

AGRICULTURAL EXCEPTIONS TO COMPETITION LAW

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ABSTRACT

State's price policies for agricultural markets may vary significantly among jurisdictions and in consequence the State's role in these markets is very different. Political economy for the agricultural sector is a delicate issue in every country and interest groups exercise a great deal of pressure over State organisms, ranging from the Congress to the Executive agencies that regulate or survey these markets. Therefore, a special treatment awarded by the law or by Government's policies for certain agricultural markets—e.g. legal exemptions and subsidies—is not surprising. Antitrust laws and policies are not alien to these powerful tides, which often turn into special measures towards agricultural markets. Exemptions and exceptions on the enforcement of antitrust laws

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in these markets have been enacted in several countries due to historic, politic, cultural and economic reasons.

The main objective of this document is to present agricultural exceptions to competition law from a theoretical and a comparative law approach. For this purpose, the document assesses the competition laws from the United States, European Union, Israel, Canada and several Latin American jurisdictions (Argentina, Brazil, Chile, Colombia and Mexico) and its enforcement in agricultural markets.

Key words: antitrust law, agricultural markets, public policies, and exceptions to competition law.

LAS EXCEPCIONES AGRÍCOLAS AL DERECHO DE LA COMPETENCIA

RESUMEN

Las políticas estatales en materia de precios para los mercados agrícolas varían de manera significativa en las diversas jurisdicciones y, en consecuencia, el rol del Estado en dichos mercados es diferente. La economía política del sector agrícola es un asunto delicado en cada país y los grupos de interés ejercen una gran presión sobre las entidades estatales, desde el Congreso hasta las agencias de la Rama Ejecutiva que regulan o inspeccionan dicho mercado. Por lo anterior, el otorgamiento de un tratamiento especial por parte de la ley o de las políticas gubernamentales a ciertos mercados agrícolas –por ejemplo, mediante excepciones legales y subsidios– no es sorpresivo.

Las legislaciones y políticas de libre competencia no son ajenas a estas fuertes corrientes, que frecuentemente se

traducen en medidas especiales para los mercados agrícolas. Las excepciones y exenciones a la aplicación de la legislación de libre competencia en estos mercados se han establecido en varios países debido a razones de orden histórico, político, cultural y económico.

El principal objetivo del presente documento es exponer las excepciones agrícolas a la aplicación de la legislación de libre competencia desde un punto de vista teórico y de derecho comparado. Para tal efecto, el documento estudia las leyes de competencia de Estados Unidos, la Unión Europea, Israel, Canadá y varias jurisdicciones de América Latina (Argentina, Brasil, Chile, Colombia y México) y su aplicación en los mercados agrícolas.

Palabras clave: *derecho de la libre competencia, mercados agrícolas, políticas públicas y excepciones a la legislación de libre competencia*

SECTION I

INTRODUCTION

Besides being producers in agricultural markets, what do Aquitania's (Colombia) scallion croppers, Belgian dairy farmers and Michigan's tart-cherry growers have in common? In recent years they have voluntarily wasted part of their production due to their concern on their products' prices. And what concern they do not share at all? They don't share the same preoccupation on their Government's reaction in response to their conduct.

In spite of the fact that such a conduct may only render individual benefits to its perpetrators when it is part of a concerted practice, in the above-mentioned examples each Government had a completely different reaction in regards to the farmers' conduct. The Colombian competition authority penalized seven scallion farmers for wasting ten percent of

their production in the year 2008 under the accusation of an anticompetitive agreement intended to raise prices¹. The European Commission responded to the 2009 protests of milk producers –that dumped millions of liters of fresh milk– with a proposal of temporary aids for dairy farmers².

Finally, the United States (US) Government simply didn't react to the fact that tart-cherry farmers in seven different States left a high percentage of their crop unharvested by the end of 2009. Actually US law³ allows farmers and product “handlers”⁴ in agricultural markets (such as fruits, vegetables, nuts, specialty crops, and milk⁵) to regulate their offer -which means collectively reduce offer- in order to keep prices stable under a federal marketing order⁶ or a marketing agreement⁷. Furthermore, if a person exceeds “*any quota or allotment fixed for him*” by a marketing order or agreement may be penalized⁸.

The aforementioned examples depict how State's price policies for agricultural markets may vary significantly among jurisdictions and in consequence the State's role in these markets is very different. The

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- 1 According to the Colombian authority, competition law was infringed due to the agreement intended to reduce the offer of scallions and increment its price. (*Superintendencia de Industria y Comercio - SIC, Res. 39869 of 2008 and Res. 00090 of 2009.*)
 - 2 European Commission, “Milk: Commission proposes further measures to help dairy sector in short, medium and long term”, Press release, Brussels, 17 September 2009.
 - 3 Agricultural Marketing Agreement Act of 1937 and subsequent amendments.
 - 4 “Handlers” are defined by the law as “*processors, associations of producers, and others engaged in the handling of any agricultural commodity or product (...)*” (Agricultural Marketing Agreement Act, 7 U.S.C. § 608c (1).)
 - 5 The commodities to which the marketing orders are applicable are established in the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c (2).
 - 6 *Cfr.* Dennis W. Carlton and Jeffrey M. Perloff, “Modern Industrial Organization” (Boston MA, Addison Wesley, 2005), pp. 310-312.
 - 7 Agricultural Marketing Agreement Act, 7 U.S.C. § 608b.
 - 8 Penalization will be equivalent to “*a sum equal to the value of such excess at the current market price for such commodity at the time of violation, which forfeiture shall be recoverable in a civil suit brought in the name of the United States*”. (Agricultural Marketing Agreement Act, 7 U.S.C. § 608c.)

political economy in the agricultural sector is a delicate issue in every country and interest groups exercise a great deal of pressure over State organisms, ranging from the Congress to Executive agencies that regulate or survey these markets⁹. Therefore, a special treatment awarded by the law or by Government's policies for certain agricultural markets – e.g. legal exemptions and subsidies – is not surprising¹⁰.

Antitrust laws and policies are not alien to these powerful tides, which often turn into special measures or regulations towards agricultural markets. Exemptions and exceptions¹¹ on the enforcement of antitrust laws in agricultural markets (and other economic activities such as labor, transportation, financial and insurance services¹², energy, telecommunications and media/publishing¹³) have been enacted in several jurisdictions due to historic, politic, cultural and economic reasons.

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- 9 See, GEOFFREY A. MANNE and JOSHUA D. WRIGHT, “A First Principles Approach to Antitrust Enforcement in the Agricultural Industry”, 5 CPI Antitrust Chronicle (2010) (arguing that the agricultural industry in the U.S. is the most politicized industry, about the highly politicized nature of the policy debates in this sector and on the political pressures that may be exerted over the enforcement agencies).
- 10 *In contrast see* GEOFFREY A. MANNE and JOSHUA D. WRIGHT, “A First Principles Approach to Antitrust Enforcement in the Agricultural Industry”, 5 CPI Antitrust Chronicle (2010), págs. 4-10 (advocating towards an enforcement of competition law in agricultural markets that i) focuses solely on competition goals rather than on political goals, ii) regards market concentration as a poor basis for assessing competition performance and iii) conceives intellectual property rights as complementary tools for achieving the goals of fostering innovation and dynamic efficiency).
- 11 The categories “exemption” and “exception” may be distinguished by the extent of their scope, since the former presents a “broader in scope” (e.g. covering markets) than the latter, which tends to be narrowly focused for certain type of conducts (e.g. agreements for research and development) (*Cfr.* UNCTAD, “Application of competition law: exemptions and exceptions”, 2002, págs. 1-2).
- 12 The European Commission issued a new regulation that block exempts certain conducts in the insurance sector. “Commission Regulation (EU) of 24 March 2010 on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.” [Official Journal L 83 of 30.03.2010].
- 13 UNCTAD, “Application of competition law: exemptions and exceptions”, 2002, pág. 11.

Generally, exemptions from antitrust laws have been justified under the following economic reasons:

1. Regulate a natural monopoly by the establishment of price and output regulation or other conduct restrictions¹⁴.
2. Mitigate market failures¹⁵. Examples of the latter include, the objective of balancing asymmetric market power and bargain power¹⁶, address transaction costs and collective action problems¹⁷; and reduce risk and uncertainty¹⁸.
3. Favor certain economic or social sector (e.g. farmers) through the transfer of wealth, in order to achieve a Governmental objective beyond antitrust (e.g. increase countryside's households income)¹⁹.

Exemptions for certain economic activities or exceptions for certain conducts are more common in industrialized nations than in developing

14 American Bar Association Section of Antitrust Law "Federal statutory exemptions from antitrust law" (2007), págs. 53-56.

15 *Id.*, págs. 56-75.

16 For example, see Christine A. Varney's statement on the role of agricultural cooperatives for leveling the bargain power with purchasers: "*In fact, we are acutely aware of the dynamic –not unique to agriculture –where a small number of large buyers are able to exert undue influence on the price of commodities. Agricultural cooperatives play a key role here, helping to level the playing field in negotiations between small family farmers and large buyers who may have either superior information, superior market position, or often, both.*" (CHRISTINE A. VARNEY, "A shared vision for American agricultural markets" (March 12, 2010), pág. 4) *Cfr.*, Arie Reich, "The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation", in *Texas International Law Journal*, vol. 42, No. 843, 2007. UNCTAD, "Application of competition law: exemptions and exceptions", 2002, págs. 28-29.

17 UNCTAD, "Application of competition law: exemptions and exceptions", 2002, págs. 29-31.

18 *Id.*, págs. 31-33.

19 *Cfr.* American Bar Association Section of Antitrust Law "Federal statutory exemptions from antitrust law" (2007), págs. 76-81. OECD. "Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling", DAF/COMP (2005) 44, 2005, pág. 15.

economies that have recently adopted competition laws²⁰. It must be noted that the establishment of exemptions is not devoid of debate both in industrialized and developing nations, as it will be explained below²¹.

Competition policy is not an isolated public policy and must interact with other State's economic policies²². However, the principles underlying competition policies and agricultural policies may not always be compatible. On the one hand, agricultural policies may pursue a number of objectives – e.g. the stability of agricultural goods' prices; the stability of revenue for different agents in the production chain; the maintenance of certain income level for rural households; the control of food prices; and/or to guarantee the country's food security; amongst others. On the other hand, competition policies are normally understood as a means to promote and maintain freedom of competition and the efficiency of markets (allocative, productive and/or dynamic) to maximize consumer welfare.

There are different situations where the Government needs to solve the trade-offs that arise between the attainment of agricultural policy's goals and competition policy's objectives. For example, the stability of agricultural prices may require either command-and-control policies (that by definition rule out competition policies) or certain degree of coordination between the agricultural markets' economic agents – interaction that otherwise would be deemed as an infringement to competition law. Hence Governments must balance diverse policy schemes that reflect the view of different interests at stake, e.g. consumer welfare versus rural workers' welfare or producers' welfare versus retailer's welfare.

20 UNCTAD, "Application of competition law: exemptions and exceptions", 2002, pág. 11.

21 See ARIE REICH, "The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation", in *Texas International Law Journal*, vol. 42, No. 843, 2007.

22 For a reflection upon the complementary roles of regulation and competition policy in the EU (interestingly nothing is said about agriculture regulation), see JOAQUÍN ALMUNIA, "Competition v Regulation: where do the roles of sector specific and competition regulators begin and end?". (23 March, 2010).

Enforcement of antitrust in agricultural markets is currently an important topic in the US's competition authorities agenda. Since March 2010 the US Department of Justice and Department of Agriculture initiated a series of joint public workshops “*to explore competition issues affecting the agricultural sector in the 21st century and the appropriate role for antitrust and regulatory enforcement in that industry.*”²³ In contrast, an ample debate on these topics has not taken place in Latin America in spite of the fact that several jurisdictions have more than 20 years of experience in the enforcement of competition law and that agriculture remains as an important sector for their economies.

The main objective of this document is to present agricultural exceptions to competition law from a theoretical and a comparative law approach. For this purpose, the document assesses the competition laws and its enforcement in the United States, European Union, Israel, Canada, Argentina, Brazil, Chile, Colombia and Mexico. The document focuses on the mentioned Latin American jurisdictions, specifically on the enforcement of competition law in their agricultural markets. Regarding these jurisdictions, the main source of data on cases in agricultural markets was the competition authorities' websites, their annual reports and case law.

The nature of this document is descriptive (or *positive*, in economics scholarship jargon) and may serve as a base for a prospect debate, normative in nature, upon three basic questions that are specially pertinent for Latin America: i) should competition laws be displaced by other public policies' goals in agricultural markets?; ii) are agricultural exceptions to antitrust law the best means, in terms of costs/benefits, for welfare-transfer to agricultural producers?; and iii) do agricultural markets have peculiar features that justify exemptions or exceptions to antitrust laws?

23 Information available at <http://www.justice.gov/atr/public/workshops/ag2010/index.htm>. See also, CHRISTINE A. VARNEY, “A shared vision for American agricultural markets” (March 12, 2010). PHILIP J. WEISER, “Toward a Competition Policy Agenda for Agriculture Markets” (August 7, 2009).

The desirability of distinguishing these markets from other markets for the pursuit of special goals or the enactment of exceptions cannot be taken for granted. Clearly the mere existence of antitrust exceptions to agriculture in other jurisdictions is not a sufficient argument for its implant in Latin America.

Section II of the document presents a succinct *state of the art* of agricultural markets regulation. For that purpose, the section describes the following: i) the alleged distinctive features of agricultural markets that have been used to justify sector-specific policies and law exceptions and ii) State intervention in agricultural markets.

Section III of the document exposes the specific agricultural exceptions to competition law established in the US, EU, Canada, Israel and five jurisdictions in Latin America (Argentina, Brazil, Chile, Colombia, and Mexico). The laws and enforcement in each of the mentioned jurisdictions are described, compared and contrasted on the following aspects:

1. The existence of exceptions to the application of competition law in agricultural markets, which includes explicit, implicit²⁴ and informal²⁵ exceptions.
2. The specific features of competition law's enforcement in agricultural markets (focus on anticompetitive conduct cases). The assessment takes into account antitrust conduct cases (excluding mergers) and focuses on the cases that occur in the following markets: i) markets of production and provision of agricultural primary goods (e.g. cartels among producers of goods) and ii) markets of purchase of

24 An implicit agricultural exception refers to regulation that allows firms to engage in practices that would otherwise be deemed as illegal under the competition law (e.g. horizontal agreements among producers established in agricultural laws).

25 An informal agricultural exception refers to i) situations where the Government promotes conducts that may be considered anticompetitive, without the existence of an explicit or implicit exception, such as price stabilization agreements in agro-food sector and ii) to the systematic inaction of the authority regarding gross anticompetitive conducts.

agricultural primary goods²⁶ (e.g. cartels among purchasers of these goods and single conduct - monopsony cases). Upstream markets (the supply of inputs for agricultural production such as seeds, fertilizers and herbicides) and downstream markets (distribution or retailing of processed food) are not included as “agricultural markets”, but they are referenced.

Finally, **Section IV** presents the conclusions on the explicit, implicit and informal agricultural exceptions to antitrust in the studied jurisdictions.

SECTION II

AGRICULTURAL MARKET CHARACTERISTICS AND REGULATORY CONSEQUENCES

This section briefly describes the features that distinguish most agricultural markets from other products and services markets. As mentioned above, the alleged distinctive characteristics have been used as a justification to support sector-specific regulation and the enactment of exemptions and exceptions for agriculture to antitrust laws in the studied jurisdictions.

2.1. AGRICULTURAL MARKETS’ DISTINCTIVE FEATURES

Paul Samuelson argued several decades ago that it is not possible to understand the fundamental political issues of the countryside without first comprehending the economic concepts of offer and demand²⁷.

26 These markets include the purchase of primary goods for any purpose: direct consumption, further processing of the good, distribution, marketing or retailing of the goods to final consumers.

27 SAMUELSON, PAUL A., *Curso de Economía Moderna*, 1967, pág. 511.

Actually, the markets of agricultural goods have often been used in economics textbooks to depict the nearest market structure to perfect competition and to teach economists how the law of demand and offer work in market economy.

The economic features that distinguish agricultural markets from other type of markets have been used as justification for particular Government's policies toward these markets and also for a specific competition law and policy agenda for agriculture²⁸. Therefore, it is pertinent to review the characteristics of most agricultural markets (obviously, not all agricultural markets present the same situation) that are taken into account for policy and regulatory purposes²⁹:

2.1.1. OUTPUT IS AFFECTED BY EXTERNAL FACTORS (CLIMATE CYCLES) THAT PRODUCERS MAY NOT CONTROL

Production costs are affected by climate conditions, hence external factors that may not be controlled or accurately predicted by producers will determine if output is scarce or abundant. Agricultural cycles fixed by climate conditions determine the markets' productivity and production in the short run. Hence, the market equilibrium may vary due to the weather, causing scarcity or abundance of agricultural goods. Still, the sole fact that external factors affect the offer of a good does not impede that market forces reestablish equilibrium automatically in the next period.

28 For example, according to UNCTAD exemptions for agricultural, dairy, fishing and forestry markets “*have been generally introduced in various countries in order to help ensure the farmers, fishermen and forestry workers receive ‘fair’ and ‘stable prices’ for their products and labour. The seasonal nature of their activities the cycles in production and harvesting, and the social objectives of ensuring viable farming, fishing and forestry communities are also among the reasons for the exemptions.*” (UNCTAD, “Application of competition law: exemptions and exceptions”, 2002, pág. 28)

29 For a review of the key features of agricultural products, see: OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, pp. 15-19.

2.1.2. CONSTANT PRICE FLUCTUATIONS

As it occurs in any other market, output determines agricultural products' prices. What may distinguish agricultural markets from other markets is that strong price fluctuation³⁰ may negatively affect the welfare of a massive group of persons. This occurs due to the sensitivity of output by weather in the short-run combined with the high costs of stocking and transporting the goods.

