THE CHANGING INTERNATIONAL STATUS OF EXPORT CARTEL EXEMPTIONS

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INTRODUCTION

Prosecuting and deterring international cartels increasingly occupies the time and energy of competition authorities around the world. In order to provide appropriate policy instruments, policymakers have had to address a range of issues: corporate amnesty policies, extraterritoriality, building antitrust institutional capacity in developing countries, and multinational agreements for competition authorities to cooperate and share information. In a similar vein, some countries have eliminated or limited previously existing antitrust exemptions for cooperation among private firms for exporting goods and services; others, however, have steadfastly insisted on the importance of maintaining these exemptions.

With increasing consensus, both in favor of freer international trade and in opposition to price fixing and market division agreements, these exemptions have come under criticism over the last decade. By 1991, academics were beginning to call for a change in policy toward export cartels. "[Export exemptions from antitrust laws] authorize firms to collaborate to engage in anticompetitive behavior in foreign markets, at the expense of other countries' consumers and producers, in a manner that would be unlawful if undertaken at home."[1] Spencer Weber Waller, the preeminent expert in this area, wrote that "the absence of international regulation pertaining to the use of export cartels leaves a conspicuous gap in the enforcement of competition norms."[2] The Organisation for Economic Co-operation and Development ("OECD") voiced similar criticism,

1. *See* A. Paul Victor, *Export Cartels: An Idea Whose Time Has Passed*, 60 ANTITRUST L.J. 571, 571 (1991).

2. *See* Spencer Weber Waller, *The Failure of the Export Trading Company Program*, 17 N.C. J. INT'L L. & COM. REG. 239, 272 (1992) [hereinafter Waller, *The Failure of the ETC Program*]; *see also* Spencer Weber Waller, *The Ambivalence of United States Antitrust Policy Towards Single-Country Export Cartels*, 10 NW. J. INT'L L. & BUS. 98, 99 (1989) [hereinafter Waller, *U.S. Antitrust Ambivalence*] (arguing that while the "shining success" of U.S. antitrust law in the latter part of the twentieth century is our strong stance against international cartels that harm U.S. consumers, we have a "poor history of responding to the challenges posed by single-country export cartels").

calling for the "worldwide repeal of cartel exemption coupled with an efficiency defense."[3]

Whether in response to these criticisms or broader economic and political forces, over the last decade many countries have eliminated or limited explicit antitrust exemptions for exporters and the associated notification requirements. In part, this reflects an international movement toward creating stronger cooperation in competition policy, as well as more uniform rules and enforcement.[4] In this article, we document this shift and discuss its implications for antitrust enforcement and the effectiveness of global competition.

A few countries, such as the United States and Australia, continue to offer explicit export exemptions. Two questions arise: Is this antiquated or protectionist thinking on the part of these "hold out" countries, or is it the correct policy stance? Do we want explicit exemptions, implicit exemptions, or no exemptions at all? Many would argue that we should have no exemptions: allowing firms to fix prices for domestic *or* export purposes should be illegal. But if we cannot achieve that goal in the near future, it may be worse, not better, to have countries moving to implicit exemptions if "implicit" implies no notification, no ongoing oversight, and increased uncertainty regarding a firm's vulnerability to foreign antitrust prosecution. If there are explicit exemptions, they should be based on considerations of global welfare, rather than "beggar-thy-neighbor" strategies.[5] Countries should work together either to agree to

3. *See* ORG. FOR ECON. CO-OPERATION AND DEV., OBSTACLES TO TRADE AND COMPETITION 11 (1993).

4. *See* Report of the Group of Experts, *Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules*, 9 (European Comm'n 1995) (recommending increased cooperation among competition authorities around the world). One of the reasons for its recommendation is that "there are more and more competition problems which transcend national boundaries: international cartels, export cartels, restrictive practices in fields which are international by nature (e.g. air or sea transport, etc.), mergers on a world scale . . . or even the abuse of a dominant position on several major markets . . . ." *Id.*

5. *See* Julian L. Clarke & Simon J. Evenett, *A Multilateral Framework for Competition Policy?*, *in* THE SINGAPORE ISSUES AND THE WORLD TRADING SYSTEM: THE ROAD TO CANCUN AND BEYOND 136 (Simon J. Evenett & the Swiss State Secretariat of Economic Affairs eds. 2003) ("Moreover, it is difficult to see

eliminate export exemptions or to adopt explicit exemptions that are jointly monitored. The current patchwork of implicit and explicit exemptions is the *least* favored approach.

This paper presents an overview of different types of "pure" export cartel exemptions (i.e., those intended exclusively for trade in foreign markets), documents their changing international status, and discusses the reasons for these changes.[6] Our use of the term "export cartel" is not meant to imply that the member firms are able to exercise market power, but simply that they have been granted permission to engage in activities that cartels behave in, such as fixing prices. An "export cartel" or "export association" is simply a group of firms that nations permit to work together (sometimes with clear restrictions specifying over which dimensions they may or may not coordinate). Such an association may or may not function as a classic price-fixing cartel. A "hard core" cartel has the goal of price fixing and/or market allocation.[7] An "export cartel" *may* have the identical primary goal, or it might have strictly efficiency enhancing goals; or it may do both. For example, the firms in the association may simply be sharing the fixed costs of marketing or transportation.[8] Still, it is their self-selection in obtaining exemptions from antitrust laws regulating "hard core cartel" activities that sets these associations apart. We will use both terms, referring to "export associations" when speaking about a legal designation and "export cartels" when discussing the policy issues more generally.

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an argument for retaining beggar-thy-neighbour legal provisions such as exemptions from national competition laws for export cartels.").

6. Export cartels can be "mixed," meaning that they have both domestic and foreign effects. Alternatively, export cartels can be classified as "national" in membership (domestic firms only) or "international" in membership. The pure export cartels discussed here are usually national, but some countries, including the United States, permit foreign firms to join export associations and receive antitrust exemptions, as long as their effects are strictly outside the country in question.

7. *See* Org. for Econ. Cooperation and Dev., *Recommendation of the Council Concerning Effective Action Against Hard Core Cartels*, OECD Doc. C(98)35/FINAL, 3 (1998) (using the terminology "hard core cartels" to refer to private cooperative agreements to set prices or allocate markets).

8. *See* Andrew R. Dick, *Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting?: Evidence from the Webb-Pomerene Experience*, 15 RES. L. & ECON. 89, 90-91 (1992).

The paper proceeds as follows. Section I provides a brief overview of the motivations for export cartel exemptions. We then turn in Section II to the current policy debate about these exemptions and discuss the positions of different countries with respect to continued exemptions. Section III gives a detailed discussion of the types of export cartel exemptions and the changing status of these exemptions around the world. We survey the antitrust laws in fifty-five countries, report on how they currently treat export cartels, and examine whether and why their policies have changed over the past decade. The conclusion draws on this analysis to offer relevant policy recommendations.

I. MOTIVATION FOR EXPORT CARTEL EXEMPTIONS AND THEIR PREVALENCE

A. MOTIVATION

As the country with the strongest and longest standing antitrust laws, the United States also adopted the earliest "export exemption" to its antitrust laws in 1918.[9] At the time, Congress was primarily concerned with two factors that might inhibit exports: (1) the inability of U.S. firms to work together in representing their own interests vis-à-vis powerful foreign cartels, and (2) the high fixed costs of exporting, which would be particularly burdensome to small firms.[10] Although there was a great deal of controversy about such legislation (in particular, there were concerns that the firms in these export associations would coordinate to increase domestic prices), the Webb-Pomerene Export Trade Act ("WPA" or "Webb-Pomerene")[11] passed and remains in effect today.[12]

9. *See* Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000).

10. *See* David A. Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J.L. & ECON. 461, 462-63 (1970); *see also* 15 U.S.C. § 4001(a) (2000).

11. 15 U.S.C. §§ 61-66 (2000). Firms must register with the Federal Trade Commission to form a Webb-Pomerene association.

12. See STAFF REP. TO THE FED. TRADE COMM'N, WEBB-POMERENE ASSOCIATIONS: A 50-YEAR REVIEW 1-7 (1967) [hereinafter FTC STAFF REP.], for an assessment of the WPA.

Over sixty years later, with U.S. firms facing increased competition in global markets, Congress expanded upon the antitrust exemptions provided in the WPA when it passed the Export Trading Company Act of 1982 ("ETC Act").[13] The ETC Act does not supersede the Webb-Pomerene Act, and at the time of passage of the ETC Act there were thirty-nine registered Webb-Pomerene associations in existence.[14] Congress was motivated, in part, by both the growing U.S. trade deficit and the perceived restrictiveness of U.S. antitrust policies on the ability of U.S. firms to compete abroad.[15] Congress intended that the ETC Act would "increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers . . . ."[16] According to Spencer Weber Waller, Congress anticipated that the ETC Act would:

> 1) encourage the formation of well financed vertically integrated general trading companies along the line of Japanese general trading companies ("sogoshosas") to assist United States exporters with all aspects of the exporting process; 2) allow competitors to jointly exploit market power abroad to offset the power of private cartels and foreign government enterprises; and 3) unleash a wave of export activity by small and medium sized firms previously restrained by uncertainty over the application of U.S. antitrust laws.[17]

13. Export Trading Company Act, 15 U.S.C. §§ 4001-4003, 4011-4021 (2000); *see* Waller, *The Failure of the ETC Program*, *supra* note 2, at 243-45 (summarizing the features of the ETC Act, compared to the Webb-Pomerene Act); *see also* James V. Lacy, *The Effect of the Export Trading Company Act of 1982 on U.S. Export Trade*, 23 STAN. J. INT'L L. 177, 185 (1987). The United States has also granted export trading certificates ("ETCs") to a handful of Webb-Pomerene associations, such as the California Dried Fruit Export Trading Co. and Northwest Fruit Exporters, although the member firms are not always identical. *Id.*

14. *See* Victor, *supra* note 1, at 573. The number of Webb-Pomerene associations has declined slowly through the years. Currently, only six Webb-Pomerene associations are registered with the Federal Trade Commission. *See* Fed. Trade Comm'n, *Export Trade Associations Registered Pursuant to the Webb-Pomerene Act* (May 5, 2003) [hereinafter 2003 WPA Registration], *available at* http://www.ftc.gov/os/statutes/webbpomerene/list030505.pdf (last visited Mar. 3, 2005).

15. *See* Waller, *The Failure of the ETC Program*, *supra* note 2, at 239-40.

16. *See* 15 U.S.C. § 4001(b).

