection (b) [this subsection is analysed subsequently], no criminal or civil action may be brought under the antitrust laws against a person to whom a certificate of review is issued which is based on conduct which is specified in, and complies with the terms of, a certificate issued under section 303 [15 U.S.C. §4013] which certificate was in effect when the conduct occurred.

The second difference between the *Webb-Pomerene Act* and the *Export Trading Company Act* is that the former is limited to the export of goods while the latter covers both goods and services.¹⁹⁰ Third, the *Webb-Pomerene Act* is limited to associations of firms. The *Export Trading Company Act* expands the exemption to individual firms as well.¹⁹¹ Fourth, the *Webb-Pomerene Act* obliges associations to engage solely in export activities. However the *Export Trading Company Act* allows associations to conduct domestic or import business, although only export activities benefit from the exemption of section 4016.¹⁹² Fifth, the *Webb-Pomerene Act* does not require antitrust preclearance while the *Export Trading Company Act* requires written preclearance.¹⁹³ Sixth, the *Export Trading Company Act* limits private antitrust actions to single damages, compared with treble damages under the *Webb-Pomerene Act*. The *Export Trading Company Act* provides for such damage limitation through section 4016(b) which entitles, *inter alia*, a party to bring a civil action if he/she has been injured by the activities of an export association.¹⁹⁴ Section 4016(b)(3) provides that in such an action: “[T]here shall be a presumption that conduct which is specified in and complies with a certificate of review does comply with the standards of section 303(a) [15 U.S.C. § 4013(a)]”. Finally, the *Webb-Pomerene Act* does not provide for awarding attorney’s fees for the defendant whereas the *Exporting Trading Company Act* does.¹⁹⁵

Reviewing the effectiveness of the *Export Trading Company Act*, Paul Victor concluded that:

conduct that would be violative of this standard are likely to be rare. In particular, this standard is not applied to vigorous competition. Such competition would be consistent with this standard even if it improves the competitive position of the applicant as compared to other U.S. export competitors. Certification in such circumstances may be possible even if the applicant accounts for a substantial share of the U.S. supply of a product or service.

¹⁹⁰ *Export Trading Company Act*, *supra* note 69, § 4002(a)(1).

¹⁹¹ *Ibid.*, § 4002(a)(4).

¹⁹² *Ibid.*, § 4002(a)(4).

¹⁹³ *Ibid.*, § 4012, 4013.

¹⁹⁴ *Ibid.*, § 4016(b).

¹⁹⁵ *Ibid.*, § 4016(b)(1).

Although the Export Trading Act offers substantially more protection to export associations than the Webb Act, it has not proven particularly more successful in spurring exports. As of April 1, 1991, a mere 127 Certificates had been issued during the Export Trading Act's nine-year lifespan, this time largely to small and mid-sized firms, or to individuals. Thus, it is fair to say that the U.S. export cartels statutes have not been successful in accomplishing their goals, but have resulted in the facilitation of some anticompetitive conduct, both abroad and in the U.S. market. [Emphasis added.]¹⁹⁶

Spencer Weber Waller considers the *Export Trading Company Act* a failure.¹⁹⁷ Certificate holders have been reduced to 65 in 2009¹⁹⁸ from 153 in 2003.¹⁹⁹ Among explanations for such weak response by firms to the presumed advantages of the *Export Trading Company Act* are:

[T]he dramatic appreciation of the United States dollar relative to other currencies in the 1980s, the widening trade deficit, the fear of disclosure of confidential business information to the government in order to receive certification, and the lack of a definitive precedent interpreting the scope of the protection provided by antitrust certification.²⁰⁰

James V. Lacy believes that the *Export Trading Company Act* has accounted for over USD 1 billion in exports between 1982 and 1987.²⁰¹ He states that in three years (1984-87), certificate holders reported USD 300 millions in exports.²⁰² In a more comprehensive empirical study, William Nye demonstrates that, based on a sample of 63 certificate holders that filed at least one annual report in 1984, 1985 and 1986, the Act had a "certain success." During this period, the total volume of exports of these certificate holders was USD 527 million.²⁰³ This export volume grew from USD 54 million in 1984 to USD 206 million in 1985 and USD 265 million in 1986.²⁰⁴ In 1986, these certificate holders accounted for one-tenth of one percent of all United States merchandise exports²⁰⁵ and: "[M]uch of this growth was attributable to the growing number of certified firms."²⁰⁶ Although this data may indicate that the *Export Trading Company Act* was a success, one has to remember that this "success" has only been possible through the

¹⁹⁶ Victor, *supra* note 7 at 575.