On one hand, if production is abundant, farmers may not sell all their production and may not be able to stock part of their production or transport it to places where demand is higher. Due to sanitary requirements and the perishable nature of the goods the costs related to the stocking of goods are very high. Market prices will decrease and consumers' wellbeing will increase. In contrast, the income of countryside households will be negatively affected by an abundant harvest³¹.

On the other hand, if production is scarce, prices of agricultural goods will rise and consumers' wellbeing will decrease. An inflationary process instigated by the commodities' prices will affect negatively consumers' income and may produce macroeconomic instability³².

30 *Cfr.* PAUL A. SAMUELSON, "Curso de Economía Moderna", 1967, pp. 516-517.

31 *See* CHRISTINE A. VARNEY, "A shared vision for American agricultural markets" (March 12, 2010) pág. 3 (stating that in spite of agricultural prices volatility, the Department of Justice's objective is "to protect competition broadly" and therefore the agency is "forced to be agnostic about the fact that some firms close up shop from time to time -exit is a part of the competitive process.")

32 For example, *see* CHRISTINE A. VARNEY, "A shared vision for American agricultural markets" (March 12, 2010), págs. 5-6 (depicting the trade-offs that are faced due to different agricultural price levels: on one hand, low prices for farmers increases unemployment and endangers stability and adequacy of food supply, but on the other hand, high prices affects the poorest sectors of society and endangers child nutrition. Varney concludes that a well functioning market "must put enough food on the table of American families at prices sufficient to ensure a living and dignified wage for the people responsible for putting it there".).

2.1.3. PRICE DISTORTIONS INTRODUCED BY INTERNATIONAL MARKETS

Price distortions are introduced by international markets, which are highly subsidized. Agricultural subsidies of industrialized countries affect local agricultural market's incentives especially in developing countries³³. For example, the United States subsidies to cotton farmers have reduced world prices between 20 and 40 percent³⁴. In the year 2008, agricultural support in OECD countries “*comprised about a fifth of gross farm receipts of farmers in these countries*”³⁵ which amounts to USD 265 billion in subsidies³⁶. Furthermore, in the year 2008 OECD farmers “*received prices that were on average 13% above international levels*” and “*farm receipts were 27% higher than if they had not been supported by policies*”³⁷.

2.1.4. ATOMIZED MARKET OF PRODUCERS VERSUS CONCENTRATED DOWNSTREAM MARKETS

Generally the market structure is atomized at the production level and presents oligopoly/oligopsony structure in the processing, distribution and retailing of agricultural goods³⁸. Market structure in the different

33 See, KYM ANDERSON and ALBERTO VALDÉS (editors and contributors), “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008.

34 CARLTON, DENNIS W. and PERLOFF, JEFFREY M., “Modern Industrial Organization” (Boston MA, Addison Wesley, 2005), p. 622. Furthermore, agricultural price supports are burdensome for States. For example, support schemes for dairy products represented a cost for US consumers of US \$ 10,4 billion in higher prices between the years 1986 and 2001. (Robert E. Hall and Marc Liberman, “Economics”, Thompson South-Western, 3rd ed., USA, 2005, pág. 94).

35 OECD. “Agricultural Policies in OECD Countries: Monitoring and Evaluation 2009”, pág. 40.

36 *Id.*, pág. 41.

37 *Id.* However, it must be stressed that farmers’ support in OECD has been falling in the last years, due to policy reform and to the decrease of weight of the agricultural sector in the overall economy. (OECD. “Agricultural Policies in OECD Countries: Monitoring and Evaluation 2009”, págs. 40-59.)

38 *Cfr.* ARIE REICH, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, vol. 42, No. 843, 2007, pág. 849.

agricultural market chains may be the origin of several antitrust concerns in agricultural markets. For example, buyer power is one of the most important concerns in the enforcement of competition laws in agricultural markets³⁹, especially regarding its supposed relation with asymmetric response of retail prices when farmgate prices fluctuate⁴⁰ and the diminishing of farmers' income⁴¹.

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- 39 “OECD. “Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling”, DAF/COMP (2005) 44, 2005, p. 28 (*farmers have often argued that monopsony purchasing power has been used against them to lower their returns and increase the risks in their farming activities. Some researchers argue that weak enforcement of antitrust laws are responsible for an undue concentration of retailing and purchasing and that antitrust laws should be enforced more strictly against their buyers than against other combinations. (Carstensen (2004) and Taylor (2004)) Other researchers argue that as profit margins decline, increasing concentration is inevitable, in order to spread fixed costs and remain competitive. (Sutton (2003))*”). CHRISTINE A. VARNEY, “A shared vision for American agricultural markets” (March 12, 2010), pág. 4 (“*Yet buyer power in agriculture is still an important antitrust problem on which we keep a watchful eye. Undue concentration of buyer power, which we call monopsony, poses a threat to farmers and consumers alike. It enables pricing that is not competitive—in this case, a price that is too low to sustain the efficient amount of production—and that means that farmers will produce less, or that some farmers will go out of business. That eventually leads to shorter supply delivered to consumers, and that can raise their prices. Congress crafted our nation’s competition laws with these exact problems in mind, (4) and there is thus no question that protection of consumers goes hand in hand with the protection of farmers from undue concentration in the agricultural marketplace.*”).
- 40 OECD. “Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling”, DAF/COMP (2005) 44, 2005, págs. 32-33.
- 41 According to CHRISTINE VARNEY, downstream market concentration is a “potential antitrust problem”: “*Many of the businesses with which farmers interact are significantly more concentrated than farming, creating a dynamic where farmers lack the ability to bargain for fair prices and making further concentration in those industries a potential antitrust problem.*” (CHRISTINE A. VARNEY, “A shared vision for American agricultural markets” (March 12, 2010) pág. 3). In contrast, a report of the US Government Accountability Office concluded it is not clear that market power in US agricultural markets was caused by concentration and instead considered that commodity and food increases may have been related with other “*factors such as higher energy costs and growing global demand for grains.*” (US Government Accountability Office “Agricultural Concentration and Agricultural Commodity and Retail Food Prices”, GAO-09-746R (June 30, 2009), pág. 3).

1. **Input provision.** The provision of seeds and fertilizers needed for the production of goods is highly concentrated most countries. Farmers are dependant of big biotechnology firms that require investments on high research and development (R&D)⁴².
2. **Production.** The markets for production of agricultural products, in general, are highly atomized. Especially in developing countries, there are hundreds or thousands producers of agricultural products (of different sizes and with different production technology) that are located in specific regions⁴³. In general, agricultural goods producers are price takers⁴⁴. In contrast, it must be noted that in developed countries the production of agricultural commodities has considerably increased its concentration in the last decades⁴⁵.

42 PHILIP J. WEISER, "Toward a Competition Policy Agenda for Agriculture Markets" (August 7, 2009), pág. 4 (*"Notably, farmers today increasingly turn to patented biotechnology that is used to produce seeds resistant to herbicides and insects, producing larger crop yields than ever before. At the same time, this technological revolution and accompanying market developments have facilitated the emergence of large firms that produce these products, along with challenges for new firms to enter this market"*).

43 *Cfr.* JONATHAN BROOKS and SABRINA LUCATELLI, in "International competitiveness in the A-B-C agro-food sector", in "Trade and competitiveness in Argentina, Brazil and Chile: not as easy as A-B-C", OECD, 2004, pág. 149.

44 According to Carlton and Perloff in most agricultural markets of the United States no farm has as much as one percent of total sales; as a result of this market structure, the elasticity of demand that each farm faces is enormous, which makes them price takers. DENNIS W CARLTON and JEFFREY M PERLOFF, "Modern Industrial Organization" (Boston MA, Addison Wesley, 2005), pág. 69.

45 This is the case of the US agricultural and food production. *"Concentration generally has increased at all levels of the food marketing chain in all agricultural sectors since the 1980s. At the farm level, less than 2 percent of farms accounted for 50 percent of total sales in 2007. At the food processors' level, in general, a small number of companies accounted for a large and growing portion of sales in each of the five major agricultural sectors."* (US Government Accountability Office, "Agricultural Concentration and Agricultural Commodity and Retail Food Prices" GAO-09-746R (June 30, 2009), pág. 3). CRS Report RS21999, "Farm Commodity Policy: Programs and Issues for Congress", 2006, p. 4 (*"In recent decades, the face of farming has changed. Farmers now comprise less than 2% of the population. Most agricultural production is concentrated in fewer, larger, and more specialized operations. In 2002, about 7% of farms accounted for 76% of the sales (these*

3. **Processing, transport and retailing.** The markets for processing (e.g. rice mills, meat packing or sugar cane refineries) and for commercialization of agricultural products (e.g. supermarkets and marketing firms) are concentrated in few firms⁴⁶. The firms that process or commercialize agricultural goods may have sufficient market power to influence prices or to be price makers. There are strong barriers to entry for the processing and retailing of goods due to the high fixed investments required. Furthermore distribution costs of the goods may be high due to insufficient transport infrastructure and geographic conditions. It must be noted that the authorization of farmers' joint marketing activities through cooperatives (an implicit agricultural exception to antitrust) has been justified in certain jurisdictions as mechanism to increase producers' bargaining power that allows to counterbalance buyer power of concentrated producers and retailers⁴⁷.

151,000 farms had average sales over \$1 million). Most of the country's 2 million farms are part-time, and operators rely on off-farm jobs for most of their income.”).

- 46 This is the case of most OECD countries, including the UK and the US. *“Regulations and law play a large role in determining the structure and nature of competition in buying agricultural products in many OECD countries. In some countries, the level of concentration among processors and purchasers of agricultural products has increased significantly in recent years. For instance, in the UK, the top 4 grocery chains will have about 90% of the one-stop shopping grocery store market. In the US, there are now 4 meatpacking firms that have about 80% of the market”.* (OECD. “Competition and Regulation in Agriculture: Monopsony Buying and Joint Selling”, DAF/COMP(2005) 44, 2005, pág. 28)
- 47 UNCTAD, “Application of competition law: exemptions and exceptions”, 2002, págs. 28-29 (*“In addition, with the advent of large processing firms in these sectors, the relative weak bargaining position of individuals engaged in these activities could be exploited. The formation and exemption of cooperatives and marketing boards were seen as possible corrective measures. The cooperatives can enable their members to bargain more effectively for higher prices for their products, and cooperate in such areas as processing, transportation, storage, standards, and marketing to exploit available synergies and efficiencies not likely to be attained on an individual basis”*).

2.2. STATE INTERVENTION IN AGRICULTURAL MARKETS

As pointed out before, the particular characteristics of agriculture markets are used in some jurisdictions to justify different intervention policies that are put in place to regulate the market. The most common forms of State intervention in agriculture are the following:

- i) Direct and indirect subsidies for producers⁴⁸;
- ii) Quota systems (limit production or restrict acreage);
- iii) Price support mechanisms⁴⁹ (such as State purchase of output excess⁵⁰; State loans and price stabilization funds);
- iv) Programs that increment demand for agricultural products (e.g. marketing and promotion of agricultural products);

48 According to STIGLITZ, the biggest subsidy plans in the United States have been destined for agriculture. (JOSEPH E. STIGLITZ, “La economía del sector público”, Antoni Bosch, 3 ed., España, 2000, pág. 40)

49 According to the OECD, the price support mechanism “*is the dominant way in which support is delivered to producers*” both in OECD countries and Non-OECD countries such as Brazil, Bulgaria, China, Romania, Russia, South Africa and Ukraine. OECD. “Agricultural Policies in Non-OECD Countries: Monitoring and Evaluation 2007”, págs. 27-29.

50 Governments have pursued price stabilization through price support systems that ultimately aim at increasing farmers’ welfare. The price support system may operate through the acquisition of goods by the State at high prices, preventing prices to fall. For Carlton and Perloff the use of this sort of policy to transfer income to farmers is very inefficient (it costs more than the benefits it renders) and there are no economic reasons that explain why agricultural markets need stabilization more than other markets and that this purpose should be obtained through government intervention. DENNIS W CARLTON and JEFFREY M PERLOFF, “Modern Industrial Organization” (BOSTON M.A., ADDISON WESLEY, 2005), p. 719. In the same sense, the OECD has stated that “*is a relatively inefficient way of delivering support to producers (...), but is often attractive in countries with lower incomes, as it does not require the use of (and can be a source of) scarce budgetary funds*”. OECD. “Agricultural Policies in Non-OECD Countries: Monitoring and Evaluation 2007”, pág. 27.

- v) Programs that decrease production costs (e.g. research promotion);
- vi) Direct price control (e.g. price floors);
- vii) Promotion of vertical integration; and
- viii) The establishment of legal barriers from imports⁵¹.

Economists have considered that Government intervention in these markets as an underhand manner of transferring income to the agricultural sector, that is burdensome for States and that has the consequence of promoting inefficiency and harming consumers⁵². However, it must be noted that the different kinds of agricultural support schemes produce different levels of “market disruption”. According to OECD studies, “market oriented” policies (e.g. decoupled from production decisions) achieve better results than price supports or credit subsidies, which ultimately stimulate production beyond the amount that would be produced under competition⁵³.

It is also important to note that although the OECD considers that the “core economic analysis” on agricultural policies remains valid for all countries, “*the impracticality of providing fully decoupled support*

51 Cfr. DENNIS W. CARLTON and JEFFREY M. PERLOFF, “Modern Industrial Organization” (Boston MA, ADDISON WESLEY, 2005), págs. 718-721 PAUL A. SAMUELSON, *Curso de Economía Moderna*, 1967, págs 520-28. Arie Reich, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, vol. 42, No. 843, 2007.

52 See, DENNIS W CARLTON and JEFFREY M. PERLOFF, “Modern Industrial Organization” (Boston MA, Addison Wesley, 2005), pp. 718–719 (“*Why governments engage in policies that promote inefficiency and harm consumers? One explanation is that the government wants to transfer income to the agricultural sector but does not want to do so openly and directly by just giving farmers money. To accomplish this transfer of income, price supports and quantity controls are used.*”). Also see, ROBERT E. HALL and MARC LIBERMAN, “Economics”, Thompson South-Western, 3rd ed., USA, 2005, pág. 94. L. ALAN. WINTERS, “The So-Called “Non-Economic”. Objectives of Agricultural Policy, *OECD Economics Department Working Papers*, No. 52, 1988, OECD Publishing, pág. 2.

53 OECD, “Agricultural Policies in Non-OECD Countries: Monitoring and Evaluation 2007”, pág. 28.

*in poor countries, and the suggestion that market interventions may provide a legitimate way of stimulating agriculture to develop beyond a low level equilibrium of subsistence farming.”*⁵⁴

Agricultural policies are formulated for the pursuit of certain economic goals, such as, the stabilization of domestic prices, to facilitate adjustment from external shocks, to foster economic growth, to increase employment and to control inflation⁵⁵. Also non-economic goals or social goals⁵⁶, such as the maintenance of farmers' income, support for small and family farms⁵⁷, promotion of equity, regional development, breeding national champions, the pursuit of national food security or sovereignty (i.e. the guarantee of stable and safe national supplies⁵⁸), environmental protection and public health, are key elements for the formulation of agricultural policies.

These strategic interests for the States may prevail over the objective of protecting freedom of competition, which may explain how they

54 Id., pág. 29.

55 L. ALAN. WINTERS, “The So-Called “Non-Economic” Objectives of Agricultural Policy”, OECD *Economics Department Working Papers*, No. 52, 1988, OECD Publishing, págs. 6-21. OECD, “Competition Law and Policy in Chile: A Peer Review”, 2004, pág. 21.

56 L. ALAN WINTERS contends that the “so called” non-economic objectives of agricultural policies, such as the maintenance of farmers' income, the encouragement of family farming, the capability of self-sufficiency in food and environmental protection, among others, are actually economic goals since they measurable in money terms and “*in the sense that their achievement requires the absorption of real resources which could otherwise have been used for other objectives.*” See, L. Alan. Winters, “The So-Called “Non-Economic” Objectives of Agricultural Policy”, OECD Economics Department Working Papers, No. 52, 1988, OECD Publishing, págs. 2-4.

57 See, CHRISTINE A. VARNEY, “A shared vision for American agricultural markets” (March 12, 2010), p. 3 (arguing that small, local and family farms play an important role in competitiveness of agricultural markets and therefore “*neither the market nor the country has anything to gain from the impoverishment or failure of family farms or their agricultural co-ops.*”).

58 See, for example, CHRISTINE A. VARNEY, “A shared vision for American agricultural markets” (March 12, 2010) p. 2 and 5 (stating that antitrust enforcement in agricultural markets must aim to only at economic efficiency, but also at promoting diversity among producers, keeping food plentiful and affordable for consumers).

influence in competition policy and why competition law goals diverge when agricultural markets are at stake⁵⁹.

Furthermore, the promotion of equity in countries where rural wellbeing is below urban wellbeing is an important criterion for the formulation of agricultural policies. Increasing and maintaining the countryside households' income is an objective shared by many countries. It must be taken into account that “[t]he vast majority of the world’s poorest households depend on farming for their livelihoods”⁶⁰. The increment and stability of agricultural producers' income is often pursued by policies that increment purchase prices. However there are shortcomings in the policies that guarantee certain prices for producers that consist on the reduction of farmers' incentives to compete and the correlative productive inefficiency consequences⁶¹.

Nevertheless, the other “side of the story” of agricultural commodities' prices must be taken into account, that is, the increment of food prices that represent a key macroeconomic variable for any country due to its incidence on general inflation. In Latin America, the manipulation of

59 OECD, “Competition Law and Policy in Chile: A Peer Review”, 2004, pág. 21 (“*In addition to competition-related goals, some countries either assign other “public interest” goals to competition law or permit competition law’s economic efficiency and consumer welfare goals to be over-ridden in order to protect a policy objective unrelated to competition. These public interest goals, many of which are elements of “industrial policy,” include promotion of employment, regional development, national champions (sometimes couched in terms of promoting an export-led economy or external competitiveness), national ownership, economic stability, anti-inflation policies, social progress or welfare (measure by some standard other than consumer welfare), poverty alleviation, the spread of ownership (or wealth) to historically disadvantaged persons, and national security*”).