17. Waller, *The Failure of the ETC Program*, *supra* note 2, at 240.

After World War II, other countries around the world adopted stronger provisions against domestic price-fixing; the number of countries with provisions for antitrust exemptions for export activities also increased. For example, Germany's 1958 antitrust law, recently amended,[18] required pure export cartels to go through a notification process, but it exempted them from scrutiny and prosecution "provided they are intended to strengthen the competitive position of the domestic member firms vis-à-vis their foreign competitors."[19]

Australia also adopted (and maintains) an explicit exemption with notification. Australia's law recognizes that firms might want to collaborate in order to promote or facilitate exports, but it is concerned about potential harm to domestic consumers: "Most nations exempt export agreements or export associations from competition regulation, and Australia is no exception. Some countries (including the United States and Australia) are, however, concerned that competition-reducing spillover effects be avoided in domestic markets, and require some sort of registration and disclosure of the arrangement."[20] Australia's guidelines justify these exemptions by noting that, "[w]hile size may not be necessary to enhance export opportunities, correct and complete market information is crucial."[21] For example, the Australian Competition and Consumer Commission ("ACCC") is "open to arguments that an export consortium has been structured in a way such that domestic competition will not be substantially lessened, so that coordination of supply to overseas markets and information exchanged in an export

18. *See generally infra* notes 84-89 and accompanying text (discussing the evolution of Germany's competition law).

19. Victor, *supra* note 1, at 576.

20. ASIA-PACIFIC ECON. COOP., EXPORTS AND THE TRADE PRACTICES ACT: GUIDELINES TO THE COMMISSION'S APPROACH TO MERGERS, ACQUISITIONS AND OTHER COLLABORATIVE ARRANGEMENTS THAT AIM TO ENHANCE EXPORTS AND THE INTERNATIONAL COMPETITIVENESS OF AUSTRALIAN INDUSTRY § 3 (1997) [hereinafter EXPORTS AND THE TRADE PRACTICES ACT GUIDELINES], *available at* http://www.apeccp.org.tw/doc/Australia/Decision/audec1c.html (last visited Mar. 3, 2005).

21. *Id.* § 4, *available at* http://www.apeccp.org.tw/doc/Australia/Decision/audec1d.html (last visited Mar. 6, 2005).

consortium is quarantined from activities undertaken on the domestic market."[22]

There is pressure to enact antitrust exemptions only where there are strong antitrust laws. Advocates of these exemptions rely on two types of arguments. First, they fall back on Mercantilist arguments supporting policies that are intended to increase exports and improve the trade balance, even at the expense of domestic consumers and trade partners.[23] For example, Israel's existing antitrust law specifically provides for an exemption for transactions that improve the balance of payments of the state.[24] Second, they argue that these exemptions level the playing field for small firms that would otherwise be disadvantaged in overcoming the hurdles of entering international markets.[25]

B. PREVALENCE OF EXPORT CARTELS

A few numbers can help to put the export cartel exemptions debate in perspective. The best data come from the United States, which requires registration and publishes announcements of its certification of exemptions. Table 1 presents the U.S. data, along with intermittent data from selected other countries. Immediately after passage of the ETC Act, many export trade associations applied for certificates; however, the number of applications leveled out in the mid-1990s. As of 2003, there were 153 valid U.S. export trade certificates. Among the explanations for the modest response by firms to the ETC Act are:

> [T]he dramatic appreciation of the 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,

22. *See id.* § 3 (noting that the ACCC distinguishes "export agreements" and "export consortia"). "Agreements" relate to pricing, while "consortia" relate to product development and marketing strategies for export operations. *Id.*

23. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 607-26 (1937), provides the classic argument against Mercantile policies that favor exporters, the creation of a trade surplus, and the accumulation of domestic gold stocks at the expense of consumer welfare.

24. *See infra* note 61 and surrounding text.

25. *See generally* Dick, *supra* note 8, at 90-95.

> and the lack of a definitive precedent interpreting the scope of the protection provided by antitrust certification.[26]

As discussed above, Australia, like the United States, has an explicit exemption along with a notification requirement. The ACCC can authorize an exemption if it feels there is a potential benefit that outweighs the potential harm.[27] Consistent with the U.S. trend, the annual Australian "authorizations" for export cartels have declined from a peak of sixty-nine in 1975 to just four in 2002. As of 1997, the ACCC reported that "over the years" it had received approximately 400 export agreement notifications.[28] The story is similar in Japan, where Table 1 shows that exemptions in force declined from 180 in 1973 to two in 1998 and zero in 1999. Germany shows a similar pattern in annual exemptions: 227 in 1972 to thirty-six in 1999.

These data provide, at best, only a partial answer to the question of how many export cartel exemptions antitrust authorities issue annually around the world. The available data suggest that such exemptions are still used, but that their number is rapidly declining. Since most countries do not require registration or notification, there is no way to measure whether the use of export associations themselves is declining, or whether they are still prevalent in countries where registration is not required.

II. THE POLICY DEBATE

A. ARGUMENTS AGAINST EXPORT CARTEL EXEMPTIONS

A growing number of policymakers argue that countries should abandon export cartel exemptions and replace them with cooperative, international antitrust enforcement.[29] There are four types of

26. Waller, *The Failure of the ETC Program, supra* note 2, at 246.

27. *See generally* EXPORTS AND THE TRADE PRACTICES ACT GUIDELINES, *supra* note 20, § 3.

28. *See generally id.* (noting that the ACCC analyzes export consortium proposals on a case-by-case basis).

29. *See* World Trade Org., *Rep. of the Working Group on the Interaction Between Trade and Competition Policy – Communication from the European Community and its Member States: A WTO Competition Agreement's Contribution*

arguments in favor of harmonization and cooperation. The first can be thought of as a defense of positive comity. As articulated in 1996 by Sir Leon Brittan and Karel Van Miret, and repeated many times since, export cartel exemptions are especially problematic because they prevent those with the most information about the activities of export cartels from helping those who might be harmed by them.[30]

A second argument against exemptions stems from the concern that the intended beneficiaries are not those using these exemptions. It has frequently been argued that large international companies, not small and medium-sized ones, are taking advantage of export cartel exemptions, thus defeating the purpose of the exemptions.[31] At a 2003 meeting of the World Trade Organization ("WTO") Working Group on the Interaction Between Trade and Competition Policy, the Thai representative acknowledged that export cartels "could sometimes be pro-competitive or have efficiency-enhancing effects," but argued that these associations "should not benefit from a blanket

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to International Cooperation and Technical Assistance for Capacity Building, WTO Doc. WT/WGTCP/W/184, 4 (May 8, 2003)

> (A competition agreement should include provisions to facilitate voluntary case-specific cooperation in relation to anti-competitive practices having an impact on international trade. Such provisions should apply to . . . anti-competitive practices . . . with an impact on the trade flows to and from a different geographical market than that in which the practices have been conceived (e.g., export cartels, abuse of a dominant position by a foreign corporation).).

30. *See Towards an International Framework of Competition Rules*, Communication, Submitted by Sir Leon Brittan & Karel Van Miert to the Council, COM(96)284 § I(b), Annex § (b) (1996) (discussing export cartels and informational requirements for prosecution), *available at* http://europa.eu.int/comm/competition/international/com284.html (last visited Mar. 3, 2005). For a general discussion of positive comity, see *id.* Annex § (c). The WTO representative of Switzerland argued that "[w]ith regard to export cartels, . . . the countries that would be competent to pursue these cartels, namely those in whose markets the cartels operated, often lacked the necessary tools and information since the participating firms were located abroad." World Trade Org., *Rep. on the Meeting of 20-21 Feb. 2003*, WTO Doc. WT/WGTCP/M/21, 16 (May 26, 2003) [hereinafter *WTO Feb. Rep.*]. "These considerations were important for small countries that had not the ability to get information from firms with main offices abroad." *Id.*

31. *See* World Trade Org., *Rep. of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WTO Doc. WT/WGTCP/7, 14 (July 17, 2003).

exemption from competition laws, which would exclude them even from scrutiny under a rule of reason (case-by-case) approach."[32] Her concern was motivated by evidence suggesting that most export cartels involved multinational companies, and therefore, the efficiency argument was suspect.[33]

This claim that the majority of export cartels were made up of relatively large firms had validity in the 1950s and 1960s. A 1967 study of Webb-Pomerene associations found that "[m]ost associations are [made up of] medium to large-sized firms with assets greater than $10 million."[34] Three years later, a study by Larson found that between 1958 and 1962, almost seventy percent of Webb-Pomerene associations were composed of firms with assets of greater than $1 million.[35] Only seventy-five of the 455 firms in the sample were classified as "small," and fifty-three of these firms exported agricultural goods.[36] Furthermore, none of the "small firm" associations functioned as a single sales agency: "Thus, scale economies and cartel protection are irrelevant for this group."[37]

It is not clear that this characterization continues to hold. In his study of ETCs, Waller finds that "[t]he ETC program has been used almost exclusively by small export intermediaries and by trade associations focusing on a small group of products, industries, or markets."[38] Waller also argues that the number of certificates of

32. *WTO Feb. Rep.*, *supra* note 30, at 17.

33. *See* World Trade Org., *Rep. on the Meeting of 26-27 Sept. 2002*, WTO Doc. WT/WGTCP/M/19, 6 (Nov. 15, 2002) [hereinafter *WTO Sept. Rep.*] (reporting that the Thai representative claimed that "a vast number of studies had shown that most such cartels involved large companies and that there was little or no efficiency justification for their practices").

34. *See* FTC STAFF REP., *supra* note 12, at 44.

35. *See* David A. Larson, *An Economic Analysis of the Webb-Pomerene Act*, 13 J.L. & ECON. 461, 470 (1970) (noting that only sixteen percent of the firms were small firms that all belonged to the same fifteen associations, leaving thirty-two associations with no small firm members).

36. *See id.*

37. *Id.* at 472.

38. Waller, *The Failure of the ETC Program*, *supra* note 2, at 250; *see also* SPENCER WEBER WALLER, ANTITRUST AND AMERICAN BUSINESS ABROAD § 9:23, at 9-64 (3d ed., Dec. 2004) [hereinafter WALLER, BUSINESS ABROAD]. Other

review issued by the Commerce Department has been small and declining.[39] There is precious little empirical work on the current composition of export cartels for the primary reason that government agencies either do not collect data on them or keep that data confidential. In general, even the data for countries that require notification "can be deceiving given the fact that there may be no requirement of compulsory notification when export agreements are abandoned and no requirements for reporting cartels or agreements which do not include any restrictions on domestic commerce."[40] Even when countries do report data on exemptions, they often aggregate it with data on other types of exemptions, making it impossible to disentangle information specifically about export cartels. Waller's analysis suggests that U.S. export cartels are no longer dominated by large multinational companies, or at least that a substantial number of ETCs are made up of relatively small firms. Of course, this conclusion only relates to the United States and cannot extend to other countries without further study.

