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WHAT DO WE REALLY KNOW ABOUT EXPORT CARTELS AND WHAT IS THE APPROPRIATE SOLUTION?

D. Daniel Sokol*

ABSTRACT
This article responds to Florian Becker's article in this journal, "The Case of Export Cartel Exemptions: Between Competition and Protectionism." Professor Becker provides a number of insights into various approaches that battling export cartels may take. I take issue with three of Becker's main themes. First, Becker underplays the importance of political economy issues in the creation and perpetuation of export cartel exceptions from antitrust. A public choice understanding of export cartels is critical to formulating any effective remedy for export cartels. Second, Becker assumes that export cartels are hard-core cartels and that they are a serious problem in international antitrust. In fact, there is very little empirical data on export cartels and nearly all of it comes from the United States. Therefore, it is difficult to say with any great certainty whether export cartels are a problem and how serious a problem they are. Third, Becker ignores the role that international organizations such as the OECD and ICN can play to reduce the effects of export cartels. After surveying different possible solutions, I propose a WTO transparency regime to address export cartels more effectively.

I. INTRODUCTION
This article responds to Florian Becker's article in this journal, "The Case of Export Cartel Exemptions: Between Competition and Protectionism." Professor Becker provides a number of insights into various approaches that battling export cartels may take. He focuses his analysis on the WTO regime and its applicability to addressing export cartels. I take issue with three of Becker's main themes. First, Becker underplays the importance of political economy issues in the creation and perpetuation of export cartel exceptions from antitrust. In many cases, an antitrust agency may be too weak politically vis-à-vis other domestic actors to prevent the creation of an export cartel

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Let us for the moment accept that Becker has correctly identified a serious problem in international antitrust. Export cartels may create a negative externality. Though they have no cost in their home jurisdiction, they may have a cost globally. Just as in other regulatory fields with externalities (for example, environmental, banking, and securities regulation), negative spillovers limit global welfare even if a particular country were to gain from the externality. To the extent that export cartels are a significant problem in international antitrust, a purely domestic solution seems inadequate given that the incentives of countries and their antitrust agencies are not aligned. Becker's proposed solution, like that of Levenstein and Suslow (2005, see note 7), is to encourage greater cooperation and coordination across antitrust authorities to limit the impact of export cartels. In crafting such a solution, Becker does not address public choice concerns that might limit cooperation and coordination. Addressing these public choice concerns is critical to any solution that advocates increased coordination. Third, Becker ignores the role that international organizations such as the OECD and ICN can play to reduce the effects of export cartels. After surveying different possible solutions, I conclude with my own proposal. In a world of second best alternatives, this proposal better addresses the potential costs of export cartels with a solution that is easier to administer through a WTO-mandated transparency regime.

II. EXPORT CARTELS BACKGROUND

A. Export Cartels in Theory

One way in which antitrust has become international is through the spillover of anticompetitive conduct from one jurisdiction to another. There has been a long-standing practice in many countries to allow export cartel exemptions to antitrust laws. Export cartels are cartels that allow companies to fix prices and coordinate conduct that, if firms pursued such conduct domestically, would lead to antitrust scrutiny. An export cartel exemption allows exporters within a given country immunity to antitrust laws so long as the conduct in question affects international markets only. Because these activities are conducted for export markets only, they do not necessarily harm competition in the domestic market. This potentially leads to perverse outcomes. For example, a firm that colludes in a global conspiracy and exports 90 percent of its products could face criminal and/or civil sanctions, while a firm that
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exports 100 percent of its products would face no penalty under its domestic antitrust laws.

Becker suggests that there may be a strategic trade rationale for export cartels. Strategic trade theory entered the trade policy debate in the 1980s and addresses game theoretical outcomes between firms in international oligopoly. One purpose of strategic trade is for a firm to shift rents from another firm to its own through a change in the strategic interaction between the firms. Government policy is a mechanism to undertake such a rent shift. The incentive of a government to shift rents in favor of domestic firms is that such a policy improves a country's terms of trade. In such settings, antitrust policy may be trumped by strategic trade objectives. Strategic trade suggests that a government created export cartel immunities to improve its terms of trade. What Becker fails to address in his article is any empirical evidence that suggests whether such an approach creates any gains from such a policy and at what cost.