¹⁹⁷ Waller, "Failure", *supra* note 171.

¹⁹⁸ U.S., Department of Commerce, "The Current Export Trade Certificate of Review Holders", online: Department of Commerce <<http://www.ita.doc.gov/td/oetca/list.html>>. (consulted March 27, 2009).

¹⁹⁹ Levenstein & Suslow, *supra* note 11 at 792.

²⁰⁰ Waller, "Failure", *supra* note 171 at 246.

²⁰¹ Lacy, *supra* note 171 at 202.

²⁰² *Ibid.* at 201.

²⁰³ Nye, *supra* note 171 at 311.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

²⁰⁶ *Ibid.*

“*facilitation of some anticompetitive conduct, both abroad and in the U.S. market*”. [Emphasis added.]²⁰⁷

The *Foreign Trade Antitrust Improvements Act*²⁰⁸ was enacted in 2000 and covers unregistered associations. It narrows the jurisdictional reach of the *Sherman Act* by incorporating in it section 6(a) which reads as follows:

This Act [15 USCS §§ 1 et seq.] 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 in the United States; and

(2) such effect gives rise to a claim under the provisions of this Act [15 USC §§ 1 et seq.], other than this section.

If this Act [15 USCS §§ 1 et seq.] applies to such conduct only because of the operation of paragraph (1)(B), then this Act [15 USCS §§ 1 et seq.] shall apply to such conduct only for injury to export business in the United States.

In brief, the *Foreign Trade Antitrust Improvements Act* eliminates jurisdiction over conduct that occurs in the United States or abroad, whose effects are felt only in foreign markets.²⁰⁹

The literature acknowledges that there is no willingness to ban export cartels among the major economies of the world, including the United States.²¹⁰ In fact, the United States: “has been one of the leading defenders of export cartel exemptions.”²¹¹ For instance, within the WTO framework, the United States took the following position:

Continuing, with regard to the call for prohibition of so-called “export cartels”, he noted [representative of the United States] that these arrangements typically were conceived as mechanisms for domestic entities that lacked the resources to engage in effective export activity acting individually. As such, they often had pro-competitive effects in that they added another player to the relevant markets and might bring innovation or lower prices. Moreover, they were not secret and therefore did not bear the hallmarks of what was traditionally considered to be a hardcore cartel. Hence, blanket condemnation or per se treatment of such arrangements was inappropriate. If the effects of this kind of cartels were anticompetitive, there was no impediment

²⁰⁷ Victor, *supra* note 7 at 575.

²⁰⁸ *Supra* note 145. For a discussion on the Act, see: Deborah J. Buswell, “Foreign Trade Antitrust Improvements Act: A Three Ring Circus - Three Circuits, Three Interpretations” (2003) 28 Del. J. Corp. L. 979.

²⁰⁹ Victor, *supra* note 7 at 574.

²¹⁰ See generally: Fox, *supra* note 7 at 675; Kauper, *supra* note 142 at 94.

²¹¹ Levenstein & Suslow, *supra* note 11 at 798.

today to any jurisdiction affected enforcing their competition law to prosecute their anticompetitive effects.²¹²

C. Export Cartels in Brazilian Law

Brazilian competition policy is set forth by the *Brazilian Antitrust Law*²¹³ which creates an implicit exemption system. Section 3 establishes an independent federal agency the Administrative Council for Economic Defence (CADE), under the aegis of the Department of Justice, which shall enforce the provisions of the *Brazilian Antitrust Law*. Sections 20 and 21 constitute the general prohibition of cartels in Brazilian Law. These provisions hold, *inter alia*:

20. Notwithstanding malicious intent, any act in any way intended otherwise able to produce the effects listed below, even if such effects are not achieved, shall be deemed to be a violation of the economic order:

I- to limit, restrain or in any way injure open competition or free enterprise;

II- to control a relevant market of a certain product or service;

III- to increase profits on a discretionary basis; and

IV- to abuse one's market control [...].