The third argument against exemptions reflects concern about the effects of these laws, and elimination of these laws, on developing countries. At recent WTO meetings, developing country delegates articulated support for the elimination of export cartel exemptions in industrialized countries, while preserving this option for developing countries. At a 2002 meeting, Thailand argued that most export cartels damage the economies of developing countries and should be illegal; but developing countries should be exempt, since small exporters might need to join forces to increase bargaining power.[41] One year later, WTO representatives from Egypt and China made the same point, citing the need to pool resources as necessary to promote international trade.[42]

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authors have drawn similar conclusions. *See* William Nye, *An Economic Profile of Export Trading Companies*, 38 ANTITRUST BULL. 309, 323 (1993) (finding that over forty percent of all ETCs at the time had total exports less than $50,000).

39. WALLER, BUSINESSS ABROAD, *supra* note 38, § 9:24, at 9-66–9-67 ("The Department of Commerce has issued only 182 certificates of review through June 30, 2001. Of these, a number have been relinquished, revoked, or have expired.").

40. Waller, *U.S. Antitrust Ambivalence*, *supra* note 2, at 110.

41. *See WTO Sept. Rep.*, *supra* note 33, at 6.

42. *See* World Trade Org., *Rep. on the Meeting of 26-27 May 2003*, WTO Doc. WT/WGTCP/M/22, 11 (July 9, 2003) [hereinafter *WTO May Rep.*] (reporting that

Fourth, export exemptions undermine international trade policies that promote greater market integration and freer international trade. The Canadian Bar Association commented in a 2003 submission concerning the Free Trade Area of the Americas ("FTAA"):

> With respect to export cartels, the CBA Section has difficulty seeing how Canada, the U.S. or other jurisdictions could seek to preserve export cartel exemptions in the context of an FTAA with a meaningful competition policy component. The fact that this was not addressed in Chapter 15 of [the North American Free Trade Agreement ("NAFTA")] is one of many reasons why more vigorous provisions on export cartels need to be explored.[43]

The United States declined to repeal the WPA and ETC Act when asked to do so by trading partners in the mid-1990s.[44] Mexico specifically asked that these U.S. provisions be repealed, but the United States rejected this request. In fact, the final version of NAFTA specifically preserves these "safe havens" from U.S. antitrust law:

> No changes in U.S. antitrust laws, including the Export Trading Company Act of 1982 or the Webb-Pomerene Act, will be required to implement U.S. obligations under the NAFTA. These laws have contributed to the

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the Egyptian representative said that "it was necessary to leave to [developing nations] the right to assist their local firms either directly, for example by granting them subsidies, or indirectly by allowing for mergers, acquisitions, export cartels, resource pooling or otherwise as each country deemed appropriate for its policy objectives"). At this same meeting, China stated it "shared the view that had been expressed by Thailand that the future multilateral framework on competition policy should incorporate restrictions on the maintenance of export cartels by developed country Members." *Id.* at 15. *See generally* Nareerat Wiriyapong, *Easing of Competition Law Urged*, THE NATION (THAILAND), Aug. 31, 1999 (reporting that academics "urged the government to relax the implementation of the Competition Law for export cartels in order to strengthen competitiveness of Thai exporters in international markets").

43. CANADIAN B. ASS'N NAT'L COMPETITION L. SEC., SUBMISSION CONCERNING THE FTAA COMPETITION 2 (Apr. 2003).

44. *See* COALITION FOR OPEN TRADE, ADDRESSING PRIVATE RESTRAINTS OF TRADE: INDUSTRIES AND GOVERNMENTS SEARCH FOR ANSWERS REGARDING TRADE-AND-COMPETITION POLICY 18 (Sept. 1997) [hereinafter COALITION TRADE POL'Y SEARCH] (noting the importance of U.S. safe harbor policy given the potential damage awards offered under U.S. law), *available at* http://www.dbtrade.com/licit/licit.pdf (last visited Mar. 3, 2005).

> export competitiveness of U.S. 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.[45]

B. THE POLICY RESPONSE FROM THE UNITED STATES

In the context of this growing criticism of export exemptions, and in an effort to eliminate trade frictions and encourage competition within the European Union ("EU"), the European Commission and many EU member states have eliminated explicit exemptions for export activity. In contrast, the United States has been one of the leading defenders of export cartel exemptions. However, these criticisms appear to have effected the promotion of export exemptions by U.S. officials. The United States' joint FTC/DOJ International Antitrust Guidelines changed between 1988 and 1995 to reflect the U.S. shift in policy toward more aggressive enforcement of antitrust laws against international cartels. Presumably reflecting the tension between the European position and the unchanged U.S. law allowing export cartels, the new guidelines give the exemptions a lower profile in its characterization of U.S. international antitrust policy.[46]

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45. *Id.* (quoting The North American Free Trade Agreement Implementation Act, NAFTA Administrative Action Statement, ch. 15(B) (Sept. 3, 1993)).

46. Prominently featured in the first paragraph under "Enforcement Policy" in the 1988 Guidelines, the U.S. Department of Justice states that it "is not concerned with conduct that solely affects competition in foreign markets and could have no direct, substantial, and reasonably foreseeable effect on competition and consumers in the United States." Antitrust Guidelines for International Operations, 53 Fed. Reg. 21584, 21586 (1988). In the 1995 revision, the first paragraph under the new Section 3, "Threshold International Enforcement Issues," states:

> Just as the acts of U.S. citizens in a foreign nation ordinarily are subject to the law of the country in which they occur, the acts of foreign citizens in the United States are subject to U.S. law. The reach of the U.S. antitrust laws is not limited, however, to conduct and transactions that occur within the boundaries of the United States. Anticompetitive conduct that affects U.S. domestic or foreign commerce may violate the U.S. antitrust laws regardless of where such conduct occurs or the nationality of the parties involved.

U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST ENFORCEMENT GUIDELINES FOR INTERNATIONAL OPERATIONS § 3.1 (April 1995) [hereinafter ANTITRUST GUIDELINES], *available at* http://www.usdoj.gov/atr/public/guidelines/internat.htm (last visited Apr. 14,

Despite all of the criticisms, the United States continues to defend the WPA and the ETC Act. At a 2003 WTO meeting, the United States argued:

> [T]hese 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.[47]

The U.S. position does reflect what little is known about the effects of current U.S. export exemptions on competition in world markets. Spencer Weber Waller's survey of the activities of ETCs concludes that most function as export intermediaries and service providers, not as horizontal agreements between competitors.[48] While recognizing the limited overall *positive* impact of these ETCs, Waller discounts the threat to competition posed by export exemptions:

> The ETC Act does not create market power, nor does it create or maintain barriers to entry. It merely permits an industry, as a matter of U.S. law, to collusively exploit such market power abroad if it already exists. The history of the Webb-Pomerene Act suggests that few export associations will have sufficient global market power to exploit foreign markets.[49]

In 1992, Andrew Dick came to a similar conclusion from his analysis of the Webb-Pomerene experience.[50] Global policy discussions and revisions, however, have continued despite limited

2005). The "direct, substantial, and reasonably foreseeable effect" wording of the Foreign Trade Antitrust Improvements Act of 1982 can still be found in the guidelines, but it is placed instead at the end of the same paragraph. *Id.*

47. *WTO Feb. Rep.*, *supra* note 30, at 15.

48. *See* Waller, *The Failure of the ETC Program*, *supra* note 2, at 251-52.

49. *Id.* at 251.

50. *See* Dick, *supra* note 8, at 104 (noting that, from a sample of sixteen Webb-Pomerene Associations, cartel operation raised export volumes by an average of 15.0% and lowered prices an average of 7.6%). Only two industries in the sample produced evidence that the Webb-Pomerene Associations had anti-competitive effects. *Id.* at 110.

knowledge of the impact of export cartels based in the United States or elsewhere.

III. STATUS OF EXPORT CARTEL EXEMPTIONS

A. CURRENT STATUS

This section examines the current status of the law on export cartel exemptions for fifty-five countries, including the existence of reporting requirements (Table 2). This sample consists of all OECD countries, EU countries, and selected developing countries. An asterisk in Table 2 indicates a developing country.[51]

We classify the legal treatment of export cartels into three groups: explicit exemptions, implicit exemptions and no statutory exemption. *Explicit exemptions* are created when a statute explicitly excludes export cartels from the substantive provisions regarding the scope of the antitrust law. Of the countries covered in Table 2, seventeen have explicit exemptions. There are two types of explicit exemptions: those that require notification or authorization procedures, and those that do not. The notification procedures generally require businesses to apply for, and receive, permission from the government before, or concurrent with, participating in practices that may otherwise violate domestic antitrust law. Of the seventeen countries with explicit exemptions, six require notification.

Canadian competition law provides a good example of an explicit exemption *without* a notification requirement.[52] Under Canada's statutory scheme, combinations relating solely to the export of products from Canada are exempt from antitrust liability. However, Canadian exporters can lose their exemption if "the arrangement has resulted in or is likely to result in a reduction or limitation of the real

51. The categorization of developing countries is taken from the World Bank. *See* World Bank Group, *Data & Statistics: Country Groups* (classifying developing countries into groups based on region, income, and indebtedness), *available at* http://www.worldbank.org/data/countryclass/classgroups.htm (last visited Mar. 3, 2005). The classification by income splits developing countries into three groups: low income (*e.g.*, Armenia, India, Vietnam), lower-middle income (*e.g.*, Albania, China, Thailand), and upper-middle income (*e.g.*, Argentina, Czech Republic, Saudi Arabia). *Id.*

52. *See* Competition Act, R.S.C., ch. C-34, § 45(5) (1985) (Can.) (stating that export activity is exempt from conviction under the Competition Act).

value of exports of a product."[53] Since there is no notification requirement, it is impossible to measure how many exporters have taken advantage of this exemption from antitrust liability. This is also the case in Iceland, where the law provides an explicit exemption without a notification requirement.[54] Iceland's legislature passed the law in 1993 and amended it several times since then, so its provisions are not simply a vestige of historical practice.[55]

By contrast, Australia, like the United States, offers an explicit exemption for export cartels, but requires that firms satisfy a notification requirement to receive immunity.[56] This exemption protects "any provision of a contract, arrangement or understanding that relates exclusively to the export of goods from Australia, or to the supply of services outside Australia provided that particulars [of the agreement] are submitted to the [ACCC] within 14 days of the contract, arrangement or understanding being arrived at."[57] Australian competition law therefore provides for automatic immunity for export transactions on a transaction-by-transaction basis.[58] The ACCC explicitly excludes from exemption any agreement that relates to supply or pricing in the domestic market.[59] Between 1974 and 2004, the ACCC received approximately 234 notifications.[60]

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53. *Id.* § 45(6a).