60 KYM, ANDERSON and VALDÉS, ALBERTO, “Introduction and summary”, in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, pág. 1.

61 For example, price schemes and policies have been criticized in regards to the US’s dairy markets due to the distortions they cause: “*In recent years, questions have arisen regarding the economic efficiency and pricing of agricultural and dairy products’ marketing boards and cooperatives. Individual farmers have little incentive to be competitive if price paid are ‘guaranteed’. Alternative approaches can be designed so that individual producers compete to sell their output within the cooperative or marketing board framework*”. (UNCTAD, “Application of competition law: exemptions and exceptions”, 2002, pág. 29).

food prices to protect urban consumers from inflation is still a pervasive policy⁶².

The direct impact on food prices is a matter of interest for every State since millions of persons in the World are affected by malnutrition. Increments in food prices have a particularly strong effect on low-income consumers' welfare, since this segment of the population assigns a high percentage of its house income to food purchasing. In Brazil, for example, food's participation in low-income families' total expenditure amounts to 32 percent⁶³. According to the President of Mexico, Felipe Calderón, in Mexican markets with competition problems the consumers pay 40 percent more than they would pay if markets presented more competitive conditions⁶⁴; furthermore, he argued that this problem was even more severe for poor household destined more than 40 percent of their income to pay goods or services that are more expensive because of the lack of competition in certain markets⁶⁵.

Taking into account the aforesaid, it is clear that public policies must balance the trade-offs between the maintenance of farmers' income and consumers' income. Hence, the implementation of certain policy should be preceded of cost/benefit analysis that illustrates the cost of attaining either outcome.

2.3. THE CASE OF LATIN AMERICA

Although historically agriculture has had an important role in the creation of wealth and employment in Latin America, the tendency in this region

62 KYM, ANDERSON and VALDÉS, ALBERTO, "Introduction and summary" in "Distortions to agricultural incentives in Latin America", World Bank, USA, 2008, pág. 7.

63 FARINA, ELIZABETH, "Distribution and the price of food: Competition and the Hunger Millennium Development Goal", 2006, pág. 1.

64 The speech of President Calderón was delivered on April 5, 2010, and it is available at <http://www.presidencia.gob.mx/prensa/discursos/?contenido=54914>.

65 PRESIDENT CALDERÓN concluded that the absence of economic competition in Mexican markets is a barrier for the fight against poverty and inequality.

is urbanization and the decline of agricultural markets⁶⁶. During the period 1965-2004 the agriculture's sectoral share of gross domestic product (GDP) has decreased (six percent in 2004⁶⁷) as well agriculture's share in overall employment (19 percent in 2004⁶⁸).

In spite of the decline of agricultural markets in the latter terms, the gross subsidy equivalent of assistance to farmers in Latin America, in the period 2000-2004, amounted to US\$5,376 million, which represented US\$126 per person engaged in agriculture⁶⁹.

According to the 2009-2010 World Economic Forum's "Global Competitiveness Report" the Latin American countries that presented a burdensome agricultural policy for the economy were Ecuador (131 over 133), Bolivia (129), Venezuela (124), Nicaragua (118), Dominican Republic (115) and Argentina (112)⁷⁰. In contrast, the Latin American the countries that presented more balanced agricultural policies (in terms balancing interests of taxpayers, consumers, and producers) were Costa Rica (28), Brazil (35), Panama (49) and Uruguay (54)⁷¹.

It is important to note that agricultural price and trade policies have not always increased farmers income in Latin America; in fact, with the exception of Chile and Colombia, Latin American famers earnings were reduced by these policies since the mid 1960s and through out the

66 This trend is shared by industrialized economies such as the US, where in year 1950 ten million people lived from agriculture (17% of active population) and by the year 2004 only three million lived from agriculture (2% of active population). (GREGORY MANKIOW, *Economía*, Thompson, España, 2007, pág. 75.)

67 Agriculture's sectoral share of GDP in Latin America has decreased in the period between 1965 and 2004. In the period 2000-2004 the share of agriculture in Latin America's total GDP was only 6%, while industry had 29% share and services 65% share. (Kym Anderson and Alberto Valdés, "Introduction and summary", in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, pág. 6.)

68 Employment accounted for farming activities has fallen from 45% the period 1965-1969 to 19% in the period 2000-2004. (*Id.*)

69 *Id.*, págs. 34-35.

70 World Economic Forum, "The Global Competitiveness Report 2009-2010", 2010, pág. 411.

71 *Id.*

1980s⁷². This trend was only modified, towards a positive effect of assistance for farmers by the year 1992 in most of Latin America⁷³. The most favored products by agricultural policies in the period 2000-2004 were rice, sugar, milk, poultry and cotton⁷⁴ and the first three have “*the highest rates of distortion and gross subsidy...*”⁷⁵.

Finally, a constant trend between the years 1965 and 2004 is a strong antitrade bias, which is manifested by the positive effect of government’s policies on gross returns to producers of import-competing products in contrast with the negative effect of government’s policies on gross returns to producers of exportable products⁷⁶.

SECTION III

AGRICULTURAL EXCEPTIONS AND ENFORCEMENT OF COMPETITION LAW

The establishment of exemptions and exceptions from the enforcement of competition laws in agricultural markets has also been funded in the special economic features of these markets and the pursuit of economic and “non-economic” goals. However, broad exemptions and exceptions have been depicted as unnecessary, benefiting small interest groups and not always aligned with public interest⁷⁷. Actually, there may be legal

72 KYM, ANDERSON and VALDÉS, ALBERTO, “Introduction and summary” in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, págs. 21-22.

73 *Id.*, pág. 21.

74 *Id.*, pág. 24.

75 *Id.*, pág. 54.

76 *Id.*, págs. 26-29. According to Anderson and VALDÉS, “[t]his may be understandable from a political economy viewpoint, but it nonetheless means that resources are not being allocated efficiently within the farm sector and – because openness tends to promote economic growth – that total factor productivity growth in agriculture is slower than it would be if remaining interventions were removed”. (*Id.*, págs. 54-55).

77 See, ARIE REICH, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, Vol. 42, No. 843, 2007. See also OECD. “Competition and Regulation in

reasons (e.g. fairness, non-discrimination and transparency) and economic reasons (e.g. interdependent nature of markets, promotion of allocative efficiency and consumer welfare) that may justify application of antitrust to all economic sectors⁷⁸.

Furthermore, antitrust enforcement in these markets could be especially pertinent regarding two antitrust concerns that bring the attention of competition authorities: i) producers' joint activity that may restrict output and raise prices⁷⁹ and ii) abuse of buyers' monopsony power, that may squeeze producers' profits to low levels, and purchasers' cartels⁸⁰.

This section describes the antitrust law exceptions to agriculture that are currently applied in the US, EU, Canada, Israel, Argentina, Brazil, Chile, Colombia, and Mexico. Regarding the Latin American jurisdictions, a special emphasis is made upon the enforcement of

Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005. Antitrust Modernization Commission, “Report and Recommendations of the Antitrust Modernization Commission” (April 2, 2007) pág. 335 (“Typically, antitrust exemptions create economic benefits that flow to small, concentrated interest groups, while the costs of the exemption are widely dispersed, usually passed on to a large population of consumers through higher prices, reduced output, lower quality, and reduced innovation. [14] The concentrated benefits provide incentives for interested parties to seek immunities from Congress, but the diffuse costs often have sufficiently minimal impact on individual consumers that they are unlikely to oppose the creation of immunities. Congress therefore is unlikely to hear from those who would be adversely affected by a proposed antitrust exemption. (...) Antitrust exemptions can harm the U.S. economy and, in the long run, reduce the competitiveness of the industries that have sought antitrust exemptions. As noted above, competition drives firms to find ways to operate more efficiently and compete more effectively”) (footnote excluded).

78 See, UNCTAD, “Application of competition law: exemptions and exceptions”, 2002, pp. 5-7 (for a review of the reasons that justify the recommendation for a general application of competition law and policy).

79 See, OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, págs. 19-28 (for a review on “producer joint-activity organizations” in agriculture).

80 See, OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, págs. 28-34 (for a review on “buying power” in agriculture).

competition laws in their agricultural markets. The latter is pertinent since the existence of informal legal exceptions—exceptions to the law that are not explicitly or implicitly established by statutes—may be inferred from the attitude of competition authorities and other governmental agencies towards agricultural markets.

3.1. UNITED STATES

Since the first decades of the 20th century the US implemented several statutes⁸¹ that subsidized agricultural producers, e.g. through price and income support programs for farmers⁸². Furthermore, US Congress has passed statutes that have partially exempted the application of antitrust law to these markets⁸³. This is the case of section 6 of Clayton Act of 1916 that explicitly considered that the existence and operation of an agricultural organization created for the purposes of mutual help shall not be “*held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws*”⁸⁴.

Clayton Act’s exception was reinforced by the Capper-Volstead Act of 1922 that allowed persons engaged in the production of agricultural products to act together in associations to “*in collectively processing, preparing for market, handling, and marketing in*

81 See, CRS Report 96-900, “Farm Commodity Legislation: Chronology, 1933-2002”, 2002, and CRS Report RS21999, “Farm Commodity Policy: Programs and Issues for Congress”, 2006 (for a review of US farm commodity policy and farm commodity law).

82 CRS Report RS21999, “Farm Commodity Policy: Programs and Issues for Congress”, 2006, pág. 4 (“*When farm programs were first authorized in the 1930s, most of the 6 million farms in the United States were small and diversified. Policy makers reasoned that stabilizing farm incomes using price supports and supply controls would help a large part of the economy (25% of the population lived on farms) and assure abundant food supplies. In recent decades, the face of farming has changed. Farmers now comprise less than 2% of the population*”).

83 See, American Bar Association Section of Antitrust Law “Federal statutory exemptions from antitrust law” (2007), pp 89 et. seq (for a review of the statutory agricultural exemptions).

84 Clayton Act, 15 U.S.C. § 17.

*interstate and foreign commerce, such products of persons so engaged*⁸⁵.

The alleged justification for these exemptions was the market structure of the farming industry and the monopsony or oligopsony power of processing and marketing firms⁸⁶. This purchase power was meant to be countervailed by producer associations allowed to, among others, increase their bargain power by consolidating their offer, collectively setting the selling conditions of their goods and provide common marketing and transport services⁸⁷. Without the establishment of this exception some of the activities performed by these organizations would be deemed as illegal under the Sherman Act.

The extent of the exception established by the Capper-Volstead Act was limited by the jurisprudence of the Supreme Court⁸⁸ and by the faculty of the Secretary of Agriculture to impede that an association engaged in monopolization or restraints of trade “*to such an extent*”

85 Capper-Volstead Act, 7 U.S.C. § 291.

86 American Bar Association Section of Antitrust Law “Federal statutory exemptions from antitrust law” (2007), p. 91. Arie Reich, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, Vol. 42, No. 843, 2007, pág. 846 (“*The background to the exemption was the atomistic nature of the farming industry and the inability of individual farmers to bargain on a leveled field with the few firms that dominated the processing and marketing of agricultural produce. The farmers were many and scattered, isolated from each other and from their consumers, and were therefore easy prey for cunning middlemen*”).

87 *Cfr.* ARIE REICH, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, Vol. 42, No. 843, 2007, p. 846. American Bar Association Section of Antitrust Law “Federal statutory exemptions from antitrust law” (2007), pág. 87.

88 Arie Reich, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, vol. 42, No. 843, 2007, pág. 848 (“*The Supreme Court limited the exemption granted by the Capper-Volstead Act to the formation of cooperatives and did not extend it to their anticompetitive activities, such as combining with competitors or using their dominant position to suppress competition with independent producers and processors*”).

that the price of any agricultural product is unduly enhanced by reason thereof..."⁸⁹.

The Agricultural Adjustment Acts of 1933 and 1935 (AAA) permitted the US Government to intervene in all sorts of agricultural markets (e.g. price support, direct subsidies and supply control⁹⁰) as a consequence of the Great Depression era where "*farm prices fell by more than 50 percent between 1929 and 1932.*"⁹¹ However, the Supreme Court of Justice declared the AAA unconstitutional in the year 1936⁹².

The AAA was partially reenacted by the Agricultural Marketing Agreement Act of 1937 (AMAA) that regulates marketing orders and agreements, which may be considered as "government enforced cartel arrangements"⁹³. The marketing orders may regulate, among others, the following: a) limitation of the total quantity and quality of a commodity marketed by handlers; b) allocation of product quantities that handlers may purchase and market in or transport locally or abroad; c) control and elimination of the surplus of the commodity; d) establishment of reserve pools of the product; e) provision of a method for fixing the characteristics of the packs or containers for the products⁹⁴.

89 Capper-Volstead Act, 7 U.S.C. § 292.

90 CRS Report 96-900, "Farm Commodity Legislation: Chronology, 1933-2002", 2002, pág. 1.

91 HALL ROBERT E. and MARC LIBERMAN, "Economics", Thompson South-Western, 3rd ed., USA, 2005, pág. 92. CRS Report 96-900, "Farm Commodity Legislation: Chronology, 1933-2002", 2002, pág. 1. ("*Farm commodity programs were a product of the Great Depression. After World War I, farm prices dropped from their wartime highs, as economic recovery in Europe lessened the demand for U.S. farm products. Many producers struggled financially throughout the 1920s; their voluntary cooperative efforts to bolster prices (mainly by controlling supplies) failed. Meanwhile, farm advocates in Congress called for more aggressive government intervention. The situation became more acute when farm prices fell by more than 50% between 1929 and 1932 alone, and net farm income plummeted even more precipitously.*")

92 *United States v. Butler*, 297 U.S. 1 (1936).

93 American Bar Association Section of Antitrust Law "Federal statutory exemptions from antitrust law" (2007), pág. 89.

94 Agricultural Marketing Agreement Act, 7 U.S.C. § 608c(6).

Producers and handlers take part in the initiation, definition⁹⁵ and management of these programs that are enforced by the United States Agricultural Department (USDA). The marketing orders and agreements are implemented in several agricultural markets and generally consist on the quota allocation of farmers' output that may be sold in the domestic market, therefore controlling and increasing its price, while the rest is sold in the export market at a lower price⁹⁶.

This legislation has also been considered a continuation of Roosevelt's New Deal farm legislation of the Great Depression, which procured the restriction of output to raise prices and stabilize farmers' income⁹⁷. Furthermore, this scheme was allegedly enacted by the US Congress to protect farmers from monopsony power of milk processors⁹⁸. Finally, since the marketing orders are binding for producers and handlers, it solved a "free-rider" problem where "*producers who were not members of the marketing association received the benefits from*

95 According to the Agricultural Marketing Agreement Act, 7 U.S.C. § 608c, the issuance of an order by the Secretary of Agriculture requires the approval, in a grower referendum, of at least two thirds of the growers voting by number or by volume. Furthermore, the Act provides that issuance of an order is subject to the condition that "handlers" that represent 50 percent (except for California citrus fruits that require 80 percent) of the volume of the commodity covered by such order have signed marketing agreements. Only in exceptional cases the Secretary of Agriculture may enact an order without the latter requirement.

96 CARLTON, DENNIS W. and PERLOFF, JEFFREY M., "Modern Industrial Organization" (Boston MA, Addison Wesley, 2005), págs. 310-312.

97 American Bar Association Section of Antitrust Law "Federal statutory exemptions from antitrust law" (2007), pág. 93 ("*Its goal was to facilitate cartelization of agricultural product markets for the benefit of producers. The economic justification of this statute was explicitly to transfer wealth to farmers from downstream buyers through the creation of market power to producers*"). See also, NEFF, STEVEN A. and PLATO, GERALD E., "Federal Marketing Orders and Federal Research and Promotion Programs", Agricultural Economic Report No. (AER707) 42 pp, May 1995, pág. 3 ("*The Roosevelt Administration wanted to bring order, confidence, and growth to the country, which was more rural then. The language of the AMAA is understandably couched in terms of bringing stability and order to commodity markets, with the intention of stabilizing farm prices, farm incomes, and rural credit.*").

98 CARLTON, DENNIS W. AND PERLOFF, JEFFREY M., "Modern Industrial Organization" (Boston MA, Addison Wesley, 2005), note 1 at pág. 310.

the marketing association without abiding by the shipping restrictions (price, quantity, or quality) incumbent on members”⁹⁹ .

Agricultural marketing orders and agreements¹⁰⁰ represent a broad exception from the enforcement of antitrust laws and allow farmers and “handlers” to act in a way that would be otherwise prescribed by antitrust. In terms of allocative efficiency, the welfare effect of schemes that reduce output and increases prices result in social inefficiency, since consumers lose more than producers gain from its implementation¹⁰¹ .

Most of the agricultural intervention laws from the Great Depression era were partially abolished by the Federal Agriculture Improvement and Reform Act of 1996 (under Clinton’s Administration) that aimed at a more market-oriented policy¹⁰² . Some of the policies were restored under the Bush Administration through the Farm Security and Rural Investment Act of 2002¹⁰³ . Current Government intervention still

99 NEFF, STEVEN A. and GERALD E., PLATO, “Federal Marketing Orders and Federal Research and Promotion Programs”, Agricultural Economic Report No. (AER707) 42 pp, May 1995, pág. 2.

100 Agricultural Marketing Agreement Act, 7 U.S.C. § 608b (“*The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the termination of this chapter.*”).

101 Dennis W Carlton and Jeffrey M Perloff, “Modern Industrial Organization” (Boston MA, Addison Wesley, 2005), pp. 311 – 312.

102 The Federal Agriculture Improvement and Reform Act of 1996 “*intended to accelerate a long-term shift toward a more “market-oriented” farm policy. (...) Acreage reduction programs and most planting restrictions were ended. Elimination of farmer-owned grain reserves, lower CCC loan rates, and use of marketing loan repayment provisions effectively curtailed USDA’s role in commodity storage and management.*” (CRS Report 96-900, “Farm Commodity Legislation: Chronology, 1933-2002”, 2002, p. 5.)