21. The Acts spelled out below, among others, will be deemed a violation of the economic order, to the extent applicable under article 20 and items thereof:

²¹² WTO, Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of 20-21 February 2003 – Note by the Secretariat*, WTO Doc. WT/WGTCP/M/21 (2003) at 37, online WTO: <<http://docsonline.wto.org/>>. See also: WTO, Working Group on the Interaction between Trade and Competition Policy, *Report on the Meeting of 1-2 July 2002*, WTO Doc. WT/WGTCP/M/18 (2002) at 44, online WTO: <<http://docsonline.wto.org/>>.

²¹³ Law No. 8,884 of June 11th, 1994 (Official Gazette of the Federal Executive, June 13, 1994), online: Secretariat of Economic Monitoring <http://www.seae.fazenda.gov.br/document_center/legislation/>. For more information on Brazilian law, see generally: OECD & Inter-American Development Bank, *Competition Law and Policy in Brazil - A Peer Review* (Paris, OECD, 2005), online: OECD <<https://www.oecd.org/dataoecd/12/45/35445196.pdf>>; International Competition Network, Cartels Working Group, *Anti-Cartel Enforcement Template: Brazil* (International Competition Network, 2005), online: International Competition Network <<http://www.internationalcompetitionnetwork.org/index.php/en/publication/277>>. For an overview of competition policy and cartels in Latin America, see generally: Ignacio De Leon, *Latin American Competition Law and Policy: A Policy in Search of Identity* (The Hague: Kluwer Law International, 2001); OECD & Inter-American Development Bank, *Fighting Hard Core Cartels in Latin America and in the Caribbean* (Washington, D.C.: Inter-American Development Bank, 2005) online: OECD <<http://www.oecd.org/dataoecd/41/26/38835329.pdf>>; Ignacio De Leon, "The Role of Competition Policy in the Promotion of Competitiveness and Development in Latin America" (2000) 23:4 World Competition 115. For a discussion on competition policy in the context of MERCOSUR, see: Eve Rimoldi de Ladmann, "MERCOSUR" in Jürgen Basedow, ed., *Limits and Control of Competition with a View to International Harmonization* (The Hague: Kluwer Law International, 2002) 273.

I. to set or offer in any way - in collusion with competitors - prices and conditions for the sale of a certain product or service;

II. to obtain or otherwise procure the adoption of uniform or concerted business practices among competitors [...].

Section 2 of the Act institutes the implicit exemption system that exists in Brazil by holding that:

Without prejudice to any agreements and treaties to which Brazil is a party, this Law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein [emphasis added].

Foreign companies that operate or have a branch, agency, subsidiary, office establishment, agent or representative in Brazil shall be deemed situated in the Brazilian territory [emphasis added].

VI. THE HARMONIZATION OF NATIONAL COMPETITION LAWS

This part advocates why an informal harmonization process geared towards the explicit exemption system that comes with a notification requirement is desirable. It underscores that this option is both realistic and in accordance with the legal activities of the OAS. Secondly, it explains why an informal harmonization process would constitute the best vehicle to achieve harmonization in the Americas. Finally, it highlights the advantages of harmonization by illustrating, *inter alia*, that it affords developing countries vital protection against harmful export cartels.

A. Legal Harmonization and the Legal Activities of the OAS

As mentioned in section 3(B), although the IAJC did not explicitly endorse harmonizing national competition laws in its document *Competition and Cartels in the Americas: Suggested Conclusions to Document CJI/doc.118/03*,²¹⁴ there is considerable support nonetheless. Keeping in mind that the FTAA is currently ineffectual and that the final report of the rapporteurs entitled *Competition and Cartels in the Americas* did not completely disregard the harmonization option, such a solution is conceivable within the OAS framework. As emphasized in section 3(B), it is possible that the political willingness of OAS member states to regulate cartels through the FTAA could be redirected towards informal harmonization.

Section 99 of the *OAS Charter* holds that one of the purposes of the IAJC is to:

²¹⁴ OAS, Inter-American Juridical Committee, *Conclusions*, *supra* note 116.

[S]tudy juridical problems related to the integration of the developing countries of the Hemisphere and, insofar as may appear desirable, the possibility of attaining uniformity in their legislation. [Emphasis added.]

The fact that this section does not include the developed countries of the Hemisphere does not hinder the solution advocated for by this paper. Canada and the United States have an explicit exemption system. The only difference between their legal regimes is that the United States has a notification requirement whereas Canada does not. The harmonization process suggested by this paper thus requires only a minor modification in Canadian law and is geared towards the regime that currently prevails in the United States. Accordingly, excluding Cuba which is not allowed to participate in the activities of the OAS, this harmonization process would encompass 32 developing countries of the American hemisphere, thereby conforming with section 99.