54. *See* Competition Law, No. 8, art. 3 (1993) (Ice.) (mandating that the Competition Law does not apply to exports by stating: "[t]his Law shall not apply to agreements, terms or actions which are solely intended to have an effect outside of Iceland"), *available at* http://www.samkeppni.is (last visited Mar. 3, 2005).

55. *See id.* (noting that the law was amended in 1994, 1997, 1998, and 2000).

56. *See* Trade Practices Act, No. 51, §§ 6-7 (1974) (Austl.) (stating that Australian exporters seeking an exemption from antitrust liability must first notify the government under the requirements detailed in section 51(2)(g) of the Trade Practices Act of 1974).

57. *See* EXPORTS AND THE TRADE PRACTICES ACT GUIDELINES, *supra* note 20, at 33.

58. *See* Trade Practices Act, § 51(2)(g).

59. *See* EXPORTS AND THE TRADE PRACTICES ACT GUIDELINES, *supra* note 20, at 34.

60. *See* E-mail from Jaime Norton, Adjudication Branch, Australian Competition and Consumer Comm'n (June 2003) (noting that section 51(2)(g)

Israel also has a reporting requirement, but with somewhat different criteria for issuing an exemption. Under its policy, engaging in export is a factor for consideration in applying for antitrust exemption, not a separate category of exemption.[61] When reviewing applications for exemptions, Israel's Antitrust Tribunal considers matters of public interest, which include "[i]mproving the balance of payments of the State by reducing imports or reducing the price of imports or by increasing exports and their feasibility."[62]

Two of the countries whose laws provide for explicit exemptions with a reporting requirement apparently do not actually have any such exemptions in effect, at least at the present time. South Africa's 1998 competition law includes an explicit exemption with notification,[63] but the Competition Commission has yet to grant any export exemptions. Taiwan's 2000 law also permits firms to apply for an exemption from its ban on concerted actions,[64] but as of July 2004, no such exemptions were in effect.[65]

Finally, United States antitrust law offers a wide-reaching exemption to businesses engaged in export. In 1982, the United States clarified the jurisdiction of its antitrust laws, amending the

export agreements are not considered "authorizations," and therefore Australia's annual report statistics do not include them) (on file with author).

61. *See* Restrictive Trade Practices Law, No. 5748, §§ 7-10 (1988) (Isr.), *available at* http://www.antitrust.gov.il/Antitrust/en-US/LawandRegulations/RestrictiveTradePracticesLaw.htm (last visited Mar. 3, 2005).

62. *Id.* § 10 (listing quality and supply of goods, promotion of competition, prevention of harm to important industries, and job creation as other equally important factors for consideration when reviewing a restrictive agreement).

63. *See* § 10 of Competition Act of 1998 (S. Afr.) (permitting the Competition Commission to exempt certain agreements that contribute to the "maintenance or promotion of exports," as well as other considerations, such as economic stability and enhancing the competitiveness of small businesses), *available at* http://www.compcom.co.za/thelaw/TheNewAct.pdf (last visited Mar. 8, 2005).

64. *See* Fair Trade Act, § 14(4) (2000) (Taiwan) (providing that enterprises can enter into concerted action agreements so long as they affect only foreign markets), *available at* http://www.ftc.gov.tw/indexEnglish.html (last visited Mar. 10, 2005).

65. *See* Fed. Trade Comm'n (Taiwan), *Statistics: Applications for Concerted Action Approval: Cases Received* (giving a list of exempted enterprises and the type of exemption), *available at* http://www.ftc.gov.tw/2000010129991231801.htm (last visited Mar. 10, 2005).

Sherman Act[66] to make clear that it applies only to actions that harm the domestic market.[67] In doing so, the United States provided an implicit exemption, similar to those discussed below, for firms that engage in collusive conduct solely affecting the export market. Then Congress went further, creating a new explicit exemption. Under the Export Trading Company Act of 1982, an exporter, group of exporters, or export intermediary can apply for a certificate of review stating that its export trade activity does not violate U.S. antitrust laws before they engage in cooperative activity directed at the export market.[68]

The ETC Act includes provisions for written antitrust pre-clearance. The Department of Justice reviews each request for an "export trade certificate of review" before the Department of Commerce can grant such a certificate.[69] Issuance of an ETC certificate essentially eliminates the threat of governmental prosecution for antitrust violations. It shifts the burden of proof in any civil litigation to the litigant/accuser and limits any awards to single, rather than treble, damages in private antitrust actions.[70] The ETC Act also expanded the scope of U.S. exemptions beyond that provided in the WPA. It allows antitrust protection for export of services (rather than goods only), allows any person, partnership, or association to apply for a certificate of review (rather than associations only), and allows banks to participate in and to acquire

66. 15 U.S.C. § 1 et seq. (2000).

67. *See* Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. §§ 6(a), 45(a)(3) (2000) (exempting export commerce that does not have a "direct, substantial, and reasonably foreseeable effect" in the United States from the Sherman Act and FTC Act); *see also* F. Hoffman-LaRoche Ltd. v. Empagran S.A., 124 S. Ct. 2359, 2361 (2004) (holding that when the foreign effects of price-fixing are independent of any adverse domestic effect, neither the FTAIA nor the Sherman Act apply, and a claim cannot be sustained).

68. *See* Export Trading Company Act, 15 U.S.C. §§ 4001-4016 (2000).

69. *See, e.g.*, *id.* § 4013(a) (specifying the conditions for granting an export trade certificate of review). There cannot be "a substantial lessening of competition or restraint of trade within the United States" and the association cannot "constitute unfair methods of competition against competitors engaged in the export of goods. . . ." *Id.*

70. *See* Waller, *The Failure of the ETC Program*, *supra* note 2, at 245 (outlining the antitrust certificate provisions of the ETC Act).

shares in an export trading company.[71] The ETC Act also differs from the WPA by establishing an office within the Department of Commerce both to oversee the granting of ETC certificates, and to promote the formation of export trading companies in the United States.[72] It is important to note that the ETC Act does not protect American export cartels from prosecution by other countries.[73] Firms are only eligible for an ETC exemption if their actions will have no effect on the domestic market. The cooperative activity must not harm domestic competition or create unfair competition for domestic competitors.[74] The ETC Act offers other benefits to certificate holders in civil litigation, including a shorter statute of limitations, presumption that certified conduct is lawful, and attorney's fees and costs for the prevailing party.[75] Between 1983 and 2003, the Department of Commerce issued 191 certificates, 153 of which were still valid in 2003.

71. *See* 15 U.S.C. § 4001(b).

72. *See id.* §§ 4003, 4011.

73. *See* ANTITRUST GUIDELINES, *supra* note 46, § 2.7 (reporting that an export trade certificate issued under the ETC Act "does not constitute, explicitly or implicitly, an endorsement or opinion by the Secretary of Commerce or by the Attorney General concerning the legality of such business plans under the laws of any foreign country"). There have been two important cases in this regard. The first was the 1988 *Wood Pulp* decision by the European Court of Justice. *See* Victor, *supra* note 1, at 574 (providing a brief overview of the *Wood Pulp* case); *see also* Aditya Bhattacharjea, *Export Cartels: A Developing Country Perspective,* 38 J. WORLD TRADE 331, 341 (2004) (explaining that the 1988 *Wood Pulp* decision by the European Court of Justice rejected the American companies' defense that they had immunity via their WP association and asserted that Webb-Pomerene associations were optional, not required, and thus, the principle of state non-interference did not hold). Bhattacharjea focuses on an analysis of the second relevant case, or more properly, global series of cases, involving the American Natural Soda Ash Corporation ("ANSAC"), a Webb-Pomerene association formed in 1983. Bhattacharjea analyzes ANSAC's legal battles with antitrust authorities in the European Union, India, South Africa, and Venezuela. *Id.* at 340-47. Despite initial failure, ANSAC's reformulation as the American-European Soda Ash Shipping Association ("AESASA") satisfied the European Commission's exemption requirements, but ANSAC continued to have problems in other countries and was unsuccessful in convincing any competition authority that the efficiency benefits of the association outweighed the potential for exercising market power. *Id.*

74. *See* 15 U.S.C. § 4013(a).

75. *See* Waller, *The Failure of the ETC Program*, *supra* note 2, at 245.

An *implicit exemption* for export cartels exists when a national antitrust statute applies only to anticompetitive conduct affecting the domestic market.[76] Most countries in our sample (64%), including almost all members of the EU, have implicit exemptions. Such an exemption is granted by negative implication, since the scope of the antitrust law is limited, and does not explicitly mention behavior affecting foreign markets.

Ireland's competition law provides a typical example of an implicit exemption for export cartels.[77] The Irish Competition Act of 2002 prohibits agreements that restrict or distort competition within the State of Ireland.[78] Specifically, the Competition Act of 2002, Section 4(1), provides: "[A]ll agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition in trade in any goods or services *in the State or in any part of the State* are prohibited and void . . . ."[79] The Act does not refer to agreements that restrict or distort competition in other countries.

In some countries, there is *no statutory exemption.* This occurs when price fixing is illegal, and there is not an implicit exemption, because the antitrust statute simply does not define the geographic scope of the market, nor is there an explicit exemption allowing price fixing for export-oriented activity. This category includes Luxembourg, Russia, Thailand, and Uruguay. For example, Luxembourg's "Loi du 17 mai rélative a la concurrence" prohibits cartels and other activities that limit competition "sur le marché," but

76. *See* Simon Evenett, Margaret Levenstein & Valerie Suslow, *International Cartel Enforcement: Lessons from the 1990s*, 24 WORLD ECON. 1221, 1230-31 (2001) (making a similar distinction between explicit and implicit exemptions); *see also* Bhattacharjea, *supra* note 73, at 336 ("Conduct relating to exports is excluded from the coverage of the national law, either explicitly, or implicitly by jurisdiction being limited to activities that affect competition in the domestic market.").

77. *See* Competition Act, No. 14, § 4(1) (2002) (Ir.), *available at* http://www.irishstatutebook.ie/ZZA14Y2002S4.html (last visited Mar. 3, 2005).