There is a second potential explanation for export cartels. This explanation for the origin and continuation of export cartels rests upon a public choice theory. Regulation (including immunities from said regulation) is a function of successful rent seeking by small and well-organized interest groups. Specific to export cartels, those consumers most affected by export cartels are foreign consumers. Foreign consumers are a large and diffuse group, which makes such a group less effective than participants of export cartels in mobilizing politically to protect their interests at the expense of total welfare. The creation of antitrust immunities is in large part the product of a public interest battle. To overcome the effects of antitrust immunities, any successful policy must overcome the public choice factors that led to the creation of such immunities in the first place. Public choice concerns are distinct from those of strategic trade theory. Whereas in some circumstances strategic trade theory might appeal to the majoritarian interest of a country and interest groups, public choice concerns are an expression of interest group pressures that do not improve societal welfare. In many ways, the public choice explanation for export cartels, if correct, is the

2 Id. at 98.
more difficult one to overcome because once an interest group has a rent in place, it will fight hard to maintain it.

B. Export Cartels in Practice

The first inquiry that one must make regarding export cartels is to determine the size of the problem. Previous work identifies that 51 countries allow for export cartels either explicitly or implicitly in their antitrust regimes. In context, this is approximately half of all countries with antitrust regimes. Seventeen countries, including the United States, maintain explicit exemptions. An additional 34 countries lack an explicit exemption. However, they maintain an implicit exemption because their domestic antitrust legislation limits the law's reach to the domestic market. In these settings, antitrust law implicitly allows for anticompetitive conduct entirely outside of the country's borders. Among this group of countries with implicit export cartel exemptions are nearly all EU member states. Becker effectively describes the EU legal structure and the limits of this structure to allow for the prosecution of export cartels. These cartels may engage in price fixing abroad. Some of this behavior may fit within traditional notions of hard-core cartels.

Much remains unknown as to the extent of the export cartel problem in many countries—is there a problem, and if so, how large is the problem and is the problem in decline? Becker does not address these questions. Indeed, Becker notes that "the empirical situation is quite complex" but does not let the lack of data prevent him from advocating a theoretical position in favor of increased cooperation as the best solution to combat export cartels. Yet these questions of the nature and scope of export cartels are the critical questions for any such analysis of export cartels. Becker goes so far as to argue that the problem of export cartels "does not allow for second best solutions." This reasoning is problematic. First, because of political economy considerations, we live in a world of second best solutions and it is naïve to think that policy allows for first best solutions. Second, even in a world of second best solutions, Becker's solution has problems that are more severe than other alternative solutions.

9 Becker, supra note 1, at 105–106.
11 Becker, supra note 1, at 116.
12 Becker, supra note 1, at 126.
13 NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (University of Chicago Press, 1997).
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Without an understanding of the problem of export cartels and its scope, any serious discussion of export cartels may be a solution in search of a problem. Countries with explicit export cartel immunities other than the United States lack transparency and available data to detail the nature of the export cartel immunity. Indeed, even the empirical work on U.S. export cartels reveals limited data to understand export cartels fully. This creates difficulties in determining how much anticompetitive harm an export cartel may create. Even worse, in countries with implicit exemptions the collection of data and transparency is next to impossible. Where there is no notification because the export cartel immunity is implicit, it is difficult to determine even the existence of the cartel let alone the scope of the export cartel and whether it has hard-core cartel attributes. Given the data collection problems in jurisdictions that have explicit immunities, understanding the extent of the spillover effects of export cartels across jurisdictions is even more difficult to determine. The lack of empirical data suggests that global solutions on export cartels may be based more on theory than empirical evidence and therefore not well suited for situations in which the very assumptions behind such theories may be misguided.