Secondly, this harmonization process is in accordance with the Inter-American Program for the Development of International Law. In its *Declaration of Panama*, the GA of the OAS underscored:

That inter-American legal development is a priority undertaking that should be intensified in light of the decision by the heads of state and government meeting in Miami in 1994 in support of peace, democracy, development, economic integration, and social justice.²¹⁵

In accordance with this objective, the GA affirmed its:

[C]onviction that, with a view to the growing integration of our countries, it is necessary to intensify the development of private international law and the harmonization of national laws so that they will not hinder the free movement of persons and goods but facilitate regional trade [emphasis added].²¹⁶

One year later, the GA officially adopted the Inter-American Program for the Development of International Law in its *Resolution 1471*.²¹⁷ In accordance with the spirit of this program the Secretariat of Legal Affairs, with the collaboration of the Canadian International Development Agency, published a document entitled *Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS*²¹⁸, thereby confirming a prevailing trend in the OAS favourable to legal harmonization.

²¹⁵ OAS, General Assembly, 26th Sess., *Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law*, AG/DEC. 12 (XXVI-O/96), preamble, online: Organization of American States <<http://www.oas.org/juridico/english/ga-res96/Dec-12.htm>> [*Declaration of Panama*].

²¹⁶ *Ibid.* at 7.

²¹⁷ OAS, General Assembly, 27th Sess., *Inter-American Program for the Development of International Law*, AG/RES. 1471 (XXVII-O/97), online: Organization of American States <<http://www.oas.org/juridico/english/ga-res97/eres1471.htm>> [*Resolution 1471*].

²¹⁸ The most relevant papers of this document for this analysis are the following: Nadia Bourély, "The Context for Transactional Legal Harmonization in the Americas" in OAS,

B. The Informal Harmonization

Most of the abundant literature on the harmonization of competition laws views it desirable,²¹⁹ with a few exceptions.²²⁰ Harmonization can take various shapes,²²¹ the first being the formal process. The best example of this is the European Union where a supra-national agency oversees the application of European law which prevails over national laws. Another shape harmonization can take is the informal process. As Patrick Glenn explains, informal harmonization:

[D]oes not project further levels of uniformity and elimination of diversity, but rather the reverse, that uniformity is not an objective in itself and that harmony flows from recognition of diversity and the ability to work within it. Measures of harmonization are thus not imposed but allowed to develop, or at most encouraged. [Emphasis added.]²²²

Secretariat for Legal Affairs & Canadian International Development Agency, *Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS* (Washington, D.C.: Office of the Assistant Secretary for Legal Affairs, 2002) 7; H. Patrick Glenn, "Harmony of Laws in the Americas" in OAS, Secretariat for Legal Affairs & Canadian International Development Agency, *Legal Harmonization in the Americas: Business Transactions, Bijuralism and the OAS* (Washington, D.C.: Office of the Assistant Secretary for Legal Affairs, 2002) 29. See also: Enrique Lagos, *The Coexistence of Legal System in the Americas from an OAS Perspective* (Washington, D.C.: Organization of American States, 2000), online: Organization of American States <www.oas.org/legal/english/osla/leg_sys_can_2000.doc> [Lagos, Coexistence of Legal Systems].

²¹⁹ See generally: Mark R. Joelson, "Harmonization: A Doctrine for the Next Decade" (1989-1990) 10 Nw. J. Int'l L. & Bus. 133; Diane P. Wood, "International Harmonization of Antitrust Law: The Tortoise or the Hare?" (2002) 3 Chicago J. Int'l L. 391; Sally Southey, "Canadian Perspectives on International Competition Cooperation" in Tzong-Leh Hwang & Chiyuan Chen, eds., *The Future Development of Competition Framework* (The Hague: Kluwer Law International, 2004) 43 (Madam Southey is Assistant Commissioner of Competition of the Canadian Competition Bureau. She advocates for soft convergence); Immenga, *supra* note 22 at 145. For an analysis on the desirability of an international antitrust agreement, see generally: Joel Davidow & Hal Shapiro, "The Feasibility and Worth of a World Trade Organization Competition Agreement" (2003) 37 J. World Trade 49; Sigmund Timberg, "An International Antitrust Convention: A Proposal to Harmonize Conflicting National Policies Towards the Multi-National Corporation" (1973) 8 J. Int'l L. & Econ. 157; Jean-François Pons, "Is it Time for an International Agreement on Antitrust" in Josef Drexler, ed., *The Future of Transnational Antitrust: From Comparative to Common Competition Law* (The Hague: Kluwer Law International, 2003) 349; Sweeney, *supra* note 50.