78. *See id.*

79. *Id.* (emphasis added).

it does not explicitly delimit any legal, economic, or geographic boundaries of "le marché."[80]

In summary, of the fifty-five countries surveyed, thirty-four have implicit exemptions, seventeen have explicit exemptions, and four have no statutory exemptions. A little over one-third of those countries with explicit exemptions also have a notification requirement.[81]

B. RECENT CHANGES IN EXPORT CARTEL EXEMPTIONS

As the preceding discussion illustrates, there is both a lack of consistency across countries in how export cartels are treated and a lack of information on who has received exemptions and what kinds of activities they have engaged in. There does seem to be one clear trend, however, namely the elimination of explicit exemptions. Several countries have recently amended their competition laws to eliminate explicit export cartel exemptions. The countries instituting such changes are Cyprus, Germany, Hungary, Japan, Korea, the Netherlands, Sweden, Switzerland, and the United Kingdom ("UK"). Table 3 provides the dates of these reforms, as well as the form of the exemption policy change for each country. We discuss each country in turn.

One important force behind this trend is the push for convergence in competition policies across the member states of the EU. This is clearly seen in the recent modifications adopted by Cyprus and Hungary, which became members of the EU as of May 1, 2004.[82]

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80. *See* Law No. 76 of 2004, c. 1 (Lux.). "Sur le marché" means "in the market" in the context of this statute.

81. *Cf.* Waller, *U.S. Antitrust Ambivalence*, *supra* note 2, at 109-10 (noting that in 1989, only four OECD countries – Japan, Germany, the United Kingdom, and the United States – had mechanisms for registering export agreements). Thus, the changes in the antitrust policies of Japan, Germany, and the United Kingdom are only recent.

82. *See* European Union, *The Member States of the European Union: Cyprus*, *available at* http://europa.eu.int/abc/european_countries/eu_members/cyprus/index_en.htm (last visited May 22, 2005); European Union, *The Member States of the European Union: Hungary*, *available at* http://europa.eu.int/abc/european_countries/eu_members/hungary/index_en.htm (last visited May 22, 2005).

Many of these countries had explicit exemptions in the past, but have changed their laws to parallel the EU's legislative framework. Similarly, Turkey, which had no competition law before 1994, and therefore no exemption for export cartels, has adopted a law that contains the same implicit exemption now common across EU countries.[83]

The evolution of Germany's competition law is prototypical for European countries. Before a 1999 Amendment, the Act Against Restraints of Competition ("GWB")[84] allowed pure export cartel exemptions after the satisfaction of a notification requirement.[85] Between the original 1958 Act and the 1999 amendment, 130 exporters received an exemption under Germany's notification procedure.[86] In 1999, Germany amended the GWB to repeal the explicit exemption for pure export cartels.[87] Elaborating on the 1999

83. *See* Act on the Protection of Competition, No. 4054, art. 2 (Turk.) (stating that agreements which restrict competition "between any undertakings operating in or affecting markets for goods and services with the boundaries of the Republic of Turkey . . . fall under this Act"), *available at* http://www.rekabet.gov.tr/word/ekanun.doc (last visited May 21, 2005).

84. (1958) (F.R.G.), *available at* http://www.iuscomp.org/gla/statutes/GWB.htm (last visited Apr. 4, 2005).

85. *See* ORG. FOR ECON. COOPERATION AND DEV., EXPORT CARTELS: REPORT OF THE COMMITTEE OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES, ¶¶ 5-12 (1974) [hereinafter OECD EXPERT COMMITTEE REPORT] (providing a detailed interpretation of export cartel exemptions under German antitrust law).

> It is not expressly stated in the law that cartels relating solely to German exports are covered by the general prohibition of cartels (Section 1 of the Act against Restraint of Competition) . . . [but] the Federal Cartel Office [considered that] "pure" export cartels relating to German exports are cartels within the scope of Section 1 . . . [although] pure export cartels having no [domestic] effects do not fall in principle within the scope of Section 1 and thus do not have to be notified under Section 9(2) . . . [and that the] exemption for "pure" export cartels . . . merely requires that the cartel serves "the protection and promotion of exports."

Id. ¶¶ 5, 7.

86. *See* Joachim Schwalbach & Anja Schwerk, *Stability of German Cartels*, *in* COMPETITION, EFFICIENCY, AND WELFARE: ESSAYS IN HONOR OF MANFRED NEUMANN 101-28 (Dennis C. Mueller et al., eds., 1999) (arguing that Germany amended its competition law five times since coming into force in 1958, with each subsequent amendment bringing further liberalization).

87. *See id.* at 105.

amendment, commentators note: "[t]he prohibition of concerted practices, found in § 25 of the old version of the GWB (o.v.), has been incorporated in § 1 in order to follow the wording of Art. 85(1) EEC Treaty. . . . [T]he exemptions for rebate cartels . . . export cartels . . . and import cartels . . . have been repealed."[88] Legislative comments made during the passage of the 1999 amendments indicate that the export cartel exemption was repealed "due to worldwide efforts to combat cross-border restraints on competition."[89]

Similarly, the UK's Competition Act of 1998 eliminated its explicit export cartel exemptions.[90] Until 1998, the UK permitted export cartels following notification to the Director General of Fair Trading.[91] The exemption was eliminated as part of a general updating of the competition law.[92] This change was maintained in the 2002 Enterprise Act, which criminalized hard core cartels affecting the UK market.[93] The primary objective of the 1998 law was to bring the UK's cartel laws in line with those of the EU.

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88. Joachim Rudo, *The 1999 Amendments to the German Act Against Restraints of Competition* (highlighting the 1999 Amendments as an effort to further promote harmony with EU competition law), *at* http://www.rudo.de/new/main_ga_commentsonthe.htm (last visited Mar. 3, 2005). Germany has not repealed all exemptions. *Id.* Other categories of exemptions remain, such as agreements for uniform application of standards or types, specialization cartels, structural crisis, or recession cartels. *Id.*

89. *See id.* (describing the abolition of the "long-arm" statute of the Act and its notification requirement).

90. *See* Competition Act, 1998, c. 41, §§ 1-3 (Eng.).

91. *See* David Parker, *The Competition Act of 1998: Change and Continuity in U.K. Competition Policy*, J. BUS. L., July 2000, at 290 ("Under the 1956 Restrictive Trade Practices Act . . . cartel agreements were not prohibited, they were simply 'registrable'. Once an agreement was registered the DGFT [Director General of Fair Trading] was required to bring the agreement before the Restrictive Practices Court.").

92. *See id*. The 1998 Competition Act replaces the need for registration with a general prohibition. Chapter I of the Act sets out the prohibition against agreements between undertakings or concerted practices which "may affect trade within the United Kingdom" and "have as their object or effect the prevention, restriction or distortion of competition within the United Kingdom" (Section 2(1)). *Id.*

93. Enterprise Act, c. 40, §§ 188, 190 (2002) (Eng.) (stating that an individual is guilty of a cartel offense if prices are fixed "in the United Kingdom" and that, if convicted on indictment, an individual is liable "to imprisonment for a term not

Several additional factors explain the 1998 changes. One such factor was the existence of an "extreme number of [cartel] exemptions" under the Restrictive Trade Practices Act of 1973.[94] Practical enforcement of cartel prohibitions was virtually impossible under such a complicated framework of exemptions.[95] The British government recognized this problem in a Green Paper published in 1988.[96] There was also concern that the UK's former law was oriented towards the registration of anti-competitive cartels rather than the prevention of such cartels, that the prior laws did not provide for any meaningful methods of enforcement—such as retroactive penalties—and, finally, that the prior UK law did not require registration of an export cartel if only one company in the cartel agreed to restrict its conduct.[97]

Competition law in the Netherlands and Sweden has also changed. As with several other countries mentioned above (e.g., Cyprus), these changes were driven by the desire for European convergence. Switzerland's decision to modify its law in 1995 was similarly motivated.[98]

exceeding five years or to a fine, or to both"), *available at* http://www.hmso.gov.uk/acts/acts2002/20020040.htm (last visited May 22, 2005).

94. *See* John Pratt, *Changes in UK Competition Law: A Wasted Opportunity*, 15 EUR. COMPETITION L. REV. 89, 90 (1994).

95. *See id.* at 91; *see also* Aidan Robertson, *The Reform of UK Competition Law – Again*, 17 EUR. COMPETITION L. REV. 210, 211 (1996) (citing a governmental review of the Restrictive Trade Practices Act of 1973, which described it as too complex, providing for too many exemptions, and generally inadequate in terms of investigative and punitive powers).

96. *See* U.K. DEP'T OF TRADE AND INDUS., REVIEW OF RESTRICTIVE TRADE PRACTICES POLICY: A CONSULTATIVE DOCUMENT, 1988, Cmnd. 331, at 31-33 (pointing out forty-seven categories of exemption, with the "professional services" category containing seventeen sub-categories).

97. *See* Parker, *supra* note 91, at 290.

98. *See* OECD EXPERT COMMITTEE REPORT, *supra* note 85, ¶¶ 44, 47-49 (discussing the antitrust exemptions of the Netherlands, Sweden and Switzerland); *see also* Sideek Mohamed, *Competition Rules of Sweden and the European Union Compared*, 19 EUR. COMPETITION L. REV. 237, 237 (1998).

Nevertheless, European convergence is not the sole factor driving these changes. Japan's policy has followed a similar path.[99] Like Germany, Japan has a long history of encouraging cooperation among its exporting firms. Before 1997, Japanese law permitted pure export cartels to enter into agreements on price, quantity, quality, or design, by notifying the Minister of International Trade and Industry ("MITI") within ten days of conclusion of the agreement.[100] MITI could limit the export exemption if the agreement: 1) violated Japanese treaties with foreign governments; 2) injured the interests of importers or Japanese export trade; 3) contained unjustly discriminatory content; 4) unjustly restricted participation in, or withdrawal from, the agreement; or 5) unjustly injured the interest of Japanese enterprises or consumers.[101]

In the early 1990s, the Japanese Fair Trade Commission ("JFTC") began to take "a tougher stance toward approving new exempted cartels, and tried to examine various legal requirements more rigidly so that no additional exempted cartels could be formed without convincing specific and urgent necessity."[102] Although cartels in general, and export cartels in particular, used to be thought of in Japan as a "useful tool to eliminate excessive competition," the JFTC began a systematic overview of, and elimination of, its cartel exemptions.[103] Between 1992 and 1995, according to a WTO Trade Policy Review of Japan, "17 of 28 export cartels [were] abolished while many others [were] reduced in scope."[104] By 1998, the number of exempted export cartels had fallen to two.[105] These and other

99. *See* HIROSHI IYORI & AKINORI UESUGI, THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN 353-69 (1994) (providing a concise overview of the history of cartel policy in Japan and the treatment of exemptions).