III. EXPORT CARTELS AS HARD-CORE CARTELS

One hypothesis, and certainly the hypothesis of Becker, is that export cartels are hard-core cartels and create negative spillovers in other countries. In essence, export cartels allow countries to export their anticompetitive practices abroad while reaping the benefits of increased exports in the home market. This leads to a negative spillover problem. This problem is the rationale for creating an international trade regime in the first place. Export cartels also may facilitate collusion in the domestic market, particularly as export cartels increase contact among competitors. Schultz suggests that collusion among export cartel members in the domestic market is more likely if both domestic and foreign markets are similar or in the case of constant returns to scale regardless of the similarity between the two markets.

17 ROBERT AXELROD, THE EVOLUTION of COOPERATION 5-6, 16 (Basic Books, 1984).
If there are anticompetitive effects, the known effects of export cartels may be understated. This contrasts with hard-core international cartels where John Connor and others have done very interesting empirical work on the nature and reach of such cartels in terms of their overcharges. Some export cartels can have a low share of the world market but a high share of particular markets. This high market share in particular country markets may be the result of the colonial legacy of trade flows between certain developed and developing world countries. This suggests that export cartels may disproportionately hurt developing world markets. Because not all developing world countries have antitrust agencies and not all developing world antitrust agencies have sufficient financial, human, and organizational capacity constraints to address cases that involve international cartels, the burden of anticompetitive behavior and overcharges from export cartels may fall upon developing world consumers.

A. Alternative Explanation of Export Cartels

An alternative explanation as to the impact of export cartels is that export cartels are not a serious antitrust problem. That is, export cartels may not fall within the realm of hard-core cartels. Becker dismisses this claim. Export cartels may have efficiency justifications in which the coordinated conduct is merely ancillary conduct to attain the aims of a coordinated venture. A joint venture among exports may allow for economies of scale for small and medium-sized exporters and may reduce the costs of doing business internationally. This may include administrative costs, advertising, and foreign sales agencies. Another effect to export cartels is that membership in such cartels may
reduce the risk that any one company undertakes in its foreign venture. Whether or not such claims are true is unclear. At least in the United States, in the current antitrust environment, any joint exporting arrangement would require the same level of antitrust counseling to get a formal exemption under the Export Trading Company Act as it would to understand the jurisdictional limits of the Federal Trade Antitrust Improvements Act. In neither case could they reduce whatever uncertainty results from the competition laws of the country or region where they export. In other countries it is unclear whether the argument may be valid, particularly in countries with implicit exemptions.

1. Empirical Studies and the U.S. Experience

An overview of the U.S. system of export cartels helps to understand the nature of export cartels and the role that they may play for both exporters and the global economy. Because of the lack of data from most legal systems on export cartels, studies on export cartels have been limited primarily to the United States, where companies are required to notify and register export cartels. Through an analysis of data of the U.S. export cartel system, it is possible to begin to understand whether export cartels (or at least U.S. export cartels) have an anticompetitive effect. This, however, places limits on global generalizations about the potential harms that export cartels may cause. In the U.S. context, two laws govern export cartels. The Webb-Pomerene Act provides for an exemption for purely export cartels. The Export Trading Company Act provides an antitrust exemption for U.S. companies that jointly export goods and services, so long as these companies do not substantially lessen competition within the United States. Becker provides a good summary of these laws and how they operate.

Some work shows mixed results as to the whether or not export cartels played an efficiency-enhancing role for U.S.-based firms. According to Scherer, one study of U.S. export cartels suggests that few export cartels engaged in coordination that was ancillary to a business venture in international distribution. In others cases, the purpose of the export cartels was

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27 Brendan Sweeney, Export Cartels: Is There a Need for Global Rules, 10 J. INT'L ECON. L. 1, 3 (2007).
28 In discussing the United States experience, Becker incorrectly states that the United States was the first to have antitrust law provisions. Although this is true at the state level, at the country level Canada preceded the United States in its antitrust law by a year.
31 Becker, supra note 1, at 101–105.
to fix prices, coordinate bids, and/or allocate customers. In a recent study, Levenstein and Suslow find that, on average, Export Trading Company Act exemptions do not increase exports, with the more likely explanation that firms that seek an exemption do so because of a concern that exports in the sector will fall. The fact that such export cartels do not increase exports should not be surprising. Cartels typically reduce output. Indeed, if the export law benefited smaller risk-adverse firms to integrate, one would expect output to increase as they realize economies of scale through integration and reduce the transaction costs among themselves.