103 HALL, ROBERT E. and LIBERMAN, MARC, “Economics”, Thompson South-Western, 3rd ed., USA, 2005, pág. 92. CRS Report RS21999, “Farm Commodity Policy: Programs and Issues for Congress”, 2006, pág. 4 (“*The 2002 farm bill restored “counter-cyclical payments,” similar to the deficiency payments and target prices that existed from 1974 to 1995 but were eliminated by the 1996 farm bill. A counter-cyclical payment program also was begun for dairy. (...) These changes attracted widespread criticism from those who viewed the new law as reversing the market-oriented course of the 1996 farm bill. They contended that expanded farm subsidies undermined U.S. credibility in world trade negotiations where the United States has*

presents the form of price floors, State purchases of excess supply and the limitation of supply¹⁰⁴.

3.2. EUROPEAN UNION

Since the creation of the European Economic Community by the Treaty of Rome, in force since 1958, agricultural policy has been a strong variable in its market integration objective.

The current Treaty on the Functioning of the European Union (TFEU)¹⁰⁵ contains several provisions on agriculture¹⁰⁶ that set the framework for the common agriculture policy. Article 39 TFEU (ex Article 33 TEC) establishes the objectives of the Common Agricultural Policy (CAP): raising agricultural productivity, ensure fair standard of living for the “agricultural community” (increasing income), market stabilization, availability of supplies and reasonable consumer prices. Article 40 TFEU (ex Article 34 TEC) orders the establishment of a “*common organisation of agricultural market*” that may regulate prices, establish aides for production and marketing, “storage and carryover arrangements and common machinery for stabilizing imports or exports”.

called on other countries to reduce trade-distorting subsidies. Supporters of the current farm programs counter that the policy provides needed support for farmers who otherwise would see declining income and land prices.”).

104 Cfr. HALL, ROBERT E. and LIBERMAN, MARC, “Economics”, Thompson South-Western, 3rd ed., USA, 2005, págs. 93-94. CRS Report RS21999, “Farm Commodity Policy: Programs and Issues for Congress”, 2006, pág. 4 (“*Although some features of the commodity programs date to the 1930s, the programs have evolved to respond to changes in agriculture, the economy, the federal budget, and international trade. Congress and the Administration have sought for decades to make farming more market-oriented. However, periods of low prices and economic pressures on smaller “family farms” from consolidation have made that goal difficult to achieve*”).

105 The “Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community” entered into force on 1 December 2009.

106 Mainly, Title III (“Agriculture and Fisheries”).

The EU's CAP was introduced in the year 1962 in a post war context of food scarcity and uncertainty in the provision of food¹⁰⁷. The Common Market aimed at the stability of food provision and self-sufficiency and for that purpose the CAP implemented until the year 1992, among others, schemes of guaranteed prices (e.g. through purchase of surplus and production quotas), production promotion, export subsidies, and tax imports to protect local markets¹⁰⁸.

The 1992 CAP reform aimed at reducing institutional prices (therefore reducing the gap regarding market prices), reducing output surplus and granting direct aides that were partially unrelated to the quantity produced¹⁰⁹. Subsequent CAP reforms (1999 and 2003) also aimed at increasing farmers' productivity (e.g. through further reduction of "institutional prices"), integrate environmental objectives, disassociate direct subsidies from production and a more equitable distribution of the subsidies¹¹⁰.

The last CAP reform (2008) furthered the previous reforms in order to reduce the distortion of markets due to subsidies (e.g. decoupling subsidies from production¹¹¹) and due to other policies such as acreage limitations, and to procure that the agricultural activities are environmental-friendly¹¹². According to the European Commission, the reform of the CAP "*has taken a market oriented approach of helping*

107 GARCÍA BRENES, DAVID, "La Política Agraria Comunitaria y la revisión en 2008", en *Revista de Economía Institucional*, vol. 11, No. 20, Primer Semestre/2009, pág. 376.

108 *Id.*, págs. 376-380.

109 *Id.*, págs. 380-381.

110 *Id.*, págs. 381-387.

111 European Commission, DG Competition, "The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector" (February 2010), págs. 3. ("*Farm subsidies have been decoupled from production to a large extent and farmers have been given incentives to develop more innovative and business oriented market models*").

112 GARCÍA BRENES, DAVID, "La Política Agraria Comunitaria y la revisión en 2008", en *Revista de Economía Institucional*, vol. 11, No. 20, primer semestre/2009, págs. 389-391.

farmers to better respond to market signals”¹¹³. Further reforms are foreseeable in the future as part of the general objective of the EU to increment its producers’ productivity in a global context.

An important distinction between the US and EU is the situation of their rural areas and farming activities. In the US only 2% of the population comprise farmers¹¹⁴ and the weight of agriculture in the overall economy is small. EU presents a completely different scenario, as the following facts on rural areas depict: i) “*represented 90% of the territory and 56% of the population in 2006.*”¹¹⁵; ii) “*generate 43% of the Gross Value Added (GVA) in EU-27 and provide 55% of the employment, these shares being larger in the new Member States (70% and 79% respectively).*”¹¹⁶; and iii) “*income per habitant is 21% to 62% lower in rural areas and generally increases with a higher urban character*”¹¹⁷.

The EU’s treaties provided the framework for the issuance of specific competition rules for agricultural products, as early as 1962 when the Council issued the Regulation No 26/62¹¹⁸ that exempted the application of competition laws to certain agreements in this market. As it occurred in the US with the Capper-Volstead Act, the EU’s agricultural exception to competition law was a response to the concern over the conduct of farmers and farmers’ associations and aimed at solving the problems

113 European Commission, DG Competition, “The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector” (February 2010), pág. 3.

114 CRS Report RS21999, “Farm Commodity Policy: Programs and Issues for Congress”, 2006, pág. 4.

115 European Commission, Directorate-General for Agriculture and Rural Development also devotes a special annual publication “Agriculture in the European Union - Statistical and economic information”, (December, 2009), pág. 9.

116 *Id.*

117 *Id.*, pág. 10.

118 Council Regulation No. 26/62 of 4 April 1962 applying certain rules of competition to production of and trade in agricultural products [Official Journal B 30 of 20.04.1962].

such as the strengthening of farmers' power as means to counterbalance the power of economic actors downstream¹¹⁹.

The current agricultural exceptions to competition law are framed upon Article 42 TFEU (ex Article 36 TEC), according to which “[t]he provisions of the Chapter relating to rules on competition shall apply to production of and trade in agricultural products only to the extent determined by the European Parliament and the Council (...)”.

Current agricultural exceptions to competition law in the EU are contained in the Council Regulation 1184/2006¹²⁰ that repealed Council Regulation No 26/62, and the Council Regulation 1234/2007¹²¹ that establishes a “common organization of the markets”.

Articles 1 and 2 of the Council Regulation 1184/2006 establish the exception in the following terms:

“Article 1

Articles 81 to 86 of the Treaty and provisions made for their implementation shall, subject to Article 2 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to production of, or trade in, the products listed in Annex I to the Treaty.

119 “However, competition policy should not be seen as an obstacle to cooperation between farmers but as a tool that helps them to improve their production and marketing structures and strengthen their position in the supply chain, while ensuring a level-playing field where operators have equal access to the benefits of a liberalised market.” (European Commission, “The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector” (February 2010), pág. 4).

120 Council Regulation (EC) No 1184/2006 of 24 July 2006 applying certain rules of competition to the production of, and trade in, agricultural products [Official Journal L 214 of 4.8.2006].

121 Council Regulation (EC) 1234/2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) of 22 October 2007 [Official Journal L 299 of 16.11.2007].

“Article 2

1. Article 81(1) of the Treaty shall not apply to such of the agreements, decisions and practices referred to in Article 1 of this Regulation as form an integral part of a national market organisation or are necessary for attainment of the objectives set out in Article 33 of the Treaty.

In particular, it shall not apply to agreements, decisions and practices of farmers, farmers’ associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised.”

Articles 175 and 176 Council Regulation 1234/2007 establishes the exception to competition rules in almost the same terms of Council Regulation 1184/2006:

“Article 175

Application of Articles 81 to 86 of the Treaty

Save as otherwise provided for in this Regulation, Articles 81 to 86 of the Treaty and the implementation provisions thereof shall, subject to Article 176 of this Regulation, apply to all agreements, decisions and practices referred to in Articles 81(1) and 82 of the Treaty which relate to the production of or trade in the products referred to in points (a) to (h), point (k) and points (m) to (u) of Article 1(1) and in Article 1(3) of this Regulation.

“Article 176

Article 81(1) of the Treaty shall not apply to the agreements, decisions and practices referred to in Article 175 of this Regulation which are an integral part of a national market organisation or are necessary for the attainment of the objectives set out in Article 33 of the Treaty.

In particular, Article 81(1) of the Treaty shall not apply to agreements, decisions and practices of farmers, farmers' associations, or associations of such associations belonging to a single Member State which concern the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products, and under which there is no obligation to charge identical prices, unless the Commission finds that competition is thereby excluded or that the objectives of Article 33 of the Treaty are jeopardised”.

The cited articles establish three types of exceptions towards agreements, decisions and practices:

- i) That form an integral part of a national market organization, which have had limited application to date¹²² ;
- ii) That are necessary for the attainment of the objectives set out in Article 39 TFEU (ex Article 33 TEC), that is, for the pursuit of the CAP's objectives, which has been interpreted in restrictive terms by case law¹²³ ; and

122 European Commission, Directorate-General for Agriculture and Rural Development also devotes a special annual publication “Agriculture in the European Union - Statistical and economic information” (December, 2009), pág. 7 (“*As regards the first category of agreements contemplated by Article 176(1), that is to say those forming part of national market organizations, it is clearly of very limited importance given that the majority of products (including milk) are now covered by a single CMO, which has superseded market organizations operating at national level.*”). Cfr. MARIO MONTI, “The relationship between CAP and competition policy: Does EU competition law apply to agriculture?” (13 November, 2003), pág. 3.

123 European Commission, Directorate-General for Agriculture and Rural Development also devotes a special annual publication “Agriculture in the European Union - Statistical and economic information” (December, 2009), pág. 8 (“*When analysing the potential application of this 2nd exception, the relevant case law has followed a restrictive interpretation. According to this approach, the objectives of the CAP are already generally ensured by the means provided for by the rules applicable to a common market organization. If a particular private action or agreement is not expressly included among these means, it is generally not deemed to be “necessary” for the attainment of the objectives of Article 39*”). Cfr. MARIO MONTI, “The relationship between CAP and competition policy: Does EU competition law apply to agriculture?” (13 November, 2003), págs. 3-4.

- iii) Of farmers, between farmers, farmers' associations and associations of farmers' associations belonging to a single Member State for the production or sale of agricultural products or the use of joint facilities for the storage, treatment or processing of agricultural products¹²⁴.

The cited Regulations establish -in articles 2(2) and 176(2) respectively- that the European Commission has the sole power, subject to review by the Court of Justice, to determine which agreements, decisions and practices fulfill the conditions stated for exemption.

It is important to point out that, although the European Courts have considered that Treaty's agriculture provisions prevailed over competition policies¹²⁵, that they are not excluding since "*the effective the maintenance of effective competition on the market for agricultural products is one of the objectives of the common agricultural policy*"¹²⁶.

Case law has delimited the scope of the agricultural exemption to competition law since most of the farmers' agreements and decisions do not fall under the exception and fall under article 101 TFEU (ex Article 81 TEC)¹²⁷ and given that article 102 TFEU (ex Article 82

124 European Commission, DG Competition, "The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector" (February 2010), págs. 9-10 ("*Even though it may be considered that the second sentence of Article 176(1) of the Single CMO Regulation is a particular example of the two prior exceptions contained in the first sentence (by reason of the word "in particular"), the Court of Justice has finally considered that it has an independent meaning with respect to the first two prior exceptions and, therefore, amounts to an independent 3rd exception. (...) This 3rd exception seems to have been so far of very minor relevance in light of the limited case law and Commission practice in which its potential application has been analysed. No particular decision or case has been found in this regard in which it has been fully accepted*").

125 REICH, ARIE. "The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation", in *Texas International Law Journal*, vol. 42, No. 843, 2007, pág. 849.

126 MONTI, MARIO. "The relationship between CAP and competition policy: Does EU competition law apply to agriculture?" (13 November, 2003), pág. 2.

127 *Cfr.* Arie Reich, "The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation", in *Texas International Law*

TEC), on abuse of dominant position, and rules on mergers are fully applicable to agricultural markets¹²⁸.

3.3. CANADA AND ISRAEL

Other jurisdictions such as Canada and Israel have also enacted agricultural exceptions to competition law, briefly explained below.

Section 4 of Canada's Competition Act¹²⁹ contains an exception for collective bargaining activities between or among fishermen and fishermen's associations and their buyers. This exception allows the former to collectively negotiate terms (including price) regarding selling and processing of fish with the persons or associations of persons engaged in the buying or processing of fish.

Israel's Restrictive Trade Practices Law of 1988 section 3(4) establishes an explicit antitrust exception for agricultural products in the following terms:

Journal, vol. 42, No. 843, 2007, pág. 850. European Commission, DG Competition, "The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector" (February 2010), pág. 4 ("However, in light of the interpretation that European Courts have given to such derogations, the vast majority of the agreements and decisions of farmers do not fulfil the conditions for such derogations to apply. Therefore, these agreements must be analysed under the regime of the general competition rules applicable to undertakings").

128 *Cfr.* ARIE REICH, "The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation", in *Texas International Law Journal*, vol. 42, No. 843, 2007, p. 850. European Commission, DG Competition, "The interface between EU competition policy and the Common Agriculture Policy (CAP): competition rules applicable to cooperation agreements between farmers in the dairy sector" (February 2010), p. 6. *Cfr.* MARIO MONTI, "The relationship between CAP and competition policy: Does EU competition law apply to agriculture?" (13 November, 2003), págs. 5-6.

129 Canada's Competition Act section 4(1): "*Collective bargaining activities 4. (1) Nothing in this Act applies in respect of (...) (b) contracts, agreements or arrangements between or among fishermen or associations of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other like conditions under which fish will be caught and supplied to those persons by fishermen; (...)*".

“3. Arrangements Which are not Restrictive

Notwithstanding the provisions of Section 2, the following arrangements shall not be deemed restrictive arrangements: (...) (4) An arrangement involving restraints, all of which relate to the growing or marketing of domestic agricultural produce of the following kinds: fruits, vegetables, field crops, milk, eggs, honey, cattle, sheep, poultry or fish, provided that all parties thereto are growers or wholesale marketers of such produce; the above provision shall not apply to assets manufactured from such agricultural produce; the Minister of Industry and Trade, with the consent of the Minister of Agriculture and the ratification of the Knesset’s Economic Affairs Committee, may, by order, add or delete types of agricultural produce; (...)”

The scope of the exception is limited in three ways: i) its only applicable to certain agricultural products and the Minister of Industry and Trade may initiate a proceeding to exclude certain categories of agricultural products from the exception, although until the year 2007 this power had never been used¹³⁰; ii) processed or manufactured products and imported goods are excluded from the exemption; and iii) it leaves out unilateral anticompetitive conduct and mergers¹³¹.

According to Arie Reich, the exception is less stringent than the US’s (Capper-Volstead Act) and EU’s in two aspects: i) it is not subject to the supervision of an administrative and it is not subject “*to withdrawal by the authorities or the courts in cases of harmful anticompetitive behavior.*”¹³²; ii) and it exempts agreements not only between growers but also by and between wholesale marketers¹³³.

Section 3(1) of Israel’s Restrictive Trade Practices Law of 1988 also contains an implicit exception that covers agricultural markets subject to sector-specific regulation: “(1) *An arrangement involving*

130 REICH, ARIE, “The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation”, in *Texas International Law Journal*, vol. 42, No. 843, 2007, note 89 at pág. 858.

131 *Id.*

132 *Id.*

133 *Id.*

restraints, all of which are established by law;(...)". According to Reich, statutes have established "marketing boards" (composed of representatives from producers, Government and consumers) for certain products (citrus fruit, vegetables, flowers and milk) that "*were authorized by law to allocate production quotas, set prices and regulate marketing of the products within its mandate*"¹³⁴. However, after the crisis that the agricultural sector suffered by the end of the 80s agricultural policies were reformed and as a result most of these boards were eliminated¹³⁵.

Reich explains that the special treatment towards agriculture by Israel is funded not only in economic reasons, but especially in historical and political reasons directly related with the establishment of the State¹³⁶. Israel also differs from the US's historical background in the sense that in the former agriculture marketing was organized through cooperatives since the beginning of the settlement¹³⁷. In the last decade, there have been various attempts to limit (e.g. exclude from the exemption to wholesale retailers) or repeal the exemption and that, according to Reich, have failed due to the strong "agricultural lobby"¹³⁸.

3.4. ARGENTINA

After the postwar years, Argentina has had chronic fiscal and inflation difficulties that have determined its economic policies¹³⁹. Argentina's agricultural policies differ from most of Latin American countries. Since the postwar years Argentina heavily taxed agricultural producers and established trade policies that discriminated against agriculture (e.g.

134 Id., pág. 859.

135 Id., pág. 862.

136 Id., págs. 859-860.

137 Id.

138 Id., págs. 865-867.

139 STURZENEGGER, ADOLFO C. and SALZANI, MARIANA, "Argentina", in "Distortions to agricultural incentives in Latin America", World Bank, USA, 2008, págs. 63-64.

applied export taxes on farm products), which resulted in an “anti-agricultural policy bias”¹⁴⁰.

The justification of such policies have been claimed to be the support of industrial development; raising fiscal revenues; “*lowering and stabilizing the prices of agricultural staples (...), encouraging the domestic processing of farm products; and transferring welfare from landowners to wage earners*”¹⁴¹. STURZENEGGER considers that export taxes policies have a political explanation, that is, the influence of certain pressure groups where industrial interests have prevailed¹⁴².