100. *See* OECD EXPERT COMMITTEE REPORT, *supra* note 85, ¶ 14 (citing Export and Import Trading Act, Law No. 299 of 1952 (Japan) (repealed 1997)).

101. *Id.*

102. *See* IYORI & UESUGI, *supra* note 99, at 357.

103. *See id.* at 354, 359.

104. *See* World Trade Org., *Trade Policy Review of Japan*, WTO Doc. Press/TPRB/5 (1995), *available through* http://docsonline.wto.org/ (last visited Mar. 3, 2005).

105. *See* World Trade Org., *Trade Policy Review: Japan*, WTO Doc. WT/TPR/S/32, 17 (1998) (stating that "[n]ine of the 11 export cartels have been abolished since 1995 . . . [while] [r]emaining export cartels, related either to

related efforts culminated in the passage of the Omnibus Act to Repeal and Reform Cartels and Other Systems Exempted from the Application of the Antimonopoly Act under Various Laws ("Omnibus Act"), which repealed the previous explicit exemption for export cartels, as well as twenty-nine of the thirty-five other criteria for receiving exemption from antitrust liability.[106]

Similarly, in 1999, Korea passed the Act on Regulating Undue Concerted Activities from the Application of the Monopoly Regulation and Fair Trade Act ("Omnibus Cartel Repeal Act") "in order to facilitate the market economy and keep up with international trends by repealing or improving cartels permitted under individual statutes."[107] By this time, Korea, like Japan, had already abolished most export cartels. In addition, Korea took steps toward a more general deregulation of import and export processes. A report by the OECD noted the following:

> Until 1999, the Ministry of Commerce, Industry and Energy (MOCIE) had far-reaching authority to "maintain order" in the import and export market. In February 1999, the Omnibus Cartel Repeal Act limited MOCIE's co-ordinating power to exports of military equipment and compliance with inter-governmental agreements. Moreover, the same Act abolished the power of the Minister of Construction and Transportation to co-ordinate bidding in foreign markets (KFTC 1999a, §19).[108]

protection of quality or intellectual property, or to import monopolies in partner countries are to be abolished by end-1999"), *available through* http://docsonline.wto.org/ (last visited Mar. 3, 2005).

106. *See* Fair Trade Comm'n of Japan, *About the JFTC: Role of the JFTC: What Practices are Subject to Control by the Antimonopoly?* (documenting the effects of the Omnibus Act on export cartel exemptions), *at* http://www2.jftc.go.jp/e-page/aboutjftc/role/q-3.htm (last visited Mar. 3, 2005); *see also* World Trade Org., *Trade Policy Review of Japan*, WTO Doc. WT/TPR/S/107, 9, ¶ 65 (October 9, 2002) ("There are no authorized export cartels in Japan. However, 22 types of cartel [sic] are exempted from general prohibition of cartels under Japan's Anti-Monopoly Act (section (5)(vii)).").

107. *See* Int'l Bar Ass'n, *The Global Competition Forum*, *available at* http://www.globalcompetitionforum.org/asia.htm#korea (last visited Mar. 3, 2005).

108. ORG. FOR ECON. COOPERATION AND DEV., BACKGROUND REPORT: THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM, ¶ 85 (1999), *available at* http://www.oecd.org/dataoecd/3/44/2497300.pdf (last visited Mar. 3, 2005).

This trend toward the elimination of explicit exemptions, as well as reductions in the number of exemptions granted, reflects an admirable attempt to make competition law and policy more internally consistent. Many countries have been taking a much more aggressive attitude toward both domestic and international cartels that harm domestic competition. Under such circumstances, policies to promote exactly the same kind of activities outside one's borders seem logically inconsistent and contrary to the spirit of international cooperation. These policy changes reflect the views of scholars such as Spencer Weber Waller, who wrote fifteen years ago:

> The idea of the notification and registration of export cartels on an international basis is equally tempting but flawed. Transparency is a valued goal, but it is of use, first and foremost, as a tool in the detection and eradication of anticompetitive restraints and should not be used as a justification for their perpetuation . . . the best hope [is] that the national export cartel will eventually join its discredited cousin, the traditional international cartel, as an improper distortion of competition in international trade subject to universal condemnation and prohibition.[109]

The impact of these policy changes, however, is less obvious. Because countries have converged on language that restricts enforcement to activities that harm *domestic* competition, the legal status of export cartels is now more, not less, ambiguous. In addition, less information exists regarding who participates in joint export activities and where they target their activities. The questions, then, are what would be an ideal competition policy with respect to joint export activity and what kinds of enforcement mechanisms could move us toward such a policy? There are essentially two types of alternatives: the adoption of extraterritorial policies by national governments or increased international cooperation. In some ways, the most obvious resolution is the extraterritorial option: individual nation states could ban any activity for export that is already prohibited if targeted at the domestic market. There are obvious problems with any extraterritorial solution, so we believe that increased international cooperation is the preferred and more effective solution. This cooperation could be informal, as undertaken by the International Competition Network. Support for this

109. Waller, *U.S. Antitrust Ambivalence*, *supra* note 2, at 111-13.

cooperation could also come from more information sharing among competition authorities so that those nations adversely affected by export cartels have the resources to respond. The strongest form of international cooperation would be an international competition authority with jurisdiction over collusive activity aimed at foreign markets.

On the one hand, as we move toward more fully integrated global markets, there is less reason to distinguish at all between domestic cooperative activity and the same sort of activity aimed at exports.[110] If we have a general consensus that price fixing harms consumers, then export exemptions benefit a nation only to the extent that they harm foreign consumers. The policy is one of enriching oneself at the expense of one's trading partners. A multilateral agreement to eliminate these exemptions and treat price fixing the same wherever it occurs, or in whatever market is targeted, would improve global consumer welfare.

On the other hand, international cooperation and truly effective competition policy requires respect for both national sovereignty and differences in levels of development and the strength of domestic competition across nation states. The real problem with a global ban on "export cartels," whether achieved through international cooperation or through the harmonization of domestic laws, is that it ignores the unintended effects of such a policy. 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.[111]

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110. *See, e.g.*, Bernard Hoekman & Petros C. Mavroidis, *Economic Development, Competition Policy and the WTO*, 37 J. WORLD TRADE 1, 19 (2003), *available at* http://econ.worldbank.org/files/20844_wps2917.pdf (last visited Mar. 3, 2005).

111. *See* Bhattacharjea, *supra* note 73, at 341-52 (discussing the impact of the elimination of export cartels on developing countries); *see also* Ajit Singh, *Multilateral Competition Policy and Economic Development: A Developing*

We have seen exactly this kind of "unintended consequence" as a result of the increased prosecution of "hard core" international cartels.[112] For example, since the 1995 break up of a cartel among producers of seamless steel tubes, the industry has substantially reorganized. Every single former member of the cartel has either exited the industry altogether, or joined in a merger or strategic alliance with another former cartel member. The industry is more consolidated, and it is hard to see how competition could be more intense under the current industry structure than the earlier, explicitly collusive, one.[113]

International cooperation provides an alternative that, if wisely implemented, could limit the negative effects of collusion on international markets without providing a regulatory incentive to merger for small firms, especially in small or developing countries.[114] Such an agreement could require that competition officials meet a higher standard to show that the cooperative activity did in fact harm competition in some markets rather than the per se standard, which

Country Perspective on the European Community Proposals (2003), *available at* http://www.ideaswebsite.org/feathm/aug2003/MCP.pdf (last visited Mar. 3, 2005). *See generally* FREDERIC M. SCHERER, COMPETITION POLICY, DOMESTIC AND INTERNATIONAL (2000).

112. *See, e.g.*, Margaret C. Levenstein & Valerie Y. Suslow, *Private International Cartels and Their Effect on Developing Countries*, *in* WORLD DEVELOPMENT REPORT 2001 48-50, 59-60 (World Bank Jan. 9, 2001) (discussing post-cartel restructuring in the seamless steel tube and vitamin industries), *available at* http://www.worldbank.org/wdr/2001/bkgroundpapers/levenstein.pdf (last visited Mar. 10, 2005); *see also* Margaret C. Levenstein & Valerie Y. Suslow, *Cartel Duration and Organization Then and Now*, at 15 (University of Michigan, Working Paper) (July 2004).

113. *See* GEORGE SYMEONIDIS, THE EFFECTS OF COMPETITION: CARTEL POLICY AND THE EVOLUTION OF STRATEGY AND STRUCTURE IN BRITISH INDUSTRY 124-39 (2002) (providing a comprehensive study of an analogous period, and arguing that the UK's adoption of a more systematic policy against collusion in the 1950s and 1960s led to increases in concentration in formerly collusive industries).

114. *See* Victor, *supra* note 1, at 581 (proposing a number of provisions that one might include in a multilateral agreement on export cartels to allow for efficiency enhancing ventures, and yet create more elaborate checks and balances to anti-competitive ventures). For example, Victor recommends association registration, increased sharing of information across countries, and increased prosecution. *Id.* at 579-81; *see* Bhattacharjea, *supra* note 73, at 355-57 (advocating a similar position, but suggesting the use of anti-dumping rules at the WTO as the enforcement mechanism, although modified to deal with "over-pricing" by foreign cartels).

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has become more common in the national laws of most high-income countries. This policy would recognize that export associations may provide essential resources to overcome barriers to entry to export markets, and therefore, increase the competitiveness of international markets.[115] Rules should be established to give firms guidance as to whether their activity is likely to meet international competition standards, since one of the benefits of national export exemptions is providing legitimate marketing associations with assurance that they would not face domestic legal liability. A stronger policy would place the burden of proof on export associations to show that they need to cooperate in order to participate effectively in international markets and that their activities indeed do not undermine competition.

CONCLUSION

In an attempt to have more uniform pro-competition policies, many countries have chosen to eliminate or restrict the exemptions that they provide to export cartels. Seventeen of the fifty-five countries surveyed here do offer firms exemption from domestic antitrust laws for export activity. Thirty-four provide no exemption from antitrust laws for export activity, but exempt such activity implicitly because their competition laws are silent on restrictive activities that affect foreign markets. Within the last decade, at least ten countries have rewritten their laws, moving from explicit exemptions to this more passive policy of speaking only to the domestic market. However, the construction of domestic antitrust laws that only ban activity that harms domestic competition leaves a vacuum in which export cartels can continue to operate with no obvious or practical institution to provide oversight or prosecution of their activities. Further, the elimination of reporting requirements has reduced the information available concerning the activities of these cooperative ventures among firms.