²²⁰ See especially: Douglas E. Rosenthal & Phedon Nicolaides, "Harmonizing Antitrust: The Less Effective Way to Promote International Competition" in Louise I. Barrington, ed., *Global Competition and Transnational Regulations: New Developments* (Paris, International Chamber of Commerce, 1996) 155; John O. McGinnis, "The Political Economy of International Antitrust Harmonization" (2003-2004) 45 Wm. & Mary L. Rev. 549 at 560-68.

²²¹ See generally: Glenn, *supra* note 209; Wood, *supra* note 210 at 404-07.

²²² Glenn, *ibid.* at 47.

This type of harmonization usually takes the form of non-binding guidelines set forth by international organizations encouraging states to conform to its provisions. Prominent examples of such a process in competition matters include: the 1993 *Draft International Antitrust Code*²²³ and the UNCTAD *Set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices*.²²⁴ Finally, there is what Diane Wood calls the “intermediate harmonization” process which describes the situation prevailing among the three members of *NAFTA* whose chapter 15 obliges each party to: “[A]dopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect to thereto.”²²⁵

In the Americas, the informal harmonization is the process to be pursued. The majority of the literature recognizes that informal harmonization is more compatible with the history and the specificities of the Americas.²²⁶ For instance, the various free trade agreements in the American hemisphere have not been designed with a view of establishing supranational institutions.²²⁷ In that regard, Enrique Lagos, Assistant Secretary for Legal Affairs at the OAS, believes that:

We also need to encourage and become more flexible in our approach to legal instruments, and utilize advantages offered by processes of informal harmonization. This is not to say that traditional codification techniques should no longer be used, but rather to outline “soft law” instruments, such as model laws, guiding principles and checklists, as positive possibilities when seeking to address contemporary legal issues.²²⁸

The uniformization inherent in any formal harmonization process is a radical technique which ignores the national specificities, whereas informal

²²³ The Draft is reprinted in the BNA Antitrust and Trade Regulation Reporter, vol. 64 Special Supplement No. 1628 of August 19, 1993. It is also reprinted in Wolfgang Fikentscher & Ulrich Immenga, ed., *Draft International Antitrust Code* (Nomos Verlag, Baden-Baden, 1995).

²²⁴ Un. Doc. TD/RBP/CONF/10 (1980), reprinted in 19 I.L.M. (1980) 813 [UNCTAD, *Set*], approved by *Restrictive Business Practices*, GA Res 63, UN GAOR. 35th Sess., UN Doc. A/RES/35/63 (1980) 123. The UNCTAD *Set* provides rules and principles regarding the conduct of governments and private enterprises to regulate restrictive business practices. Unsurprisingly, it is non-binding; compliance is voluntary.

²²⁵ *NAFTA*, *supra* note 48, s. 1501(1). See: Wood, *supra* note 210 at 404.

²²⁶ Enrique Lagos, “Introductory Remarks” in OAS, Secretariat for Legal Affairs & Canadian International Development Agency, *Legal Harmonization in the Americas: Business Transactions, Bifurcism and the OAS* (Washington, D.C., Office of the Assistant Secretary for Legal Affairs, 2002) 1 [Lagos, “Introductory Remarks”]; Glenn, *supra* note 209 at 33-36; Bourély, *supra* note 209 at 12. See also these two papers that deal with international antitrust harmonization and that call for an informal harmonization: Wood, *ibid.*; Southey, *supra* note 210.

²²⁷ Glenn, *ibid.* at 34.

²²⁸ Lagos, “Introductory Remarks”, *supra* note 217 at 1.

harmonization offers much more flexibility in that regard.²²⁹ States remain free to adopt provisions in accordance with their political and legal regimes. Above all, one has to keep in mind that the harmonization advocated for by this paper is a minor one, requiring only modifications to the provisions exempting export cartels from national competition laws. Given this minor modification, the option of formal harmonization is not desirable, especially because American states are more favourable and accustomed to informal harmonization. The IAJC would be the best forum to draft an explicit exemption system with a notification requirement given its experience in dealing with the issue of cartels in the Americas.