2. Domestic Capacity Constraints

If the assumption is that there is no real problem because export cartels are not hard-core cartels, then there is no anticompetitive effect to foreign consumers. In such circumstances, the appropriate policy response should be inaction. However, if in fact export cartels represent a real problem, the effect may be significant, particularly in the developing world. It is difficult to assign enforcement responsibility to developing world countries for export cartels. Many developing world antitrust agencies face significant capacity constraints to address international anticompetitive conduct. Part of this is due to information costs. A given antitrust agency will have more information available to it as to the firms headquartered within its jurisdiction. Information may be difficult for a young agency to acquire as documents may be scattered across jurisdictions. Without the participation of the home agency to combat export cartels, it may be very difficult to obtain enough evidence to bring a successful case in a given country.

Because of public choice concerns, agencies may be reluctant to assist foreign antitrust agencies in information gathering of export cartels. Agencies that do offer assistance face potential political backlash regarding funding and other scrutiny by legislators and other parts of the executive branch (such as trade ministries) that support the special interests behind export cartels. This assumes that antitrust agencies are even permitted by law to assist sister agencies on export cartel investigations. There is a potential for cooperation on export cartel matters between competition officials in different countries who share a common vision and must fight against the

35 Output may remain constant for any number of factors, some of which are exogenous such as currency fluctuations.
trade or commerce officials within their own governments who promote these things. However, attacking entrenched vested interests is a risky strategy for antitrust agencies, as are other areas in which government limits competition (for example, agricultural subsidies) when other enforcement priorities such as hard-core cartels and ex ante competition advocacy come at a much lower cost and with a higher potential for success with less political backlash.

Bhattacharjea illustrates through a comparative case study of the soda ash export cartel the potential deleterious effect of export cartels on developing world countries. His work demonstrates how developing world competition agencies may be under-equipped to address export cartel anticompetitive behavior. A separate article describes how foreign export cartels have created anticompetitive effects within Mexico. In the Mexican case, the CFC's ability to act against foreign export cartels has been limited because the CFC was not empowered to investigate or impose remedies on foreign-based firms. However, what is unclear is whether these case studies are representative or suffer from selection bias. Though there was some discussion of export cartels initially in the WTO Working Group on Trade and Competition, countries dropped the issue of export cartels from the agenda early on in favor of topics in which an agreement could be reached.

3. Solutions Based on Existing Alternatives

a. Hard-Law solutions

One possible solution is to allow for these issues to be dealt with by "hard-law" international organizations. What makes an institution hard law is its binding effect through state to state-level negotiation. Hard-law agreements can be enforced through binding adjudications. In the case of antitrust, hard law among existing institutions means an export cartel ban through the WTO. However, the case of export cartels is different from traditional trade disputes that might use the WTO. The fundamental problem in export cartels is one of information rather than one of conduct. Because there is little data available regarding export cartels, a solution must weigh whether there should be a case-by-case analysis or a categorical one. For such conduct, the political economy of rent seeking suggests that, left to themselves, export cartels will not disappear.

42 Witness the strong reaction by the Department of Commerce against any limitation to Webb-Pomerene in the Antitrust Modernization Commission hearings.
A categorical ban on export cartel immunities could be imposed. A more gradualist approach offered by Scherer would be to allow each country an export cartel exemption in up to three industries. A full or partial ban is a difficult proposition to undertake. Because export cartels are case-specific and some export cartels may have ancillary justifications for their conduct, a general ban on immunities may not optimize global welfare. As with many per se rules, a per se ban on export cartel immunities provides a shorthand for how to address categorical conduct. However, per se rules may prohibit behavior that is pro-competitive. This is why, in the modern era, antitrust is wary of per se prohibitions generally. From the lack of empirical evidence based on data limitations, one cannot make a categorical assertion that export cartels are anticompetitive.