However, this is not to argue that we should revert to national exemptions that seem to legitimize anti-competitive behavior that is

115. See Joel Davidow & Hal Shapiro, *The Feasibility and Worth of a World Trade Organization Competition Agreement*, 37 J. WORLD TRADE 49, 67 (2003), which makes a similar argument.

strongly condemned if conducted in domestic markets. Instead, we suggest that international cooperation to regulate and prosecute cooperative activity affecting international markets could rationalize these policies and promote competition more effectively than the current haphazard set of national laws. Especially if it includes consideration of both market structure and barriers to entry into international markets, international cooperation could help competition authorities develop the dual capacity to detect and prevent associations that undermine competition, and provide assurance, reduced risk, and consistency for firms that cooperate, but do not undermine competition. This would provide a more coherent set of rules for firms than the current patchwork of export exemptions. It could also provide flexibility reflecting the different needs and levels of development of different countries without abandoning the principles of competition.

TABLE 1: NUMBER OF EXPORT ASSOCIATION EXEMPTIONS IN EFFECT – SELECTED COUNTRIES[a]

YEAR	AUSTRALIA[b]	GERMANY	JAPAN	U.S. (ETC)	U.S. (WP)
1970					35
1972		227	175		
1973			180		
1974	15				
1975	69				
1976	29				
1977	7				
1978	4				30
1979	6				
1980	4	266			36
1981	7				
1982	6				

YEAR	AUSTRALIA[b]	GERMANY	JAPAN	U.S. (ETC)	U.S. (WP)
1983	8			11	
1984	13			43	
1985	4			59	
1986	0			68	
1987	6			82	
1988	3			95	
1989	2			108	
1990	1			119	22
1991	1			121	
1992	1	190	28	131	
1993	12			133	
1994	5			140	
1995	7		11	145	15
1996	2	234		148	
1997	2			146	
1998	2	36	2	144	
1999	0	36	0	144	
2000	6	0	0	147	11
2001	4	0	0	149	12
2002	4	0	0	150	13
2003	4 (through June)	0	0	162	12

[a] There are other countries that require notification, but data are not available or complete enough for us to include in Table 1. For example, New Zealand requires notification but does not approve or authorize the cartel—it merely acknowledges receipt of the notification. According to a government official, they receive few notifications, on the order of one each year or one every two years. They do not keep a register of notifications. (Information provided via email, November 9, 2004.)

[b] Australia's numbers are not strictly comparable to the other countries, because exemptions are given on individual transactions.

Thus, these numbers represent the number of transactions exempted each year (a flow), not the number of export cartels in effect (a stock).

Sources:

Australia: Data provided by the Australian Competition and Consumer Commission.

Germany: Joachim Schwalbach & Anja Schwerk, *Stability of German Cartels*, *in* COMPETITION, EFFICIENCY, AND WELFARE: ESSAYS IN HONOR OF MANFRED NEUMANN 101-28 (D.C. Mueller et al. eds., 1999). The number in effect in 1998 and 1999 are taken from OECD Competition Law and Policy, Annual Report, Germany 1998-1999, *available at* http://www.oecd.org/pdf/M00008000/M00008157.pdf and OECD Competition Law and Policy, Annual Report, Germany 1999-2000, *available at* http://www.oecd.org/pdf/M00008000/M00008069.pdf, respectively.

Japan: Data refer to number of exemptions in force in March of each year. Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Developmental Dimensions*, at 6-7 (UNCTAD and Center for International Development Harvard University, G-24 Discussion Paper Series No. 18, 2002), *available at* http://www.unctad.org/en/docs/gdsmdpbg2418en.pdf Table 12 at 17. In 1998 it was reported that "Nine of 11 export cartels have been abolished since 1995. Remaining export cartels, related either to protection of quality or intellectual property, or to import monopolies in partner countries are to be abolished by end-1999." World Trade Org., *Trade Policy Review: Japan*, WTO Doc. WT/TPR/S/32, xiii (January 5, 1998), *available at* http://www.wto.org/english/tratope/tpre/tp69e.htm. The 2002 Trade Policy Review confirms that export cartels had disappeared. *See* World Trade Org., *Trade Policy Review of Japan*, WTO Doc. WT/TPR/S/107, 9, ¶ 65 (October 9, 2002).

United States: ETC data taken from the U.S. *Federal Register*. The "ETC" figures represent the total number of ETCs in existence in a given year, after eliminating ETCs that were revoked. Only thirty-seven ETCs have been revoked since 1983, so the difference between the number of ETCs issued and the number in existence is small. Webb Pomerene data is from Dick, *supra* note 8; FTC STAFF REP., *supra* note 12; 2003 WPA Registration, *supra* note 14.

TABLE 2: EXPORT ASSOCIATION EXEMPTIONS FROM NATIONAL ANTITRUST LAWS – SELECTED COUNTRIES

(Developing Countries noted with *)

COUNTRY (YEAR OF MOST RECENT RELEVANT STATUTE)	**EXEMPTION CLASSIFICATION**	**NOTIFICATION REQUIREMENT**
Argentina* (1980)	Implicit	No
Australia (1974)	Explicit	Yes
Austria (1988)	Implicit	No
Belgium (1991)	Implicit	No
Brazil* (1994)	Implicit	No
Canada (1986)	Explicit	No
Chile* (1973)	Implicit	No
China* (1998)	Implicit	No
Czech Republic* (2001)	Explicit	No
Cyprus (2004)	Implicit	No
Denmark (2002)	Implicit	No
Egypt (2005)	Implicit	No
Estonia* (2001)	Implicit	No
Finland (2004)	Explicit (vis-à-vis non-EU member states)	No
France (1986, amended 1996)	Explicit	No
Germany (1999)	Implicit	No
Greece (2000)	Implicit	No
Hungary* (1996)	Implicit	No
Iceland (2000)	Explicit	No
India* (2002)	Explicit	No
Indonesia* (1999)	Explicit	No
Ireland (2002)	Implicit	No
Israel (1988)	Explicit	Yes
Italy (1990)	Implicit	No
Japan (1947, amended 1997)	Implicit	No
Kenya* (1988)	Implicit	No
Korea (South) (1980)	Implicit	No

COUNTRY (YEAR OF MOST RECENT RELEVANT STATUTE)	EXEMPTION CLASSIFICATION	NOTIFICATION REQUIREMENT
Latvia* (2004)	Implicit	No
Lithuania* (1999)	Explicit	No
Luxembourg (2004)	No statutory exemption	—
Malta (1995)	Implicit	No
Mexico* (1993)	Explicit	No
Netherlands (1998)	Implicit	No
New Zealand (1986)	Explicit	Yes
Norway (1993)	Explicit	No
Pakistan* (1970)	Implicit	No
Poland* (1990)	Implicit	No
Portugal (1993)	Implicit	No
Russia* (2002)	No statutory exemption	—
Singapore (2004)	Implicit	No
Slovak Republic* (2001)	Explicit	No
South Africa* (1998)	Explicit	Yes
Spain (1989)	Implicit	No
Sri Lanka* (1987, 2003)	Implicit	No
Sweden (1994)	Implicit	No
Switzerland (1995)	Implicit	No
Taiwan (1992)	Explicit	Yes
Tanzania* (1994)	Implicit	No
Thailand* (1999)	No statutory exemption	—
Turkey* (1994)	Implicit	No
United Kingdom (1998)	Implicit	No
United States (1890)	Explicit	Yes
Uruguay* (2000)	No statutory exemption	—
Venezuela* (1992)	Implicit	No
Zambia* (1994)	Implicit	No

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TABLE 3: RECENT CHANGES IN EXPORT ASSOCIATION EXEMPTIONS FROM NATIONAL ANTITRUST LAWS

COUNTRY	**DATE OF AMENDMENT**	**OLD EXEMPTION POLICY**	**NEW EXEMPTION POLICY**
Cyprus	2004	Explicit	Implicit
Germany	1999	Explicit with notification	Implicit (explicit exemptions in limited circumstances)
Hungary	2004	Explicit with notification	Implicit
Japan	1997	Explicit with notification	Implicit
Korea	1999	Explicit	Implicit
Netherlands	1998	Explicit	Implicit
Switzerland	1995	Explicit	Implicit
Sweden	1994	Explicit	Implicit
United Kingdom	1998	Explicit with notification	Implicit

APPENDIX: SOURCES FOR TABLE 1

Argentina	Comisión Nacional de Defensa de la Competencia (Argentina antitrust authority), *at* http://www.miniproduccion.gov.ar/cndc; Asociacion Argentina de Economia Politica, *at* http://www.aaep.org.ar.
Australia	Exports and the Trade Practices Act: Guidelines to the Commission's approach to mergers, acquisitions and other collaborative arrangements that aim to enhance exports and the international competitiveness of Australian industry, *at* http://www.apeccp.org.tw/doc/Australia/Decision/audec1a.html.
Austria	Theodor Taurer, Austrian Federal Economic Chamber—Advisor on Competition Policy, *Competition Law in Western Europe and the USA* (Oct. 2002) (looseleaf release A/C-3).
Belgium	WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES § 29B.1 (James J. Garrett ed., 1995) (looseleaf release).
Brazil	Brazilian Secretariat for Economic Monitoring, *at* http://www.fazenda.gov.br/seae/english/index_english.html.
Canada	Consolidated Statutes and Regulations: Part VI, Offences in Relation to Competition, *at* http://laws.justice.gc.ca/en/C-34/36182.html.
Chile	ABA Global Competition Forum, *at* http://www.globalcompetitionforum.org/s_america.htm.
China	Law of the People's Republic of China for Countering Unfair Competition (1993); APEC Competition Policy and Law Database, *Questions and Answers: People's Republic of China*, *at* http://www.apeccp.org.tw/doc/China.html#QA.Chinabig.com.
Cyprus	*Protection of Competition Law of 1989*, *at*

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	http://www.competition.gov.cy/competition/competition.nsf/0/F4BFF0B315A2D8DAC2256C8E003C0C2C/$file/L.%20207-89eng..pdf?OpenElement; Federal Law on the Protection of Competition (2004), *available at* http://www.cyprus-un-plan.org/AnnexIII/AnIIIAt35_Federal_Law_on_the_Protection_of_Competition.pdf.
Czech Republic	Office for the Protection of Competition, *Legislation*, *at* http://www.compet.cz/EngVer.htm.
Denmark	Danish Competition Authority (Konkurrencestyrelsen), *at* http://www.ks.dk/english/competition/.
Egypt	Egypt passed an antitrust law in January 2005. *See Egypt Regulations: Competition Law Passed*, EIU VIEWSWIRE, Jan. 18, 2005. The law is in Arabic and has not yet been translated into English. Our thanks to Dr. Ahmed Ghoneim of Cairo University for providing us with a translation of the relevant sections, as follows: Article 5 defines the market as Egypt, Article 6 § 1 states that price-fixing is illegal, and Article 9 states that there can be some exceptions if the agreement among firms is in the public interest. However, there is no explicit exemption for export cartels.
Estonia	Competition Act (2003), *at* http://www.legaltext.ee/en/andmebaas/ava.asp?m=026.
EU	Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997). The text of Article 81 (former Article 85) is available at http://www.europa.eu.int/comm/competition/legislation/treaties/ec/art81_en.html. The EEC Treaty was signed in Rome, March 25, 1957. Article 85 of the treaty was implemented in 1962. *Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty*, 1959-1962 O.J. SPEC. ED. 87, *available at* http://europa.eu.int/eur-lex/lex/LexUriServ/LexUriServ.do?uri=CELEX:31962R0017:EN:HTML.