It is interesting to note that in the National Criminal Economic Court of Appeals’ case law *CNDC v. Industrias Welbers* (1983)¹⁴³, the Court described the objective of sector-specific regulation of the sugar sector as the “*control of the production to meet the necessities of local and external demand, avoiding the accumulation of surpluses that provoke disruptions in the local market, or in the external market’s competition, thereby affecting producers and consumers...*”¹⁴⁴.

In the year 1991 the Government introduced a structural reform in its economic policy, which included a currency board monetary scheme, privatization and deregulation¹⁴⁵. “*In relation to agriculture, the policies included the elimination of quantitative restrictions; reduction in tariffs on fertilizers, herbicides, pesticides, machinery, and irrigation equipment; (...) and the removal of inefficiencies and monopoly profits in trade channels (including grain elevators, transportation and ports)*”¹⁴⁶. According to the World Bank, these reforms “*provided a significant boost for agricultural growth*”¹⁴⁷.

140 *Id.*, págs. 59-85.

141 *Id.*, pág. 81.

142 *Id.*

143 *Cámara Nacional de Apelaciones en lo Penal Económico (CNAPE)*, Sala II, Judgment of 5/7/1983.

144 *CNAPE*, Sala II, Judgment of 5/7/1983, fourth ground of the ruling.

145 STURZENEGGER, ADOLFO C. and SALZANI, MARIANA, “Argentina”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, pág. 63.

146 *Id.*, pág. 64.

147 *Id.*

The 1991 deregulation process is depicted by the abolishment of the Commission for Concerted Milk Policy (created by the law 23.359 of 1986)¹⁴⁸. Raw milk producers, milk processors and the Secretary of Agriculture, Livestock and Fishery integrated this Commission¹⁴⁹. In the case, *Unión General de Tamberos and others v Unión de Productores Tamberos de Vela Limitada and others* (1997), the National Commission for the Defense of Competition (CNDC) described the function of this Commission in terms of the fixation of raw milk prices that should be paid to producers. In case the members of the Commission couldn't agree on the price, the Secretary of Agriculture, Livestock and Fishery would determine the price¹⁵⁰.

The 2002 recession obliged the Government to intervene agricultural markets, setting restrictions for seed and primary goods exports¹⁵¹. The economy recovered in the period 2003-2006¹⁵² and in the recent years the Government has implemented quantitative restraints for certain exports (beef, soy, wheat, maize and oilseeds) and “*strong agricultural income and pricing policies*” to control inflationary trends¹⁵³.

The importance of the agricultural sector to the economy is still significant: in the period 2000-2004 it accounted for seven percent of the GDP (and increased up to nine percent in year 2009¹⁵⁴), almost 50 percent of exports and nine percent of employment¹⁵⁵. According to STURZENEGGER and SALZANI there is strong competition in Argentina's agricultural value chain¹⁵⁶.

148 The Decree No. 2,284 of 1991 dissolved the Commission.

149 CNDC, Dictamen No. 261/1997, f. 1489.

150 *Id.*, f. 1490.

151 CNDC, Dictamen No. 556/2007, par. 96.

152 Sturzenegger, Adolfo C. and Salzani, Mariana, “Argentina”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, pág. 64.

153 *Id.*, pág. 83.

154 World Economic Forum, “The Global Competitiveness Report 2009-2010”, 2009, pág. 55.

155 STURZENEGGER, ADOLFO C. and SALZANI, MARIANA, “Argentina”, in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, págs. 64-65.

156 *Id.*, pág. 69.

3.4.1. AGRICULTURAL EXCEPTIONS TO COMPETITION LAW

The competition law does not exclude any economic sector or specific conduct from its enforcement. The law includes in its scope all kinds of conducts by persons of any nature (public and private) whose conduct may affect the national market¹⁵⁷. In fact, heavy regulated sectors (such as electricity, natural gas, banking services, insurance, airlines and airports, ports and telecommunications) have been subject to the scrutiny of the competition authority¹⁵⁸.

In spite of the absence of legal exceptions from competition laws and its application to regulated markets, the conduct of certain private parties –promoted by the Government to confront pervasive inflation– apparently escaped from the law’s scope¹⁵⁹. This is the case of price agreements periodically promoted by the Government as a means of controlling inflation. According to the CNDC, during the 1980s the Government confronted the hyperinflation trend by the hand of trade associations, which aimed at price stabilization¹⁶⁰.

157 Article 3, Act No. 25,156. Cfr. OECD, “*Competition Law and Policy in Argentina: A Peer Review*”, 2006, págs. 35-36.

158 OECD, “*Competition Law and Policy in Argentina: A Peer Review*”, 2006, págs. 36-39.

159 OECD, “*Competition Law and Policy in Argentina: A Peer Review*”, 2006, pág. 36 (“*Of course, some sectors, especially those in which natural monopolies exist, are subject to regulation in various forms, and there are inevitably accommodations between the competition law and regulation in these instances, but these sectors are also subject to the competition law. The competition/regulatory interface is discussed below. But further, it is apparent that other private actions sanctioned or required by government can also escape the coverage of the competition law. The most obvious example of this is the recent round of price agreements, which absent government participation would clearly violate the competition law*”).

160 CNDC, “*Annual Report On Competition Policy Developments in Argentina - 1997*”, 1997, pág. 3 (“*14. Another important factor of discouragement for an effective enforcement of the law for the defense of competition was that, since the 70’s, the State financed its budgetary deficits with increasing inflationary tax rates. With all this, a growing capacity for anticipation was growing in the private agents to defend their incomes, and this culminated in two episodes of hyperinflation which made evident that there were not options but stabilisation. Particularly during the 80’s this capacity for anticipation was manifested through an increasing trend to make*

In the year 2005 the Government also tried to tackle a cumulative inflation increase of 70 percent during the period 2001-2005, with the promotion of agreements between the State and private sector parties where the latter agreed to limit their ability to increment prices for certain period of time¹⁶¹ and allowed “*the parties to pass on their increases in costs...*”¹⁶². The Secretariat for Technical Coordination (part of the Ministry of Economy and Public Finance) was appointed to monitor the relevant costs¹⁶³. As expected, products included in these agreements were predominantly from the agro-food sector:

*“As of early 2006 there were agreements in several sectors, including: supermarkets (covering 200 products), milk products, books, vegetable oils, cement, soda, private education, meat producers, transportation fuel, shoes, sugar, pharmaceuticals, other food products, paper and petrochemicals”*¹⁶⁴.

Actually, according to ARANOVICH, Government officials manifested that if private parties did not execute “price stabilization” agreements, direct price control would be exercised¹⁶⁵.

preventive price raises based upon inflationary expectations. These were attempted to be counterattacked through price agreements between the State and the trade associations. The State itself encouraged to incur into breach of the law for the defense of competition when encouraging income policies that induced also a corporative structure for the business life.

15. In such a context the function of an agency of enforcement of an anti-trust law had little room, due to the lack of incentives to take any form of action. This made the NCDC an agency of almost formal existence, which dedicated its few resources to solve cases with almost no impact on the general economic interest. This implied a distortion of this Commission’s role, which, from being an agency created to enforce a federal law that protect the marketplace, turned to a limited task: solving quasi-irrelevant disputes between parties.”

161 OECD, “Competition Law and Policy in Argentina: A Peer Review”, 2006, pág. 8.

162 *Id.*, pág. 34.

163 *Id.*, pág. 34.

164 *Id.* pág. 8.

165 ARANOVICH, FERNANDO, “Entre el control de precios y la defensa de la competencia”, en *Revista Derecho Competencia*, Bogotá (Colombia), vol. 4 N° 4, 2008, pág. 50.

According to the OECD's peer review report, the tool utilized by Argentina's Government to combat inflation had negative consequences for competition policy and competition law enforcement. The report concludes that these agreements "*could contribute to informal agreements not to lower prices, and inevitably they would complicate the efforts of the competition authority to enforce the anti-cartel provisions of the law*"¹⁶⁶.

The use of informal "price stabilization" agreements promoted by the Government as means to control inflation is not exclusive of Argentina. As it will be explained below, the Colombian Government (through the Ministry of Agriculture) has also promoted the execution of agreements with private food "handlers" (wholesalers and retailers) which intend to "freeze food prices" for certain periods of time (normally the last months of a year) with the surveillance of the competition authority.

Another example of a *de facto* exemption from the application of competition law to agricultural markets is described by CABANELLAS, according to which, periodically agricultural producers "dump to the streets" part of their output to reduce the total offer and raise prices¹⁶⁷.

*"[T]he annual destruction of crops is repeated, it is published in newspapers, and the authorities in charge of impeding these practices do nothing, which speaks more about Competition defense law in Argentina than the hundreds of pages of this book"*¹⁶⁸.

There is no sector-specific legislation that allows producers to destroy part of their output, as it occurs in other jurisdictions such as the US, and the inaction of the competition authority signals that allocate efficiency and productive efficiency are not fostered in agricultural markets.

166 OECD, "Competition Law and Policy in Argentina: A Peer Review", 2006, pág. 34.

167 CABANELLAS DE LAS CUEVAS, GUILLERMO, "Derecho antimonopólico y de defensa de la competencia", Heliasta, 2 ed., Buenos Aires, 2005, pág. 679.

168 *Id.*, pág. 679.

3.4.2. COMPETITION LAW'S ENFORCEMENT IN AGRICULTURAL MARKETS

Up to date, Argentina's competition authority has dealt with few cases on agricultural markets and it has been more interested in other markets such as the health care market, cable television and liquefied petroleum gas¹⁶⁹.

In the first years of the CNDC (beginning of the 1980s) the authority was clearly more interested on agricultural markets in comparison with successive periods of time; indeed, cases on these markets became scarce in the 1990s and the first decade of the twenty-first century, as it will be explained below.

3.4.2.1. *Time Period: 1980*

A total of five cases in agricultural markets were reviewed in the period 1982-1985 and the common type of investigated conduct was abuse of a dominant position rather than anticompetitive agreements (only one case). Table 1 describes the most important features of these cases.

169 Cfr., OECD, "*Competition Law and Policy in Argentina: A Peer Review*", 2006, págs. 10-16. CNDC, "Annual Report On Competition Policy Developments in Argentina - 1997", 1998, págs. 4-7. CNDC, "Annual Report On Competition Policy Developments in Argentina - 1998", 1999, págs. 4-11. CNDC, "Annual Report On Competition Policy Developments in Argentina - 2002", 2003, págs. 2-5. CNDC, "Annual Report On Competition Policy Developments in Argentina - 2003", 2004, pág. 3. CNDC, "Annual Report On Competition Policy Developments in Argentina - 2005", 2006. GUTIÉRREZ, JUAN D., "Tacit collusion in Latin America: A comparative study of the competition laws and their enforcement in Argentina, Brazil, Chile, Colombia and Panama", en "*Latin American Competition Law and Policy*", Hart Publishing, UK (2009).

Tabla 1
Summary of cases in Argentina's agricultural markets in the 1980s

Case referente	Product Market	Investigated Conduct	Decision
<i>A. Savant v. Matadero Vera</i> (1982)	Slaughter house services and Beef market	Abuse of dominant position through market access foreclosure. The only slaughterhouse (an essential facility) in a municipality arbitrarily denied its services to a livestock producer ¹⁷⁰ .	Fine ¹⁷¹
<i>Unión General de Tamberos v. Cooperativa Popular de Santa Rosa</i> (1982)	Purchase of raw milk	Abuse of dominant position through vertical discrimination. A purchaser of raw milk with dominant position over a specific region paid preferential prices to certain milk producers (price discrimination) and refused to purchase from a producer that had tried to create a c o l l e c t i v e negotiation scheme (refusal to deal) ¹⁷² .	Fine ¹⁷³
<i>CNDC v. Industrias Welbers</i> (1983)	Purchase of sugar cane	Abuse of dominant position through abusive prices. A sugar refinery with dominant position in a region imposed certain financial concessions to sugar cane producers (grant credit to the refinery) as a condition to purchase their harvest in the year 1981. The imposed financial concessions indirectly reduced the prices that the sector-specific laws mandated for the purchase of sugar cane ¹⁷⁴ .	Fine ¹⁷⁵ ; Confirmed by Appeals Court ¹⁷⁶

(Continúa)

170 Cfr. GERMÁN COLOMA, “Defensa de la Competencia”, Editorial Ciudad Argentina, Buenos Aires, 2003, pág. 278.

171 CNDC, Dictamen No. 013/1982. Secretaria de Comercio, Resolución 78/1982.

172 Cfr. GERMÁN COLOMA, “Defensa de la Competencia”, Editorial Ciudad Argentina, Buenos Aires, 2003, pág. 174.

173 CNDC, Dictamen No. 019/1982. Secretaria de Comercio, Resolución 178/1982.

174 These price reductions occurred under an economic context where international prices were rising. Cfr. GERMÁN COLOMA, “Defensa de la Competencia”, Editorial Ciudad Argentina, Buenos Aires, 2003, pág. 279.

175 CNDC, Dictamen No. 24/1983. Secretaria de Comercio, Resolución 102/1983.

176 *CNAPE*, Sala II, Ruling of 5/7/1983.

(Continuación)

Case referente	Product Market	Investigated Conduct	Decision
<i>Asociación Argentina de Productores de Huevos</i> (1983)	Egg production and retailing	Publication of pricing information that may distort the market. The egg producers' trade association published a reference price list for eggs that was supposedly inaccurate. The CNDC accepted a compromise that allowed the publication of maximum, minimum and average prices under certain conditions ¹⁷⁷ .	Settlement ¹⁷⁸
<i>Federación de Viñateros de San Juan v. Bodegas y Viñeos Giol Empresa Estatal Industrial y Comercial</i> (1985)	Wine production	Predatory Pricing. The investigated firm's was accused of selling below costs. However, the firm's market share didn't exceed ten percent. The CNDC manifested that surpluses in the production of wine explained price reduction tendency ¹⁷⁹ .	Investigation closed without sanction ¹⁸⁰ .

From the abovementioned case law it is important to note that in the egg producers' trade association case, the CNDC didn't question the publication of historical pricing information as a means of coordinating a concerted practice in the market of egg retailing but rather the inaccuracy of the information and this is why the compromise aimed at setting a system that guaranteed the publication of more precise information.

177 CABANELLAS DE LAS CUEVAS, GUILLERMO, "Derecho antimonopólico y de defensa de la competencia", *Heliasta*, 2 ed., Buenos Aires, 2005, pág. 691.

178 The trade association agreed to abstain from recommending prices to its affiliates. CNDC, Dictamen No. 36/1983 and Secretaria de Comercio, Resolución 279/1985.

179 CABANELLAS DE LAS CUEVAS, GUILLERMO, "Derecho antimonopólico y de defensa de la competencia", *Heliasta*, 2 ed., Buenos Aires, 2005, pág. 621.

180 CNDC, Dictamen No. 66/1985. Secretaría de Comercio, Resolución No. 320/1985.

3.4.2.2. Time Period: 1997 to 2007

In the year 1997, the CNDC studied a case¹⁸¹ in the purchase of raw milk market initiated by a complaint filed by several milk producer associations against several milk processing firms, where the former alleged an abuse of dominant position or concerted practice from the latter. The plaintiffs alleged that the defendants' unilateral conduct consisted on a non-compliance of the purchase prices and conditions for raw milk set by the Secretary of Agriculture, Livestock and Fishery¹⁸². The CNDC concluded that non-compliance was not product of collusion (instead, it was due to an inflationary phenomenon and an exchange rate lag) and that the defendants didn't have a dominant position over the market¹⁸³.

According to the CNDC's annual reports, in the period 1998-2006 there was only one case in the agricultural sector (0,44% of total). In contrast, twelve adjudicated cases in the same period took place in the food sector (5,3% of the total). Table 2 shows the participation of agro-food sector in the authority's antitrust investigations:

Table 2
Cases in Argentina's in agro-food sector (1998-2006)

Period	Cases adjudicated in the agro-food sector	Total adjudicated cases
1998	Two (6,25%) took place in the beverage market (no sanction, nor settlement)	32
1999	None (0%) took place in the agro-food sector	17
2000	One (6,66%) took place in the food market (no sanction, nor settlement).	15
2001	None (0%) took place in the agro-food sector	20

(Continúa)

181 *Union General de Tamberos and others v Unión de Productores Tamberos de Vela Limitada and others (1997)*.

182 CNDC; Dictamen No. 261/1997, f. 1492.

183 *Id.*

(Continuación)

Period	Cases adjudicated in the agro-food sector	Total adjudicated cases
2002	One (3,03%) took place in the food market (no sanction, nor settlement).	33
2003	One (5%) took place in an agricultural sector, in the futures of cereals market ¹⁸⁴ (no sanction)	20
2004	One (3,34%) took place in the food and beverage markets (no sanction, nor settlement).	29
2005	Six (11,53%) took place in the food and beverage markets (no sanction, nor settlement).	52
2006	One (3,34%) took place in the food and beverage markets	8
Total	Thirteen (5,75%) took place in the agro-food sector	226

Source: CNDC¹⁸⁵

In case *Cooperativa Agropecuaria de Pérez Millán Ltda. v Mercado de Cereales a Término de Buenos Aires S.A.* (2003), a cooperative that associated cereal producers that stocked and retailed their production accused Buenos Aires’ cereal futures exchange market (MAT) for price-fixing. The plaintiff argued that the MAT had a dominant position in the market for futures of cereals, but the CNDC concluded that the defendant didn’t even participate in such market¹⁸⁶.

184 CNDC, Dictamen No. 434/2003. Secretaría de Coordinación Técnica, Resolución 24/2004.

185 CNDC, “Annual Report On Competition Policy Developments in Argentina - 1997”, 1998, págs. 4-7. CNDC, “Annual Report On Competition Policy Developments in Argentina - 1998”, 1999, págs. 4-11. CNDC, “Annual Report On Competition Policy Developments in Argentina - 2002”, 2003, págs. 2-5. CNDC, “Annual Report On Competition Policy Developments in Argentina - 2003”, 2004, pág. 3. CNDC, “Annual Report On Competition Policy Developments in Argentina - 2005”, 2006.