C. The Advantages of the Harmonization Process

In its report of 1974, the CERBP of the OECD concluded that a notification procedure is desirable.²³⁰ It recommended its member states to consider incorporating such a procedure in their national competition laws by stating that:

A notification procedure should cover details about membership, fields of action, the type of restriction involved, and the basic facts of the business done or planned. *Obligatory notification of export cartels would enable the national authorities to obtain a much more clearer picture of the advantages and disadvantages of export cartels in their countries, and eventually, modify their legislations accordingly.* [Emphasis added.]²³¹

In so doing, the CERBP shed light on the primary advantage of an explicit exemption system with a notification requirement: the ability to gather information regarding the activities of export cartels to assess the pros and cons of such associations. As a result, the IAJC should adhere to the conclusion of the CERBP.

The second advantage of this harmonization process is that it will facilitate the prosecution of anticompetitive export cartels instituted by developing American countries. As illustrated by section 2(C), developing countries are often powerless to prosecute export cartels adversely affecting their national market because they lack extra-territorial enforcement capacity, technical expertise, and access to evidence in other countries that typically don't have exemption systems with notification requirements. Some bilateral agreements provide for facilitation of extra-territorial

²²⁹ Bourély, *supra* note 209 at 12.

²³⁰ OECD, *Export Cartels*, *supra* note 10 at 52. James Atwood reaches the same conclusion. See: James R. Atwood, "Conflicts of Jurisdiction in the Antitrust Field: The Example of Export Cartels" (1987) 50 *Law & Contemp. Probs.* 153 at 162 where the author argues that: "[t]he requirement that export cartels be publicly registered under an appropriate national law provides an important element of transparency and an opportunity for government-to-government discussions, if desired. It also provides some assurance that the cartel exists and is conducting its operation with the laws and policies of the local government".

²³¹ OECD, *Export Cartels*, *ibid.* at 52-53

prosecutions but only between major American countries.²³² An informal harmonization process geared towards the explicit exemption system that comes with a notification requirement remedies, or at least diminishes, these enforcement and evidence problems.

As a final point, this harmonization process could lead to a fostering of an inter-American awareness of competition law and economic integration issues. The Canadian Department of Foreign Affairs and International Trade concluded that discussions concerning export cartels could serve to:

[D]raw isolationist elements in the U.S. Department of Justice into a process of rethinking the role of competition policy harmonization and cooperation in an integrating continental market [...].

[B]uild an understanding as to how competition policy could contribute towards deepening NAFTA and indeed multilateral market integration. [Emphasis added.]²³³

Regardless, the World Bank and the OECD foresee positive developments from such action: "In any case, increased cooperation between competition authorities and pressures to harmonize competition policy worldwide are likely to result in the elimination of export cartel exemptions or at least make them impractical."²³⁴

VII. CONCLUSION

Export cartels rest on a retrograde conception of the international system. The rationale of national enrichment to the detriment of other countries

²³² See generally: *Agreement between the Government of Canada and the Government of the United States of America on the Application of Positive Comity Principles to the Enforcement of their Competition Laws*, September 2004, online: Competition Bureau of Canada <[http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/cto2957e_agreement.pdf/\\$file/cto2957e_agreement.pdf](http://www.cb-bc.gc.ca/eic/site/cb-bc.nsf/vwapj/cto2957e_agreement.pdf/$file/cto2957e_agreement.pdf)>; *Agreement between the Government of Canada and the Government of the United Mexican States Regarding the Application of their Competition Laws*, 15 September 2001, online: Competition Bureau of Canada <<http://strategis.ic.gc.ca/pics/ct/cto2503e.pdf>>; *Agreement between the Government of the United States of America and the Government of The Federative Republic of Brazil Regarding the Cooperation between their Competition Authorities in the Enforcement of their Competition Laws*, 26 October 1999, online: Department of Justice of the United States of America <<http://www.usdoj.gov/atr/public/international/3776.htm>>; *Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws*, 11 July 2000 (entered into force 11 July 2000), online: Department of Justice of the United States of America <<http://www.usdoj.gov/atr/icpac/5145.htm>>; *Memorandum of Understanding Between the Commissioner of Competition (Canada) and the Fiscal Nacional Economico (Chile) Regarding the Application of their Competition Laws*, December 17 2001 (entered into force 17 December 2001), online: Competition Bureau of Canada <<http://strategis.ic.gc.ca/pics/ct/cto2320e2.pdf>>.