Finland	Act on Competition Restrictions (480/1992), *available at* http://www.kilpailuvirasto.fi/cgi-bin/english.cgi?luku=legislation&sivu=act-on-competition-restrictions-amended.
France	Nina Hachigian, *Essential Mutual Assistance in International Antitrust Enforcement*, 29 INT'L LAW. 117 (1995); JULIAN VON KALINOWSKI, WORLD LAW OF COMPETITION 2.06, at FRA 2-36 (1987).
Germany	(a) German Cartel Authority, *at* http://www.bundeskartellamt.de/wEnglisch/CompetitionAct/CompAct.shtml; Joachim Schwalbach and Anja Schwerk, *Stability of German Cartels*, *in* COMPETITION, EFFICIENCY, AND WELFARE: ESSAY IN HONOR OF MANFRED NEUMANN 101-28 (D.C. Mueller et al. eds., 1999), *available at* http://www.wiwi.hu-berlin.de/im/d/publikdl/98-2.pdf. (b) 1999 Amendments to German Act Against Restraints of Competition, Joachim Rudo, *at* http://www.antitrust.de/amendments/
Greece	International Bar Association, Global Competition Forum, *Greece: National Antitrust Legislation*, *available at* www.globalcompetitionforum.org/europe.htm#Greece.
Hungary	Hungarian Competition Authority, Gazdasagi Versenyhivatal (GVH), *available at* http://www.gvh.hu/index.
Iceland	Competition Law, The Law Gazette A, No. 8/1993, as amended by Law No. 24/1994, 83/1997, 82/1998, and 107/2000, *available at* http://www.samkeppni.is.
India	Ministry of Company Affairs, *at* http://dca.nic.in/; Pradeep S. Mehta & Nitya Nanda, *Changing Competition Regime in India* (noting differences between the Competition Act of 2002 and the older Monopolies and Restrictive Trade Practices Act of 1969), *available at* http://www.ciroap.org/apcl/conf/documents/competition/Changing%20Competition%20Regime%20in%20India.doc.

Indonesia	Prohibition of Monopolistic Practices and Unfair Business Competition, Law No. 5 (1999), *available at* http://www.dprin.go.id/regulasi/english/1999/uu50399.pdf.
Ireland	The Competition Authority of Ireland, Competition Act of 2002, *available at* http://www.tca.ie.
Israel	Israel Antitrust Authority, Antitrust Law and Regulations, *available at* http://www.antitrust.gov.il/Antitrust/en-US/LawandRegulations/.
Italy	Law No. 287 of October 10, 1990; Autorita Garante della Concorrenza e del Mercato (Italian Competition Authority), *available at* http://www.agcm.it/eng/index.htm.
Japan	http://www.apeccp.org.tw/doc/Japan.html#Competition; Geralyn Trujillo, *Mutual Assistance Under the International Antitrust Enforcement Assistance Act: Obstacles to a United States-Japanese Agreement*, 33 TEX. INT'L L.J. 613 (1998); WTO Trade Reports: 1995, *available at* http://www.wto.org/english/tratop_e/tpr_e/tp5_e.htm; 1998, *available at* http://www.wto.org/english/tratop_e/tpr_e/tp69_e.htm; 2000, *available at* http://www.wto.org/english/tratop_e/tpr_e/tp142_e.htm; 2002, *available at* http://www.wto.org/english/tratop_e/tpr_e/tp206_e.htm AJIT SINGH, COMPETITION AND COMPETITION POLICY IN EMERGING MARKETS: INTERNATIONAL AND DEVELOPMENTAL DIMENSIONS 6-7 (UNCTAD and Center for International Development, Harvard University, G-24 Discussion Paper, Series No. 18, 2002) (citing JAPANESE FAIR TRADE COMMISSION, THE ANTIMONOPOLY ACT OF JAPAN 27 (1973).
Kenya	Ministry of Finance, *The Monopolies and Prices Commission*, *at* http://www.treasury.go.ke/monopolies.html.
Korea (South)	WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES § 3.6 (James J. Garrett ed., 1995) (looseleaf release).

Latvia	Law on Competition (2001), *available at* http://www.competition.lv/uploaded_files/ENG/E_likumK.pdf.
Lithuania	Law on Competition (1999), *available at* http://www.konkuren.lt/english/antitrust/legislation.htm.
Luxembourg	Law of 17 June 1970; Loi du 17 mai relative a la concurrence, *available at* http://www.legilux.public.lu/leg/a/archives/2004/0762605/0762605.pdf.
Malta	Competition Act, c. 379 (1995), *available at* http://docs.justice.gov.mt/lom/legislation/english/leg/vol_10/chapt379.pdf.
Mexico	Ley Federal de Competencia, c. 1, art. 6(1) (1993); Comision Federal de Competencia, *available at* http://www.cfc.gob.mx.
Netherlands	Netherlands Legislation *at* http://www.globalcompetitionforum.org/regions/europe/Netherlands/NETHERLANDS.pdf.
New Zealand	New Zealand Commerce Commission, *Anticompetitive Practices Under Part II of the Commerce Act*, http://www.comcom.govt.nz/BusinessCompetition/Publications/anti-competitivepracticesun.aspx; WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES § 41 (James J. Garrett ed., 1995) (looseleaf release).
Norway	Norwegian Competition Authority (Konkurransetilsynet), *Legislation*, *at* http://www.konkurransetilsynet.no/internett.
Pakistan	*Monopolies and Restrictive Trade Practices*, *available at* http://www.paksearch.com/TOC/MONOPOLY.html.
Poland	Commercial Law Center Foundation, *Statutes of Commerical Law Centre*, *at* http://www.prawo.org.pl/?strona=en_statutes&lang=en.
Portugal	Direccao-Geral do Comercio e da Concorrencia (Directorate General for Trade and Competition),

	Legislacao Nacional, *at* http://www.dgcc.pt/16.htm.
Russia	ORG. FOR ECON. COOPERATION AND DEV., COMPETITION LAW AND POLICY IN RUSSIA 22-23 (2004) ("The Law on Competition in its current version specifically prohibits (Article 6.1) horizontal agreements concerning prices or any element of pricing behaviour (mark-ups, discounts), market division, restriction of market access, elimination of participants from the market, or boycott . . . . There are no block exemptions in the Law on Competition and the law does not envision a process for the creation of such exemptions.").
Singapore	The Competition Act 2004, *available at* http://www.apeccp.org.tw/doc/Singapore/Competition/CompetitionBill.pdf.
Slovak Republic	Antimonopoly Office of the Slovak Republic, *Legislation in Force*, *at* http://www.antimon.gov.sk/.
South Africa	The Competition Commission of South Africa, *at* http://www.compcom.co.za/; Department of Trade and Industry, *SACU Trade Policies*, *at* http://www.dti.gov.za/sacu/taiwan.htm.
Spain	Servicio de Defensa de la Competencia (Spanish Competition Authority), *Legislacion*, *at* http://www.mineco.es/dgdc/sdc/.
Sri Lanka	CONSUMER UNITY & TRUST SOCIETY, PULLING UP OUR SOCKS (2003), *at* http://www.cuts-international.org/pulling.pdf.
Sweden	Ulf Bernitz and Helene Palm, *Sweden Law/Commentary: The Swedish Competition Act*, *in* COMPETITION LAW OF WESTERN EUROPE AND THE USA (Martjin van Empel ed., 2004); Swedish Competition Authority (Konkurrensverket), *Competition Legislation*, *at* http://www.kkv.se/eng/competition/competition_legislation.shtm.
Switzerland	Swiss Competition Commission, *at* http://www.wettbewerbskommission.ch.

Taiwan	WORLD ANTITRUST LAW AND PRACTICE: A COMPREHENSIVE MANUAL FOR LAWYERS AND BUSINESSES § 37.9 (James J. Garrett ed., 1995) (looseleaf release).
Tanzania	CONSUMER UNITY & TRUST SOCIETY, PULLING UP OUR SOCKS (2003), *at* http://www.cuts-international.org/pulling.pdf.
Thailand	Trade Competition Act (1999), *available at* http://www.apeccp.org.tw/doc/Thailand/Competition/thcom2.htm.
Turkey	The Act on the Protection of Competition, No. 4054 (1994), *available at* http://www.rekabet.gov.tr/word/ekanun.doc.
United Kingdom	Office of Fair Trading, *Competition Act 1998*, *available at* http://www.oft.gov.uk/Business/Legal/Competition/default.htm.
United States	15 U.S.C. §§ 6a, 45(a)(3) (2000); 15 U.S.C. §§ 61–66 (2000); 15 U.S.C. § 4001–4016 (2000).
Uruguay	Sistema de Informacion sobre el Comercio Exterior (SICE) (Foreign Trade Information System), *Política de Competencia: Legislación National – Uruguay (Competition Law: National Legislation – Uruguay)*, *at* http://www.sice.oas.org/compol/natleg/Uruguay/17243.asp.
Venezuela	International Bar Association, Global Competition Forum, *Venezuela*, *at* http://www.globalcompetitionforum.org/s_america.htm#venezuela; Law to Promote and Protection the Exercise of Free Competition (1992), *available at* http://www.procompetencia.gov.ve/lppelc-eng.html.
Zambia	CONSUMER UNITY & TRUST SOCIETY, PULLING UP OUR SOCKS (2003), *at* http://www.cuts-international.org/pulling.pdf; Zambia Competition Commission, *Competition Rules in Zambia*, *at* http://www.zcc.com.zm/.