Another approach would be to use existing WTO provisions and adapt them to the specific issue of export cartels. Becker gives some detail about these possibilities. The national treatment provisions in Article III of the GATT apply the principle of nondiscrimination based on competing goods within a country's domestic rather than foreign market. Competition policy systems generally and individual competition policy provisions and enforcement fall within the realm of violation complaints when there are government restraints. These complaints therefore also would fall within the gamut of national treatment of Article III:4 of the GATT. The principle of national treatment lends itself to pro-competitive interpretation. The purpose of national treatment is to create an equality of competitive opportunities for foreign and domestic competitors. Nondiscrimination treatment covers those laws that are affected by the international trade in goods. The Appellate Body has ruled that the terms of trade that may be covered by the term "affected" under Article III:4 of the GATT 1994 has "a broad scope of application." Competition policy is part of those laws and regulations that

45 In assessing fines in the United States, the Department of Justice generally relies on the presumptions in the Guidelines, so economic impact is difficult to determine even in cases of hard-core cartels.
47 The first sentence of GATT Article III:4 reads, "The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use."
affect the sale of goods. Japan—Measures Affecting Consumer Photographic Film and Paper ("Kodak-Fuji") suggests that competition laws may be affected by national treatment. However, nondiscrimination would not reach discrimination in the external sale of domestic goods.

GATT Article XXIII:1(b) Nonviolation complaints, in contrast, is the equivalent of a claim that the dog did not bark. A nonviolation complainant must establish that it had a reasonable expectation that behavior would not occur. When countries frustrate concessions through inaction, this inaction creates a trade barrier. A complainant would also need to establish that it had a reasonable expectation that the offending government would intervene to remedy the offending measure.

In Japan—Measures Affecting Consumer Photographic Film and Paper, the panel endorsed a limited use of nonviolation complaints. However, in stating the rationale for a nonviolation complaint, the Appellate Body in Asbestos cautions that such complaints should be used infrequently, citing the panel opinion in the Kodak–Fuji case. Because of a detailed fact-specific inquiry, the nonviolation complaint is one that has been used infrequently in dispute settlement. The Kodak–Fuji panel did not understand fully that the public and private restraints were complimentary. Given that the WTO panel could not understand some of the factual underpinnings of the case, nonviolation claims for competition policy nonviolation cases may be a nonstarter.

Though no country has yet to attempt such a dispute before the WTO, the Subsidies Agreement may be a possible way to limit the reach of export cartels. Under Article 11.1(b), the Agreement forbids Members to “take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.” Export restraints often require government facilitation of coordinated behavior among competitors. The ban of voluntary export restraints (“VERs”) attempts to discipline some cartel behavior. Article 13.3 serves to prevent Members from undertaking similar measures by public or private companies to VERs. There is also

52 Film at ¶ 10.36.
53 Asbestos, supra note 51, at ¶ 186. This suggests that nonviolation complaints may not yield many cases.
discouragement of informal VERs under Article 11.3 of the Agreement on Safeguards. In VERs, exporters coordinate with each other to limit export sales to a particular country. An argument could be made that the ban on VERs applies to export cartels. This might suggest a precedent for a more general ban on coordinated conduct across countries in which companies in an importing country can coordinate, with government facilitation, with those in exporting countries to limit supply and keep up prices at a level higher than the competitive level. Becker argues that the aggressive use of VER provisions could lead to competition policy at the WTO through the back door. In fact, competition policy has already arrived at the WTO through the back door. In Mexico—Measures Affecting Telecommunications Services, a WTO panel applied competition principles to a telecommunications case. Indeed, it read a cartel prohibition into the Reference Paper of Basic Telecommunications Services where none existed.\textsuperscript{55}

Yet another alternative is to create a new set of remedies within the WTO. Bhattacharjea would create a WTO rule to address overcharges by creating a reverse antidumping style remedy. Where the export price exceeds the normal value, the importing country could retaliate against the exporting firm.\textsuperscript{56} This approach is quite innovative. However, it puts the responsibility of enforcement on importing countries rather than on the exporting countries that are the root of the export cartel problem.