186 CNDC, Dictamen N. 434/2003, f. 172.

Furthermore, the CNDC dismissed the price-fixing accusation by concluding that MAT's Assembly decision to fix a price for cereal during the period of time that the MAT wouldn't be operative (due to the economic crisis by the end of 2001) didn't have as an object or effect the restriction of competition, didn't affect the "general economic interest" and didn't constitute and abuse of a dominant position¹⁸⁷.

The CNDC¹⁸⁸ conducted a proceeding in the year 2006 on a supposedly anticompetitive practice that took place in the market of cattle intermediation under the request of the Ministry of Economy and Production. Cattle intermediaries (*consignatarios*), their association and a company that administered a cattle market (*Mercado de Liniers S.A.*) were investigated over supposed concerted practices on the sale of cattle¹⁸⁹. In the course of the proceeding the CNDC imposed a preventive measure by which *Mercado de Liniers* was ordered to put in practice the necessary means for preventing that cattle intermediaries engage in certain conducts that may distort the market forces¹⁹⁰.

In case *Confederación de Asociaciones Rurales de Buenos Aires y la Pampa (CARBAP) v Bunge Argentina S.A. and others* (2007) the plaintiffs accused eleven wheat exporters of fixing local wheat's purchase prices (or alternatively abusing of collective dominance), which led to a decrease in the prices since May 1996¹⁹¹. To assess the case, the CNDC studied the State's intervention in the wheat market and concluded that since 2002 the market was subject of intense intervention¹⁹². After the 2002 dramatic devaluation of Argentina's *peso* the State strongly intervened in the exchange market to create an "exchange rent" for exporters¹⁹³. Furthermore, the Government established restrictions on the export of seeds and certain primary

187 *Id.*, ff. 174-175.

188 *CNDC v. Mercado de Liniers S.A., El Centro de Consignatarios de Productos del País, y la Cámara Argentina de Consignatarios.*

189 CNDC, "Memoria anual Año 2006", 2007, pág. 47.

190 CNDC, Resolución of 17 March of 2006 and Resolución of 24 May of 2006.

191 CNDC, Dictamen No. 556/2007, pars. 4-6.

192 *Id.*, pars. 94-111.

agricultural goods¹⁹⁴ and set FOB prices for wheat exports¹⁹⁵. In the year 2006, the Government granted compensations for wheat producers and millers to reduce and maintain local wheat flour prices¹⁹⁶. The CNDC pointed out that the Government's intervention policies toward the wheat value chain were part of its price stabilization policies – instrumented through that “price stabilization compromises” for certain products– that aim at the “common good”¹⁹⁷.

The CNDC's conclusion in this case depicts the current *state of art* of the enforcement of competition law to agricultural markets in Argentina:

“107. In this sense it must be pointed out that the competition authority cannot and must not intervene in public policies determined by the national state whose valuation supposes the defense of a public good defined as a priority by the constitutionally empowered politic authorities.

108. Expressed more clearly, the competition authority cannot investigate facts that are generated by the private sector as consequences of a clear and evident determination of the National State.”¹⁹⁸

The CNDC recommended archiving the case and the Secretary of Commerce ordered its closure.

3.4.2.3. *Upstream and Downstream markets and Market studies*

The CNDC has conducted cases in downstream-related markets, specifically in the market for sale of herbicides and fertilizers. In case *C*.

193 *Id.*, par. 94.

194 *Id.*, par. 96.

195 *Id.*, par. 98.

196 *Id.*, par. 101.

197 *Id.*, pars. 105-106.

198 *Id.*, pars. 107-108.

Vassolo v. Cooperativa Agraria de Tres Arroyos (1983)¹⁹⁹ the CNDC investigated a supposed tying conduct in the relevant market of herbicide commercialization, but it recommended the closure of the investigation. In case *Neïstor Daniel Rostan v. Profertil S.A.* (2003) the CNDC investigated a supposedly abuse of dominant position and price discrimination in the markets of urea commercialization. The CNDC concluded that *Profertil* had not incurred in any anticompetitive practice and recommended the Technical Coordination Secretary to accept the firm's explanations²⁰⁰.

The CNDC's interest in agricultural markets is also reflected in the "market studies" it conducted. In the year 1997 the CNDC chose one sector (wheat flour) related to agriculture out of seventeen sectors "of interest for the defense of competition" with the objective of carrying on market studies (on their structure, functioning and performance)²⁰¹. In the year 1998 the CNDC carried out the market study "Tax Evasion and Competitiveness in the Beef Market"²⁰² upon the request of the beef industry trade association, according to which the tax evasion had distorted the beef market. In the market study, the CNDC stressed the importance of this sector in the overall economy²⁰³ and concluded that tax evasion created a barrier of entry in the market and that its elimination would increase productive efficiency²⁰⁴. In the year 2005 the CNDC

199 CNDC, Dictamen No. 037/1983. Secretaría de Comercio 315/1983. Cfr. Germán Coloma, "Defensa de la Competencia", Editorial Ciudad Argentina, Buenos Aires, 2003, págs. 289.

200 CNDC, Dictamen No. 436/2004.

201 CNDC, "Annual Report On Competition Policy Developments in Argentina - 1997", 1998, pág. 7.

202 CNDC, "Annual Report On Competition Policy Developments in Argentina - 1998", 1999, págs. 12-15.

203 "The gross value of the beef industry production accounts for almost 6 percent of the total gross value of the manufacture industrial production and about 20 percent of the total value of Food and Beverage production. It employs approximately 46 000 people." (CNDC, "Annual Report On Competition Policy Developments in Argentina - 1998", 1999, págs. 12.)

204 CNDC, "Annual Report On Competition Policy Developments in Argentina - 1998", 1999, pág. 15.

presented a complete study on the provision of urea to the agricultural sector and it recommended the price vigilance and the revision of certain clauses included in export contracts that impeded resale in the local market and could amount to a restraint of competition.

Finally, in December 2007, the CNDC published a market study conducted since the year 2005 on the fruit market (particularly, fruits for juices) on the province of Rio Negro. The market study was initiated due to the request of a member of the local legislature that denounced a supposed anticompetitive practice by fruit purchasers (an oligopsony composed of three firms), which lowered the purchase price of pears and apples in the 2004-2005 harvest²⁰⁵. For the elaboration of the study the CNDC practiced oral hearings and requested information to different economic agents of the value chain and public authorities²⁰⁶. The CNDC's report presented the local context of apples and pears production (including market structure upstream and downstream)²⁰⁷, its international context²⁰⁸, and the characteristics of price formation in the fruit market²⁰⁹. The study concluded the following²¹⁰:

- The market of “discarded” fruits in the valley of Rio Negro (destined for the production of juice concentrate) was different from the market of fresh fruit that is ready for the final consumer.
- Output of apples and pears in the specific valley of Rio Negro was mostly produced by 3,000 small croppers with low technical level, which result in a low performance per hectare and low quality. More than 70 percent of the industrial demand for these products in the valley came from fruit processors that elaborate juice concentrates.

205 CNDC, “Informe Industria Frutícola s/ Investigación de Mercado (C.1033)”, 2007, pág. 1.

206 Id., pág. 2-11.

207 Id., págs. 11-65.

208 Id., pág. 66-71.

209 Id., págs. 72-81.

210 Id., págs. 82-86.

- The atomized production of fruits and the few processors (four) that purchase fruits explained their “market power” of the latter that was manifested in their bargaining power. The superior bargain power of purchasers was also explained by the fact that fruit has to be sold on short period or else it lost its characteristics.
- Although the CNDC recognized the asymmetry in the market of discarded fruits, it concluded that the studied conduct, the “significant” decrease of purchase price that took place between December/2004 and February/2005, could be explained by three different “internal” and “external” factors²¹¹ rather than a concerted practice among purchasers.

3.4.3. CONCLUSIONS

The conclusions derived from Argentina’s individual assessment are the following:

1. **Agricultural exceptions to competition law**

- a. The law does not exempt any sector or except any kind of conduct from the application of competition law.
- b. However, in practice, the Government has fostered informal “price stabilization” agreements among private parties (together with prohibitions and/or heavy taxes on exports) as a means to control inflation. This has occurred especially in agro-food related sectors.
- c. Other conducts, such as the collective destruction of output by agricultural producers, which is not authorized by the sectoral

211 The following factors: i) Significant increase in local fruit production; ii) Decrease of fruit concentrate exports; and iii) Significant increase in global fruit production and the consequent decline of international prices.

laws, has not been investigated by the CNDC and appears to be another *de facto* or informal exception.

- d. In this sense, the pursuit of allocative efficiency and productive efficiency, which affect consumer welfare, are dismissed in agricultural markets by the inaction of authority.

2. Competition law enforcement in agricultural markets

- a. Antitrust cases on agricultural markets in the 1980s focused on single firm conduct. In several cases the CNDC fined firms that abused of their dominant position in downstream markets, through practices by which they imposed their superior bargaining power over agricultural producers.
- b. There are few cases of horizontal collusion among agricultural producers. This may be partially explained by the “informal” exemptions to antitrust law that the Government has promoted or tolerated.
- c. The enforcement of the competition law has focused in markets different from agricultural markets, especially since the 1990s.
- d. In the period 1998-2006 agricultural sector cases represented 0,44 percent of total adjudicated cases, while food sector cases accounted for 5,3 percent of the total cases.
- e. The cases studied by the CNDC covered the following markets:
 - i) slaughter house services and beef market;
 - ii) purchase of raw milk (two cases);
 - iii) purchase of sugar cane;
 - iv) egg production and retailing;
 - v) wine production;
 - vi) cattle intermediation;
 - vii) futures of cereals; and
 - viii) purchase of wheat.
- f. The competition authority has been interested in conducting market studies on different agricultural sectors but these studies have not triggered antitrust cases.

- g. Taking into account that in the period 2000-2004 agriculture accounted for seven percent of Argentina's GDP²¹², the number of conduct cases adjudicated by the CNDC in agricultural markets is low in comparison to other product and services markets.
- h. The CNDC has explicitly recognized that the State's public policies may overrule competition policies and therefore, "*the competition authority cannot investigate facts that are generated by the private sector as consequences of a clear and evident determination of the National State*"²¹³.

3.5. BRAZIL

Agricultural policies in Brazil have presented important changes in the last sixty years. An economic model of import substitution and industrialization promotion prevailed in the period between the 1950s and 1980s characterized by strong State intervention and price control²¹⁴. Agricultural policies in this period combined the following: i) direct and indirect taxation to the sector (including differential export taxation that discriminated in favor of processed goods²¹⁵), which aimed at keeping food prices low; ii) support through subsidized credit, to promote its productivity; iii) a minimum price policy; and iv) trade intervention instruments such as quantitative restraints, tariff exemptions on imported

212 STURZENEGGER, ADOLFO C. and SALZANI, MARIANA, "Argentina", in "Distortions to agricultural incentives in Latin America", World Bank, USA, 2008, págs. 64-65.

213 CNDC, Dictamen No. 556/2007, par. 108.

214 de Rezende Lopes, Mauro; Ignez Vidigal Lopes, Marilene Silva de Oliveira, Fabio Campos Barcelos, Esteban Jara, Pedro Rangel Bogado, "Brazil", in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, págs. 87. OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2010, págs. 10.

215 BROOKS, JONATHAN and LUCATELLI, SABRINA in "International competitiveness in the A-B-C agro-food sector", in "Trade and competitiveness in Argentina, Brazil and Chile: not as easy as A-B-C", OECD, 2004, págs. 169.

products, export quotas and banning the export of certain goods²¹⁶. Inflation was pervasive in the beginning of the 1980s and exceeded 1,000 percent in the early 1990s²¹⁷. Agricultural intervention policies aimed at mitigating this macroeconomic phenomenon²¹⁸.

Hyperinflation and a financial crisis in the mid 1980s vindicated the need for economic reforms in the late 1980s, which implied a new economic model where trade was liberalized and deregulation and privatization were implemented²¹⁹. The 1994 competition law was also enacted with the objective of controlling inflated prices²²⁰. Regarding the agricultural sector, the reform had as a consequence the abolition of export control schemes and agricultural export taxation (1996), a reduction of Government's funds for the minimum price policy and, later on, the elimination of the price support programs²²¹. The agricultural policy reform also included the elimination marketing boards—whereby the Government intended to suppress producer prices— and “*the elimination of the fiscal funds devoted to marketing activities*”²²².

Brazil's economic reforms were successful and it became one of the most important producers of several agricultural products in the world (alcohol, sugar, coffee, orange juice, soybeans, beef, tobacco, poultry, pit, fruits and maize)²²³. However, by the year 2006 only 15 percent of the population was rural²²⁴ and “*the bulk of poverty in Brazil is found*

216 DE REZENDE LOPES, MAURO; IGNEZ VIDIGAL LOPES, MARILENE SILVA DE OLIVEIRA, FABIO CAMPOS BARCELOS, ESTEBAN JARA, PEDRO RANGEL BOGADO, “Brazil”, in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, pp. 87-91.

217 Id., pág. 88.

218 Id., págs. 90-91.

219 Id., pág. 91. CADE, “Brazil: Competition Law and Policy in 1997-1998”, 1999, pág. 2.

220 OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, pág. 13.

221 DE REZENDE LOPES, MAURO; IGNEZ VIDIGAL LOPES, MARILENE SILVA DE OLIVEIRA, FABIO CAMPOS BARCELOS, ESTEBAN JARA, PEDRO RANGEL BOGADO, “Brazil”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, págs. 92-94.

222 Id., pág. 93.

223 Id., pág. 98.

224 Id., pág. 87.

*in the agricultural sector*²²⁵. Agriculture has an important weight in the economy, it represented between 8,5 percent and nine percent of Brazil's overall GDP in the period 1994-2004²²⁶ and six percent in the year 2009²²⁷.

3.5.1. AGRICULTURAL EXCEPTIONS TO COMPETITION LAW

Brazil's competition law is applicable to every economic sector and any individual or organization irrespective of its nature²²⁸, even to federal government and its agencies (not the case of state government and its agencies)²²⁹. In regulated sectors the Administrative Council for Economic Defense (CADE) enforces the law but interacts with the respective regulatory body²³⁰.

In consequence, agricultural activities are not exempted from its enforcement. Even more, article 21 –that contains a non-exclusive list of anticompetitive conducts– prohibits an act that is directly related to the agricultural sector:

“Article 21. The following conducts, besides others, will be deemed violation of the economic order, to the extent applicable under article 20 and items thereof: (...)

XVII – to abandon, cause to abandon or destroy crops or harvests, without proven good cause; (...)”

225 Id., pág. 98.

226 Id., pág. 89.

227 World Economic Forum, “The Global Competitiveness Report 2009-2010”, 2009, pág. 55.

228 Article 15, Law 8,884.

229 OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2010, pág. 61.

230 There has been a debate over the competence over the banking sector, especially regarding mergers, since the Central Bank of Brazil claims to exercise the sole authority over competitive issues in this market. See, *Id.*, págs. 67-68. OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, págs. 83-90.

However, numeral XVII of article 21 has not been enforced up to date²³¹.

It is pertinent to point out that a distinctive feature of Brazilian antitrust rules is that proof of market power is a necessary element to determine an infringement of competition law, regardless of the type of conduct that is prosecuted²³². Although the competition law doesn't establish particular exceptions to certain conducts, Article 20 of the law establishes that the achievement of "market control" will not be deemed as infringement to the law whenever it is "*a result of the natural process founded on more efficiency of the economic agent in relation to its competitors (...)*".

3.5.2. COMPETITION LAW'S ENFORCEMENT IN AGRICULTURAL MARKETS

Up to date, CADE's adjudicated conduct cases have focused on health insurance markets, medical services markets, pharmaceutical markets, fuel retailing markets and retail commerce markets²³³.

231 GOMIDE JOÃO DE PAULA, EDUARDO, ADEMIR ANTONIO PEREIRA, and GABRIEL NASCIMENTO PINTO, "Who Must Fear the Brazilian Antitrust Authority? The Control of Cartels and Monopolies in Brazil During the Last 10 Years (1998-2007)", 2008, pág. 18. According to OECD's 2010 Report, this provision, among others, "create the potential for inappropriate application of the law, but this has not happened." (OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2010, pág. 13.)

232 *Cfr.* OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, pág. 20. *See also*, OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2010, p. 23 (arguing that even in cartel cases minimal evidence on market power is required).

233 *Cfr.* Brazilian Delegation to OECD, Brazilian Delegation to OECD, "Annual report on competition policy developments in Brazil - 2002", 2003, p. 3. Brazilian Delegation to OECD, "Brazilian Delegation to OECD, "Annual report on competition policy developments in Brazil - 2003", 2004, pág. 3. Brazilian Delegation to OECD, "Annual report on competition policy developments in Brazil 2004", 2005, págs. 3-4. Brazilian Delegation to OECD, "Annual report on competition policy developments in Brazil 2005", 2006, pág. 4. *Cfr.* GOMIDE JOÃO DE PAULA, EDUARDO, ADEMIR ANTONIO PEREIRA, and GABRIEL NASCIMENTO PINTO, "Who Must Fear the Brazilian Antitrust Authority? The Control of Cartels and Monopolies in Brazil During the Last 10 Years (1998-2007)", 2008, págs. 20-21.