²³³ Policy Staff Paper No. 94/3, *supra* note 24 at 42.

²³⁴ World Bank & OECD, *A Framework for the Design and Implementation of Competition Law and Policy* (Washington, D.C.: World Bank, 1999) at 36.

appears, from a solely national perspective, to make sense. However, the thorough analysis of the various effects of export cartels in part II illustrates that they may be at best a zero-sum game. They not only distort international trade, but they may generate adverse and anticompetitive effects on domestic markets and on developing countries, which are the majority in the American hemisphere. Their anticompetitive effects may nullify their “potential benefits” which are, as evidenced by the United States experience, empirically unpersuasive for justifying their perpetuation. As Eleanor Fox argues: “It is in everyone’s interest to *be free of export cartels in an integrated world*”. [Emphasis added.]²³⁵

The study conducted by the IAJC concerning cartels in the Americas takes its origins from GA’s *Resolution 1772* which underscored the importance of legal issues in economic integration and requested the IAJC to circumscribe its activities in that matter to competition law and protectionism in the American hemisphere.²³⁶ Although the rapporteurs Rodas and Fried did not explicitly recommend a harmonization process in their final report, they did not disregard this alternative which is in accordance with section 99 of the *OAS Charter*. In the document entitled *Competition and Cartels in the Americas: Suggested Conclusions to Document CJI/doc.118/03*,²³⁷ the rapporteurs pointed out, as their second conclusion that American states are politically willing to incorporate competition law and cartels issues in an international convention, namely the FTAA, which they actually did in its three drafts. But the FTAA is currently an ineffectual organization and, even in the long-term; one can doubt that American states will advance further in this integration process.

Furthermore, the United States, as evidenced by its position within the WTO framework, acts as the standard bearer of export cartel exemptions. Thus the best alternative to achieve international regulation of export cartels is establishing of an informal harmonization based on the explicit exemption system with notification, since this mechanism currently functions in American law. This would only require redirecting the political willingness of OAS member states that was underscored by the rapporteurs towards an informal harmonization process. This process has three advantages. First, it would allow access to information on the activities of export cartels so that states could assess the pros and the cons of their eventual perpetuation or ban. Second, it would facilitate legal proceedings by developing countries against harmful export cartels, thereby complying with one request of the IAJC formulated in its resolution *Cartels in the Scope of the Competition Law in the Americas* urging member states:

²³⁵ Fox, *supra* note 7 at 675.

²³⁶ OAS, General Assembly, *Resolution 1772*, *supra* note 94 at 9.

²³⁷ OAS, Inter-American Juridical Committee, *Conclusions*, *supra* note 116 at 231.

[T]o pay special attention to the challenges faced by smaller, and less developed, member states, so that they can develop the capacity required to maintain effective administration, application, and international cooperation in this area. [Emphasis added.]²³⁸

Third, it could foster an inter-American awareness on competition law and economic integration issues.

The United States Supreme Court reminds us that: “[T]he antitrust laws [...] were enacted for the protection of competition, not competitors”. [Emphasis added.]²³⁹ This statement is undeniably accepted among the majority of the countries of the world. For instance, the OECD recognizes that all its member states consider that this statement is accurate.²⁴⁰ Export cartel exemptions are problematic precisely because they were not enacted for the protection of competition itself, but rather for the protection of competitors whose foreign activities might even generate anticompetitive effects on domestic markets. Uniformity is not an absolute good in legal matters, but in the case of export trade law it is fundamental to the welfare of consumers around the globe.

²³⁸ OAS, Inter-American Juridical Committee, *Resolution 58*, *supra* note 109 at 140.

²³⁹ *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 at 488 (1977) quoting *Brown Shoe Co. v. United States*, 370 U.S. 294 at 320 (1964).

²⁴⁰ OECD, *Qu'est-ce que la concurrence par les mérites* (Paris : OECD, 2006) at 1, online : OEDC <<http://www.oecd.org/dataoecd/7/41/37503683.pdf>> where it is stated that: ‘the objective of competition policy is to safeguard competition, not competitors’ [translated by author].