\textit{b. Soft-Law solutions}

A “soft-law” solution may be a preferred solution. In contrast with hard-law, soft-law international antitrust organizations lack the ability to bind parties formally. Instead, these organizations use norm creation and implementation to achieve compliance. In antitrust, the organizations that have the greatest effect are the OECD and ICN. If the problem of export cartels is to obtain enough information to make appropriate decisions as to whether to clear certain conduct, soft-law antitrust institutions may be effective in creating norms and pushing this type of agenda. In other settings, soft-law institutions have made significant efforts in improving procedural harmonization through the creation of better practices. In particular the ICN has created and helped to implement better practices for both merger control and cartels on


procedural issues. In the export cartel setting this would require significant changes in domestic law, more than those encountered in previous areas of soft-law successes of mergers or cartels.

Levenstein and Suslow suggest greater international cooperation and coordination to monitor and prosecute export cartels. Becker takes a similar approach. Though the cost to the international system in theory would be lower than other potential solutions offered supra, there is little incentive for agencies to interact on export cartel issues. Export cartels do not affect the interests of both countries (exporter country and importer country) in the same way as do traditional hard-core cartels that harm consumers in both countries. Export cartel host nations and their antitrust agencies would need to monitor conduct that has no effect in their country. This would not be an effective use of agency resources because the rewards of such monitoring would not accrue to that country. In fact, it might reduce the exporting country’s terms of trade. Indeed, such monitoring might create a political backlash by those forces that have kept export cartel exemptions in place.

Could soft law assist in export cartel efforts across agencies? To use soft law to identify and implement domestic business clearance for export joint ventures would require a significant change for the 51 jurisdictions that have either explicit or implicit export cartel immunities. At present, there may not be the political will necessary to undertake such a change. This particularly affects the ability of soft-law institutions to implement an export cartel solution. Presently, the most influential soft-law international institutions (ICN and OECD) do not have export cartels on their agenda. To the extent that export cartels cause consumer welfare loss because of their exemptions from domestic competition laws, these spillover effects go unpunished.

Export cartels being off the agenda of the soft-law international antitrust institutions is in part a function of the power dynamics of the countries that maintain them. Not surprisingly, the jurisdictions with the most to lose with limits on export cartels (U.S. and EU) set the agenda (or at least have veto power over the agenda) of both of these organizations. Because the United States and nearly all EU member states maintain such cartels explicitly or implicitly, this limits the likelihood that these countries, the leaders in international antitrust, will focus on removing such exemptions any time soon.

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59 Becker, supra note 1, at 126.
61 Mere mention of a discussion of export cartels at the Antitrust Modernization Commission received such negative comments by industry groups that benefit from these practices that
This problem illustrates the limits of soft law in creating norms against export cartels. However, these soft-law organizations could address export cartel issues through their analysis and implementation of cartel norms generally by distinguishing between those cartels that are hard-core cartels and those cartels in which the restraint is merely ancillary to doing business.

c. A New Approach

Battling export cartels requires a new approach from either existing hard-law or soft-law solutions. This article advocates mandatory notification and transparency of export cartels by the WTO. Countries would require legitimate export joint ventures (even those with only an implicit exemption) to undertake a robust business review clearance from their home jurisdiction that would provide immunity for a set period of time based on the proposed business plan. Business review clearance would be publicly available. To have the immunity renewed past the initial period, companies involved in the joint venture would be required to provide evidence that the venture is not participating in anticompetitive activities abroad. This proposal is not the same as the developing world essentially buying the developed world agencies' enforcement of export cartels. My proposal is more modest in that it would require fewer market access trade-offs because the only function of the developed world antitrust agency is to create transparency and a paper record on export cartels. It would be up to the antitrust agency of the importing country to take steps against any potential anticompetitive behavior by export cartels. This proposal therefore reduces the cost of information for detection of export cartels.

This process would put the onus of enforcement on developed world countries—those countries that are more likely to have explicit or implicit export cartel exemptions. These countries are better able to absorb the cost of enforcement and have the knowledge and agency capacity to undertake review rather than developing world countries that are more likely to lack both evidence and effective enforcement tools. When a developed world country has an export cartel immunity, this raises the cost of domestic enforcement among younger antitrust agencies to a point in which the developing world agency cannot act to prevent overcharges by the cartel in its market. Because of the cost of information, it is much easier for developed world countries that have export cartel exemptions to keep track of companies that apply for such immunities. Antitrust agencies undertake enforcement

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the Commission dropped export cartels from its agenda even though other difficult issues that did not affect specialized interest groups remained in the agenda.