Furthermore, CADE's annual reports (1996-2008)²³⁴ show that the agricultural sector has had a very small participation in the authority's adjudicated conduct cases:

Table 3
Cases in Brazil's in agro-food sector (1996-2008)

Period	Cases in the agricultural sector	Cases in food sector	Total adjudicated cases
1996	0 cases (0%) ²³⁵	11 cases (11,3%) ²³⁶	97
1997	1 case (0,2%) ²³⁷	24 cases (5,4%) ²³⁸	446 ²³⁹
1998	4 cases (4,44%) ²⁴⁰	0 cases (0 %) ²⁴¹	90
1999	No data	No data	64 ²⁴²
2000	0 cases (0 %) ²⁴³	2 cases (5,12%) ²⁴⁴	39
2001	0 cases (0 %) ²⁴⁵	0 cases (0 %) ²⁴⁶	34
2002	0 cases (0 %) ²⁴⁷	0 cases (0 %) ²⁴⁸	34
2003	0 cases (0 %) ²⁴⁹	2 cases (8,69%) ²⁵⁰	23
2004	0 cases (0 %) ²⁵¹	3 cases (7,14%) ²⁵²	42
2005	0 cases (0 %) ²⁵³	2 cases (3,17%) ²⁵⁴	63
2006	0 cases (0 %) ²⁵⁵	2 cases (6,66%) ²⁵⁶	30
2007	2 cases (5,12%) ²⁵⁷	2 cases (5,12%) ²⁵⁸	39
2008	0 cases (0%) ²⁵⁹	1 case (%) ²⁶⁰	58
Total: 1996-2008 (1999 excluded)	7 cases (0,70 %)	49 cases (4,92%)	995 (100%)
Total: 1998-2008 (1999 excluded)	6 cases (1,10%)	14 cases (3,09%)	452 (100%)

Source: CADE

234 CADE, "Relatório Anual de Gestão 1996", 1997, p. 85. CADE, "Relatório Anual de Gestão 1997", 1998, p. 178. CADE, "Relatório Anual de Gestão 1998/1999", 2000, p. 29 and 35. CADE, "Relatório Anual de Gestão 2000", 2001, p. 195. CADE, "Relatório Anual de Gestão 2001", 2002, pp. 129-138. CADE, "Relatório Anual de Gestão 2002", 2003, p. 28 and 29. CADE, "Relatório Anual de Gestão 2003", 2004, p. 22. CADE, "Relatório Anual de Gestão 2004", 2005, p. 43 and 44. CADE, "Relatório Anual de Gestão 2005", 2006, p. 43 and 44. CADE, "Relatório Anual de Gestão 2006", 2007, p. 34 and 35. CADE, "Relatório Anual de Gestão 2007", 2008, p. 41. CADE, "Relatório Anual de Gestão 2008", 2009, p. 12 and 20.

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- 235 In the year 1996 there were 6 conduct cases investigated in “agroindustry” sector. CADE, “Relatório Anual de Gestão 1996”, 1997, pág. 85.
- 236 CADE, “Relatório Anual de Gestão 1996”, 1997, pág. 85.
- 237 CADE, “Relatório Anual de Gestão 1997”, 1998, pág. 178.
- 238 CADE, “Relatório Anual de Gestão 1997”, 1998, pág. 178.
- 239 Of the 446 adjudicated cases, 436 were “non-proceeding”. CADE, “Relatório Anual de Gestão 1998”, 1999, pág. 35.
- 240 The four cases took place in “agroindustry” sector. CADE, “Relatório Anual de Gestão 1997”, 1998, p. 177.
- 241 CADE, “Relatório Anual de Gestão 1997”, 1998, pág. 177.
- 242 Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2000”, 2001, pág. 5.
- 243 CADE, “Relatório Anual de Gestão 2000”, 2001.
- 244 There were two cases in the food industry (cartelization and predatory pricing) that were archived. CADE, “Relatório Anual de Gestão 2000”, 2001.
- 245 There was one bid-rigging case in the market for agricultural supplies (lime) that was archived. (Administrative Process No. 08000.019706/1996-63, Ministério Público de Santa Catarina v Brascal - Calcário do Brasil Ltda. and others, (25.04.2001).)
- 246 CADE, “Relatório Anual de Gestão 2001”, 2002, págs. 129-138.
- 247 There was one cartelization case in the market for agricultural supplies (lime) that was archived. CADE, “Relatório Anual de Gestão 2002”, 2003, pág. 29.
- 248 CADE, “Relatório Anual de Gestão 2002”, 2003, págs. 29-30.
- 249 CADE, “Relatório Anual de Gestão 2003”, 2004, pág. 343.
- 250 There were two cases of alleged price-fixing in the market of pasteurized milk that were archived. CADE, “Relatório Anual de Gestão 2003”, 2004, pág. 343.
- 251 CADE, “Relatório Anual de Gestão 2004”, 2005, pág. 22. Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2004”, 2005, pág. 4.
- 252 There were three cases in the food and beverage sector that were archived. CADE, “Relatório Anual de Gestão 2004”, 2005, pág. 22. Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2004”, 2005, pág. 4.
- 253 CADE, “Relatório Anual de Gestão 2005”, 2006, pág. 44.
- 254 There were two cases in the food industry (price-fixing and predatory pricing) that were archived. CADE, “Relatório Anual de Gestão 2005”, 2006, pág. 44.
- 255 CADE, “Relatório Anual de Gestão 2006”, 2007, pág. 35.
- 256 There were two cases in the food industry that were archived. CADE, “Relatório Anual de Gestão 2006”, 2007, pág. 35.

In spite of the fact that agriculture had a share between six percent and nine percent of Brazil's overall GDP in the period 1994-2009, the number of antitrust (conduct) cases in the sector represents just the 0,70 percent of CADE's adjudicated cases in the period 1996-2008 (1999 excluded)²⁶¹.

The reason for this trend may not be found in a legal exception or exemption to agricultural markets since the competition law fully applies to this sector. Furthermore, the low number agricultural cases is not a consequence of sector-specific regulation since the economic reforms that started in the mid 1990s decreased State intervention as explained above. Other reasons that could explain this trend could be the competitiveness of agricultural markets (in comparison with other Brazilian markets that may present more antitrust concerns for the authorities) or the fact that market power is as necessary element for the configuration of an anticompetitive conduct.

In contrast, upstream markets (e.g. fertilizers) and downstream markets (e.g. production and marketing of processed foods) have had more attention of competition authorities. In the period 1996-2008 there were 49 cases in the food sector (4,92 percent of total cases) and in the period 2000-2008 there were four cases (1,10 percent of total cases) in the agricultural supplies sector (fertilizers herbicides, lime, seeds etc.).

Table 4 describes the most important features of recent agricultural conduct cases that were adjudicated by CADE.

257 There was one case in the herbicide and seeds markets of alleged tying sale and refusal supply that was archived. (Administrative Process No. 08012.008659/1998-09, Nortox S/Av Monsanto do Brasil Ltda., 27/06/2007).

258 There were two cases in the food industry that were archived. CADE, "Relatório Anual de Gestão 2006", 2007, pág. 35.

259 There was one cartelization case in the market for agricultural supplies (lime) that was archived. CADE, "Relatório Anual de Gestão 2007 – Annex I", 2008, pág. 29.

260 There was one case of beverage market (abusive prices) that was archived. CADE, "Relatório Anual de Gestão 2007 - Annex I", 2008, pág. 208.

261 MAURO DE REZENDE LOPES, IGNEZ VIDIGAL LOPES, MARILENE SILVA DE OLIVEIRA, FABIO CAMPOS BARCELOS, ESTEBAN JARA, PEDRO RANGEL BOGADO, "Brazil", in "Distortions to agricultural incentives in Latin America", World Bank, USA, 2008, pág. 89.

Table 4
Summary of recent adjudicated cases
in Brazil's agricultural markets

Case referente	Product market	Investigated conduct	Decision
<i>Cooperativa Central dos Produtores Rurais de Minas Gerais Ltda – CCPR v Cooperativa Regional dos Produtores Rurais de Pará de Minas Ltda - COOPARÁ</i> (2007)	Purchase of raw milk	Market division, imposition of exclusivity and price discrimination.	Closure ²⁶²
<i>Confederation of Agriculture and Livestock of Brazil (CNA) v Bertin Ltda and others</i> (2007)	Purchase and slaughter of cattle	Abuse of dominant position and adoption of a uniform commercial conduct. SDE initiated a preliminary investigation against 11 meatpackers and 13 individuals. One company and two individuals signed a cease and desist agreement and CADE suspended their investigations. CADE concluded that four meatpackers were cartelized. ²⁶³	Fines ²⁶⁴ (some defendants were covered by a settlement agreement)

There are two agricultural conduct cases that are not reflected in previous tables but that are worth reviewing. Firstly, in the orange juice case, the Secretariat of Economic Law in the Ministry of Justice (SDE) prosecuted a supposed cartelization on orange's purchase prices in the year 1999 by orange juice processors that finalized with a settlement

262 CADE, Administrative Process No. 08012.009312/1998-39 (18/04/2007).

263 Brazilian Delegation to OECD, "Annual report on competition policy developments in Brazil - 2007", 2008, págs. 14-15.

264 Administrative Process No. 08012.002493/2005-16.

agreement²⁶⁵. Secondly, the so-called “Alcohol Cartel Case” was initiated in 1999 due to the notification before the BCPS of an economic concentration operation²⁶⁶ whereby 84 alcohol producers (anhydrous alcohol and/or hydrated alcohol for use as fuel) intended to create the Brazilian Alcohol (“Brasil Álcool”) that would store their excess capacity²⁶⁷. Furthermore, the manufacturers also intended to create the “Brazilian Alcohol Exchange (“BBA”), that would sell under exclusivity agreements all the output of its members for three years (...)”²⁶⁸. Through these means, the petitioners sought to control price fluctuations in the context of a supposed crisis in the sugar cane and alcohol markets²⁶⁹.

The three BCPS agencies had a different assessment of the case: i) the Secretariat for Economic Monitoring (SEAE) “evaluated the transactions separately, classified the parties conduct as collusion and recommended that the operations notified to the system were

265 Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 1999”, 2000, pág. 6.

266 Concentration Act no. 08012.002315/99-50, Brasil Álcool S.A., Copersucar Armazéns Gerais S.A. and others.

267 Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2001”, 2002, pág. 4.

268 *Id.*

269 Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2000”, 2001, pág. 12 (“*The Petitioners justified the transaction by pointing out the difficulties alcohol producers were facing in this country with the fall in the price of the product to levels insufficient to cover production cost. In addition, putting off large crops to subsequent years was observed, since producers could not afford maintain their assets idle and had to produce to preserve their investment and avoid their manufacturing plants becoming scrap. As a result, prices might fall still further. As a consequence of this picture, alcohol producers decided to establish Brasil-Álcool and to export a portion of its members’ production.*”) Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2001”, 2002, pág. 4 (“*The alleged motivation for the creation of these associations was the deregulation of the sector that drove prices below their average costs of production. This supposedly would be a temporary crisis due to excess capacity that would be corrected in two or three years time with the expansion of the consumption of alcohol*”).

*blocked*²⁷⁰; ii) the SDE considered that the notified operations amounted to a cartel agreement and it could not be accepted under a “crisis cartel” argument²⁷¹; and iii), CADE didn’t assess the operation as a cartel but decided to block the operations, order the dissolution of Brazilian Alcohol, “*but did not find it necessary to notify the Public Attorney to investigate the case*”²⁷².

It is pertinent to mention that according to the last SDE’s annual report, two administrative procedures were initiated *ex-officio* by this agency against a poultry trade association²⁷³. The supposed infringement to economic order consists on a supposed recommendation from the trade association to its members to reduce their poultry output in order to avoid a surplus of local market and the consequent price decrease²⁷⁴.

Finally, it is important to point out that most of the reviewed cases in agricultural markets consisted on horizontal conduct (mainly from purchasers of agricultural products). This trend coincides to the overall trend of conduct cases, where collusive behavior represented more than 78% of the cases where a violation was found by the authority in the period 2000-2005²⁷⁵.

270 Brazilian Delegation to OECD, “Annual report on competition policy developments in Brazil - 2001”, 2002, pág. 4.

271 *Id.*, pág. 12 (“*The examination undertaken by SDE concluded that the transaction, submitted as a concentration act, was no more than a cartel, given that the members of Brasil-Álcool got together and withdrew significant volumes of alcohol from the market (allegedly to be exported) to obtain higher prices in the domestic market. Indeed, the withdrawal of inventory took place at the time the company was being constituted, and the paying up of its capital was done with portions of the production of the stockholders themselves.*”).

272 *Id.*, pág. 4.

273 SDE, “Relatório de Gestão SDE - 2009”, 2010, pág. 84 and 89.

274 Administrative Process No. 08012.003623/2009-52 and Administrative Process No. 08012.003623/2009-53.

275 OECD, *Competition Law and Policy in Brazil: A Peer Review*, 2005, pág. 21.

3.5.3. CONCLUSIONS

The conclusions derived from Brazil's individual assessment are the following:

1. Agricultural exceptions to competition law

- a. The law does not exempt any sector or except any kind of conduct from the application of competition law.
- b. The law explicitly prohibits a particular anticompetitive practice on agricultural markets (destruction or abandonment of harvest), although there are is no case law on this conduct.

2. Competition law enforcement in agricultural markets

- a. The enforcement of the competition law has focused in markets different from agricultural markets, such as health insurance, medical services, pharmaceutical, fuel retailing and retail commerce.
- b. There were few conduct cases adjudicated by CADE in the agricultural sector: a total of seven cases that represent 1,10 percent of the overall number of the adjudicated conduct cases in the period 1998-2008 (1999 excluded). Collusive conduct was the predominant anticompetitive conduct in these cases.
- c. The cases studied by the CADE covered the following markets: i) purchase of raw milk; ii) purchase and slaughter of cattle; iii) purchase of oranges; and iv) purchase of sugar cane for the production of alcohol.
- d. In contrast, in the period 1998-2008 (1999 excluded), the food sector accounted for 3,09 percent of the total conduct cases adjudicated by CADE.

- e. Furthermore, the competition authorities have not been especially interested in conducting market studies on agricultural markets²⁷⁶.
- f. Taking into account that in the period 1994–2009 agriculture had a share between six percent and nine percent of Brazil’s overall GDP, the number of conduct cases adjudicated by CADE in agricultural markets is comparatively low in comparison with other product and services markets.
- g. This trend is not explicable due to existence of antitrust exceptions or exemptions, nor to sector-specific regulation since the competition law fully applies to the agricultural markets and since the mid 1990s the Governments have established market oriented policies.
- h. Other reasons that could explain this trend could be the competitiveness of agricultural markets (in comparison with other Brazilian markets that may present more antitrust concerns for the authorities) or the fact that market power is as necessary element for the configuration of an anticompetitive conduct.

3.6. CHILE

Chile distinguishes from its Latin American peers due to its early introduction of market-oriented policies, consisting on trade liberalization, deregulation and privatization in the beginning of the 1970s²⁷⁷. During the late 1950s until the mid 1960s the Government strongly intervened in the agricultural sector with price control policies over several agricultural

276 *Id.*, pág. 97.

277 *Id.*, pág. 15. Elina Cruz and Sebastián Zárate, “Building Trust in Antitrust”, in *Competition Law and Policy in Latin America* (Fox and Sokol, editors), Hart Publishing, UK, 2009, pág. 157.

products, wholesale and retail marketing margins, export bans for certain products, import tariffs and subsidy programs²⁷⁸. Since 1967 the Government promoted the establishment of “large cooperative farms”²⁷⁹. During the Allende Government (1971-1973), State interventionism increased and imposed more severe price controls on agricultural goods and subsequently attempted to monopolize the production of certain products²⁸⁰.

The military Government introduced market-oriented policies in 1973, reducing the role of the State in the economy and fostering liberalization as stated before²⁸¹. Since 1975 the Government closed the marketing board and started to lift price control of agricultural goods²⁸².

In the beginning of 1980s the Government tried to stabilize prices of several agricultural goods and expanded assistance programs for small farms, but the expenditure on agriculture fell “dramatically”²⁸³. Although the Government maintained price intervention and “band systems” for certain agricultural goods during the decade of 2000s, current level of intervention is low²⁸⁴.

Nowadays, Chile is a small and open economy with a high degree of concentration in its industries²⁸⁵. In regards to agriculture, exportable agricultural products have more importance than livestock and field crops²⁸⁶. Agricultural share in the total GDP (excluding fishery and

278 VALDÉS, ALBERTO and JARA, ESTEBAN, “Chile”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, págs. 120-121.

279 *Id.*, págs. 122-123.

280 *Id.*, pág. 122.

281 *Id.*, pág. 122.

282 *Id.*, pág. 123.

283 *Id.*, págs. 122-123.

284 *Id.*, pág. 124.

285 CRUZ, ELINA and ZÁRATE, SEBASTIÁN, “Building Trust in Antitrust”, in *Competition Law and Policy in Latin America* (Fox and Sokol, editors), Hart Publishing, UK, 2009, pág. 158.

286 VALDÉS, ALBERTO and JARA, ESTEBAN, “Chile”, in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, pág. 125.

forestry) was 8,6 percent²⁸⁷ in the period 1999-2001, six percent in the year 2002²⁸⁸, 4,1 percent in the period 2001-2004²⁸⁹ and four percent in the year 2009²⁹⁰. Regarding the structure of these markets, according to Valdés and Jara, “*there is evidence of a high degree of buyer concentration and of increasing vertical coordination through contracts and integration in agroprocessing*”²⁹¹.

3.6.1. AGRICULTURAL EXCEPTIONS TO COMPETITION LAW

Chile’s competition law is applicable to every market²⁹² and any individual, regardless of its nature, that “*executes, enters into any act, agreement or convention, either individually or collectively which hinders, restricts or impedes free competition, or which tends to produce such effects (...)*”²⁹³. Even more, the law has been applicable in certain circumstances to government agencies²⁹⁴.

The law doesn’t exempt any market from its application and consequently antitrust should be fully applicable to agricultural

287 *Id.*, pág. 126.

288 JONATHAN BROOKS and SABRINA LUCATELLI, in “International competitiveness in the A-B-C agro-food sector”, in “Trade and competitiveness in Argentina, Brazil and Chile: not as easy as A-B-C”, OECD, 2004, pág. 151.

289 VALDÉS, ALBERTO and JARA, ESTEBAN, “Chile”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, pág. 126.

290 World Economic Forum, “The Global Competitiveness Report 2009-2010”, 2009, pág. 55.

291 VALDÉS, ALBERTO and JARA, ESTEBAN, “Chile”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, p. 129.

292 Articles 2 and 3 of the decree-law 211 of 1973. Cfr. OECD, *Competition Law and Policy in Chile: A Peer Review*, 2004, pág. 33.