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actions ex-ante in a number of other situations, such as business review letters or premerger notification.

These domestic commitments would be effectuated through a new binding commitment within the WTO. Exporting countries have no incentive to go along with mandatory transparency because they gain from export cartel immunities. To provide an incentive for such countries to agree to the WTO solution, developing world countries would need to provide increased market access in other areas. Specific WTO provisions for transparency in export cartels would enable better potential domestic enforcement. Mandatory notification would allow agencies across jurisdictions to have better information on export cartels and allow them to determine whether or not these export cartels harm consumer welfare in their own markets. This puts the onus on the antitrust agencies of importing countries to investigate export cartels and their potential harms in each particular jurisdiction given that the information costs are lowest at the domestic level.

Mandatory transparency would allow importing jurisdictions a further check on the activities of joint exporting firms that may be causing an anticompetitive effect. This would particularly assist developing world agencies in obtaining information as to the potential anticompetitive effects of export cartels in their jurisdictions. Though not a developing world antitrust agency, the Irish Competition Authority (“ICA”) has shown how transparency can yield results against export cartels. The Webb Pomerene Act requires registration with the FTC, which posts the filings on the FTC webpage. This posting made it very easy from the perspective of the ICA to get a list of all associations registered. The ICA then sent letters to all the associations and asked the associations which of their members may be engaged in cartel activities that had an effect in Ireland. Export cartel activity in Ireland stopped as a result. The Irish experience suggests a low-cost way in which the potential negative impact of joint exporting firms could be addressed by an importing country with minimal cost to the exporting country. In countries where the capacity of antitrust agencies is high, such as in North America, parts of Asia, or EU members, countries can use the type of approach that the ICA has used against U.S. export cartels. That there seem to be few such cases suggests that export cartels may not be significant in these jurisdictions.

Compliance costs for reporting might have the secondary effect of creating support for increased competition advocacy to limit immunities in the first place. After all, if there is no anticompetitive effect, why have the exemption

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64 Alternatively, there may be some sort of tacit understanding that an agency in one country will not undertake enforcement against the export cartel of another country so long as there is reciprocity for the export cartels of the second country.
in the first place? One response may be that small companies may be risk-averse and may not have the ability to afford sophisticated antitrust counsel about joint export situations. Such a claim may or may not be true. The impact of export cartels is on the foreign country but foreign antitrust agencies lack the capacity to make the determination for themselves if there is an anti-competitive harm as a result of the export cartel. The WTO prohibition would provide a policy lever to push for increased domestic policy change in export cartels and provide arguments for competition advocacy to limit any negative effects of such cartels. Competition advocacy would expose the true cost of such policies and make repeal more likely. It might also create shaming penalties. Suppose a well-known company like Proctor & Gamble was engaged in such an export cartel. The foreign antitrust agency could publicize that the export cartel members, including Proctor & Gamble, overcharge the poor. Though shaming might work if export cartel members are large corporations, shaming might have a more limited effect with smaller companies.

A commitment to transparency is within the traditional WTO rubric and is possible to enforce. For example, GATT Article III and TRIPS Article 63 require mandatory transparency and notification of provisions. Increased transparency will allow the possibility for national enforcers to take proactive steps to combat export cartels to the extent that such cartels threaten their country with anticompetitive conduct. The export cartel transparency provision, like other transparency provisions in the WTO, would be subject to dispute settlement for nonenforcement. This would be different from the traditional cartel registration “solution” offered for most of the first half of the twentieth century antitrust debate because of the now existing global norm to combat hard-core cartels.

IV. CONCLUSION

There is much that remains unknown about the frequency of and actual harm that export cartels cause. To create a more effective policy to combat this potential problem requires a solution that reduces the information costs associated with understanding export cartels. In a departure from previous approaches, such an approach should focus on increasing transparency on export cartels. A transparency regime is a lower-cost solution than that proposed by Becker and has greater potential benefits than a solution based merely on increased coordination.