293 Article 3 of the of the decree-law 211 of 1973.

294 OECD, *Competition Law and Policy in Chile: A Peer Review*, 2004, pág. 33 (“*An unusual feature of Chile’s law, which it shares with Russia and some other transition countries, is that it applies to some extent to decisions by government ministries or agencies even when they are acting in a regulatory capacity, and not just when they are acting in a proprietary capacity. It has been applied to discriminatory government action that creates an “unlevel playing field”*”).

markets²⁹⁵. However, the General Law of Cooperatives (hereinafter GLC)²⁹⁶ established the agricultural and farmers cooperatives (hereinafter, the cooperatives) regulation and may be considered an implicit exception to the application of competition law, as it will be explained below.

Article 65 of the GLC established that the cooperatives sale, distribute, produce, and transform goods and services, related to the forestry, livestock and farming activities. Their objective consists on the procurement of a higher performance in these activities and in general the social, economic, and cultural development of its associates. The cooperatives may increase the productive efficiency of agricultural markets since they lower producers' costs by means of joint purchase of inputs, usage of common premises and transportation, and eliminate intermediaries of the value chain due to direct marketing of the goods.

It is important to point out that according to the law these cooperatives constitute a separate juridical person from its associates, hence in legal and in practical terms the entity acts as a single economic agent in the market. Although article 14 of the GLC allows the cooperative's associates to belong to two or more cooperatives that have the same objective, it mandates that the associate may have a directive role only in one of the cooperatives. This limit assures that each cooperative is an independent and autonomous economic agent in the market.

There is no explicit mention in the GLC of the kind of agreements by and between the farmers and or the cooperatives that are exempted from the application of the competition law, as it occurs in the US and the EU. However, the participation of the farmers as associates in a cooperative in order produce and retail agricultural products under a sole direction are inherent to the nature of these associations. Moreover, article 14 of the GLC allows the cooperative's by-laws to introduce a "non-compete" clause where by the associates cannot enter into the same kind of activities developed by the cooperative in certain zone.

295 *Id.*, pág. 34.

296 Supreme Decree Number 502 of 1978.

Nonetheless, the GLC wouldn't entail a blanket exemption from the enforcement of competition law to farmers and cooperatives. Indeed, not any kind of agreement by the farmers and the cooperatives will be deemed as legal. For example a price-fixing agreement between two separate cooperatives could be considered an anticompetitive agreement since the two entities acted as independent competitors in the market. Furthermore, antitrust law would be fully applicable to unilateral action of the cooperatives. For example if the cooperative abuses from its dominant position in the market it could be considered an infringement to competition law.

The Tribunal for the Defense of Free Competition (TDLC) had the opportunity to settle the controversy over the application of competition laws to these cooperatives in the case *COMASA v CAPEL*²⁹⁷ that was recently adjudicated²⁹⁸, where a cooperative was accused by one of its associates of abuse of dominant position.

The complaint alleged that the defendant excluded the associate from the cooperative due to the fact that in the year 2007 the associate sold part of its grape output to third parties and not entirely to the cooperative. The defendant, according to the complaint, excluded the associate in June 2008 on the grounds of a supposed infringement to the cooperative's bylaws and the GLC. The plaintiff argued that although the cooperative is allowed by the law to include a "non-compete" clause in its bylaws, the cooperative's restriction went beyond the legal limits since it prohibited the sale of grape to third parties. Indeed, according to the plaintiff the cooperative's main activity was the purchase and process grapes for the production of *pisco* and not the plaintiff's activity, that is, the sale of grapes. In conclusion, the plaintiff alleged that the

297 *Comercial y Agrícola S.A., "COMASA" v Cooperativa Agrícola Pisquera Elqui Limitada, "CAPEL"* (Rol No. C-186-09). All the information that is pertinent to the case, including the complaint, the defendant's response to the complaint and the report presented by two experts on the case (evidence requested by the defendant), are available at the TDLC website: <http://www.tdlc.cl/Portal.Base/Web/VerContenido.aspx?ID=1918&GUID>.

298 TDLC, Judgment N° 99 of 2010. On the 21 of April 2010, the plaintiff filed a remedy of complaint before the Supreme Court.

cooperative infringed article 3 of the competition law and exercised a “monopsony power” by prohibiting the associate to sell its grape production to third parties, by imposing purchase prices that were below the production and retailing cost and by denying proper compensation for its shares according to the bylaws.

The TDLC denied the plaintiff’s requests on the following grounds. The TDLC considered that the cooperative’s associate obligations (sell all their output to the cooperative²⁹⁹) and the penalties for non-compliance were essential for the cooperative in order to fulfill its economic objectives. The TDLC confirmed the legality of the bylaws’ clause that prohibited the associates to sell part of their production to third parties and sustained that it didn’t infringe competition law. The TDLC supported its interpretation of the bylaws and the GLC on a concept rendered by the Central Preventive Commission of the year 1979³⁰⁰ that stated the following:

“It is obvious that the associates cannot diminish their cooperation and support to the cooperative’s common effort, selling the input to third parties that are competitors of the cooperative, to which they have obliged to benefit. The contrary would conduce to distort the cooperatives’ objectives, thereby loosing any reason for the existence of the cooperative” .

To finalize the reference to this case, it is important to point out that the defendant required an expert testimony that was presented in December 2009. In general, the report supported the defendant’s arguments. For the purposes of this text, it is important to mention that the expert witness report contained a comparative law study concerning the application of competition laws to agricultural cooperatives in the US and the EU. The report concluded that in these jurisdictions the agricultural cooperatives are exempted from competition law in regards

299 According to the defendant, the plaintiff had no complied with its obligation of delivering its entire production to the cooperative since the year 2004, action supposedly repeated for four consecutive years.

300 Dictamen Ord. No 215/191, June 12 of 1979.

to certain collusive conducts, but not regarding unilateral conduct, and that this conclusion is extensive to Chile³⁰¹.

3.6.2. COMPETITION LAW'S ENFORCEMENT IN AGRICULTURAL MARKETS

The economic sectors where most of the conduct cases took place are telecommunications (19 percent), fuel oil (10 percent), retail (seven percent), transport (six percent), pharmaceuticals (six percent), and waste management (five percent)³⁰².

The share of agro-food sector conduct cases in the overall cases studied by the TDLC amounts to six percent³⁰³. However, it is important to precise that these figures include conducts that correspond to “unfair competition” and six out of the twelve agro-food cases correspond to this kind of conduct. If unfair competition cases (six) and the food and beverage cases (two) are not counted, the total number of agricultural cases amounts to four, which represents 5,3 percent of the overall antitrust cases (abuse of dominant position, collusion, predatory pricing cases) studied by the TDLC in the period 2004-2010. The percentage of antitrust cases in this sector is consistent with the weight of agriculture in Chile's GDP which amounted to 4,1 percent in the period 2001-2004³⁰⁴ and four percent in 2009³⁰⁵.

Cases have focused on the markets of purchase of agricultural goods rather than the markets of production of these goods.

301 JUNGSMANN D. RICARDO and CRUZ T., MARÍA ELINA, “Informe sobre la industria pisquera en relación a la demanda de Comasa contra Capel”, December, 2009, pág. 10.

302 TDLC, “Causas Contenciosas - Mercados en los que inciden las conductas conocidas por el TDLC (a 31 de marzo de 2010)”, 2010.

303 TDLC, “Causas Contenciosas - Mercados en los que inciden las conductas conocidas por el TDLC (a 31 de marzo de 2010)”, 2010. TDLC, “Base de Datos Causas Contenciosas”, 2010.

304 *Id.*, pág. 126.

305 World Economic Forum, “The Global Competitiveness Report 2009-2010”, 2009, pág. 55.

Table 5 summarizes the agricultural antitrust conduct cases (excluding unfair competition cases) that the TDLC has studied since the year 2004:

Table 5
Summary of recent adjudicated cases in Chile's agricultural markets

Case reference	Product market	Investigated conduct	Decision
<i>Fiscalía Nacional Económica (FNE) v. Nestlé Chile S.A. and others and Soproleche and Loncoleche v. Preventive Commission</i> (2004) ³⁰⁶	Purchase of Raw milk	The FNE prosecuted five milk producers ³⁰⁷ for the following charges: market division, refusal to purchase product, manipulation of quality analysis results, gradual reduction of purchase price of milk and price discrimination ³⁰⁸ .	Close investigation, but TDLC resolved to establish six preventive measures ³⁰⁹
<i>Complaint by Fedeleche</i> (2004) ³¹⁰	Purchase of Raw milk	Reduction of purchase prices of raw milk.	Archived
<i>AGIP S.A. v. Empresas Iansa S.A.</i> (2005)	Purchase of sugar beet ³¹¹	Abuse of dominant position. Among others, the complaint stated that the accused firm had abused its monopsony power against sugar beet farmers and had incurred in price discrimination.	Denied the <i>recurso de reclamación</i> that AGIP S.A. filed against the Central Preventive Commission's Decision that closed the case ³¹²
<i>COMASA v CAPEL</i> (2010)	Purchase and process grapes for the production of <i>pisco</i>	Abuse of dominant position.	Close investigation ³¹³

306 TDLC, Judgment N° 7 of 2004 (Rol No. C-01-04). For a summary of the case, see OECD, *Prosecuting cartels without direct evidence of agreement*, 2006, pág. 88.

307 There was a sixth plant initially prosecuted by the FNE but the charges were withdrawn afterwards with favorable opinion of the FNE.

308 TDLC, Judgment N° 7 of 2004, pág. 5.

It is pertinent to comment on *Fiscalía Nacional Económica (FNE) v. Nestlé Chile S.A. and others* and *Soproleche and Loncoleche v. Preventive Commission* (2004) case law. In this case the TDLC's decision analyzed the characteristics, evolution and structure of the milk market. Regarding the relevant market, the TDLC concluded the following:

- The demand for raw milk was characterized by a concentration of purchase power of the milk producers and an atomized offer of unorganized producers³¹⁴.
- The firms' participation in the purchase of milk over the years was very stable³¹⁵.
- Since the commodity is highly perishable the offer was inelastic in the short term.
- There was great variation in the final purchase price since it depends upon factors such as volume and quality³¹⁶.

309 The measures imposed conditions on the acts or contracts in the market of raw milk, in general for all the country, that obliged the plants to 1) maintain a list of purchases with the parameters that compose it; 2) announce with a month of anticipation, any change in the conditions of purchase of raw milk; 3) justify any refusal regarding the purchase of milk; 4) keep a registry of the rejected offers and inform the FNE twice a year of the significant changes regarding the purchase of milk; 5) abstain from using the historical margin of deliveries in winter and summer to set the purchase price and 6) design a system of quality control that guarantees fairness to the all the parties.

310 Rol No. C-08-04.

311 The complaint also included accusations regarding the sugar and sweeteners market.

312 TDLC, Judgment N° 27 of 2005 (Rol No. C-26-04).

313 TDLC, Judgment N° 99 of 2010. On the 21 of April 2010.

314 TDLC, Judgment N° 7 de 2004, pág. 28.

315 Id., pág. 29.

316 Id., págs. 29-30.

The National Economic Prosecutor's Office (FNE) alleged that the conducts of market division and refusal to purchase were typified because the firms refused to purchase milk from suppliers that already sold to other firms. Since the suppliers had to sell their product to the nearest plants, the firms' conduct impeded the suppliers to offer the milk to other firms (eliminating the producers' mobility from one purchaser to another). The conduct of price reduction, according to the FNE, was configured by a simultaneous reduction (same date) at a similar level (between five percent and ten percent) by three firms between the years 1994 and 1995 in one of the regions. The same pattern of behavior occurred in another region where six plants reduced their purchase prices between the years 1994 and 1995 at a similar level (between eight percent and 15 percent)³¹⁷.

The TDLC considered there was no direct evidence of any agreement among the firms. In effect, it concluded from the behavior of international prices, imports and exports of milk, and due to the seasonality of the product that the evidence was not sufficient to prove an agreement³¹⁸. The TDLC pointed out that the stability of the firms' market share in spite of the dispersion of prices was important indirect evidence of the existence of market division. However, the TDLC concluded that the quality of the information presented in the proceedings didn't allow definitive conclusions since the average prices were not adjusted to the different degrees of quality of the milk³¹⁹. In relation to the price discrimination charge the TDLC only found guilty one of the prosecuted firms³²⁰.

In conclusion, TDLC did not found the milk producers guilty of collusion but established that due to the market structure there were market imperfections and lack of transparency. Hence, the TDLC

317 Id., págs. 5-6.

318 Id., pág. 32.

319 Id., págs. 33-34.

320 Id., págs. 34-35.

resolved to establish six preventive measures³²¹, applicable to all the regions of the country, in order correct the imperfections of the market and hinder any opportunistic behavior from the milk producers³²².

3.6.3. CONCLUSIONS

1. Agricultural exceptions to competition law

- a. The competition law doesn't exempt any economic sector or except any individual from its enforcement. In this sense, competition law should be fully applicable to the agricultural sector.
- b. However, the GLC allows the constitution of farmers' and agricultural cooperatives, which may represent an implicit and limited exception to the application of antitrust to these cooperatives and its associates.
- c. The TDLC assessed a case where the scope of the implied exception established by the cooperatives' sector-specific regulation was defined. The competition authority concluded that the limits that the GLC and the cooperative's by-laws establish regarding the associates' activities are essential to functioning cooperatives and do not infringe the competition law.

321 The measures imposed conditions on the acts or contracts in the market of raw milk, in general for all the country, that obliged the plants to 1) maintain a list of purchases with the parameters that compose it; 2) announce with a month of anticipation, any change in the conditions of purchase of raw milk; 3) justify any refusal regarding the purchase of milk; 4) keep a registry of the rejected offers and inform the FNE twice a year of the significant changes regarding the purchase of milk; 5) abstain to use the historical margin of deliveries in winter and summer to set the purchase price and 6) design a system of quality control that guarantees fairness to the all the parties.

322 TDLC, Judgment N° 7 de 2004, págs. 36-38.

2. Competition law enforcement in agricultural markets

- a. In the period 2004-2010 the TDLC studied four antitrust conduct cases that took place in the agricultural market, which amounted to 5,3 percent of the overall antitrust conduct cases (excluding unfair competition cases). The food and beverage sector accounted for two antitrust conduct cases.
- b. The cases studied by the TDLC covered the following markets:
 - i) purchase of raw milk (two times), ii) purchase of sugar beet, iii) purchase and process grapes for the production of *pisco*.
- c. The percentage of antitrust conduct cases (5,3 percent) in agricultural markets is consistent with the weight of agriculture on Chile's overall GDP (four percent).
- d. All the cases involved the study of a supposed conduct of firms that purchased agricultural goods (with supposed oligopsony or monopsony power) against primary goods producers. None of the cases finished with penalty.

3.7. COLOMBIA

As it occurred with other Latin American countries, since the 1950s and until the end of the 1980s an “import substitution” model dominated economic policies in Colombia³²³. An aggressive trade liberalization program under the Government of César Gaviria was initiated in the 1990s, which also included deregulation, privatization and the implementation of competition policies³²⁴.

Agricultural policies were influenced by the market economy reform initiated in the 1990s. The latter implied the substitution of the producer

323 Guterman, Lia, “Colombia”, in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, pág. 160.

324 *Cfr.* OECD, “Competition Law and Policy in Colombia: A Peer Review”, 2009, pág. 10.

price supports through a price band scheme that took world prices as benchmark³²⁵. However, the Government responded the decline of agriculture in 1992 with financial facilities, export subsidies and foreign trade barriers³²⁶.

In 1994 the Government of Ernesto Samper counteracted the trade liberalization process with import tariffs, direct and indirect quantitative import restrictions, direct and storage subsidies, the promotion of agreements between producers and manufacturers, the application of safeguards, the creation of more agricultural price stabilization funds “*that regulated marketing according to a unique domestic producer price, whereby markets with higher prices subsidized markets with lower markets*”³²⁷.

In the period 2000-2005, under the Governments of ANDRÉS PASTRANA and ÁLVARO URIBE, these policies were maintained and in some cases even strengthened. This was the case of production or value chains agreements (between producers and processors) and “[s]pecial attention was devoted to the promotion of producer cooperatives and alliances between small farmers for the production of perennial crops considered labor intensive”³²⁸.

According to LIA GUTERMAN, “[a]griculture has been the single most important sector in the Colombian economy”³²⁹. HOWEVER, the weight of agriculture in the economy has declined in the last decades. In the period 2000-2005 agriculture represented 13 percent of the total economy’s GDP³³⁰ and decreased to nine percent in the year 2009³³¹.

325 GUTERMAN, LIA, “Colombia”, in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, pág. 181.

326 *Id.*, pág. 182.

327 *Id.*, pág. 183.

328 *Id.*, pág. 184.

329 *Id.*, pág. 161.

330 *Id.*, pág. 159.

331 World Economic Forum, “The Global Competitiveness Report 2009-2010”, 2009, pág. 55.

3.7.1. AGRICULTURAL EXCEPTIONS TO COMPETITION LAW

Articles 2 and 4 of the law 1,340 of 2009 established that competition laws are applicable to every person that develops an economic activity or that may affect its performance (independent of its juridical nature) and to every sector and economic activity, without prejudice of sector-specific regulation.

However, the Colombian competition regime has two types of exceptions from its application. The first is exception may be alleged by investigated parties in antitrust conduct cases and is contained in article 49 of the decree 2153 of 1992. This article exempts three specific conducts from the application of competition law and are not considered anticompetitive: i) cooperation for research and development of new technology; ii) agreements on norms, standards and non-binding measures that don't limit market entry for competitors; and iii) procedures, methods, systems and utilization forms of common facilities³³².

The second type of exception was established by article 1 of the law 155 of 1959 (amended by the decree 3307 of 1963) and consists on a procedure whereby private parties request a “block exception” in the following terms:

“Article 1.- (...) Paragraph. The Government may however authorize agreements or understandings that, despite restricting free competition, are intended to defend the stability of a basic sector for the production of goods and services of interest for the general economy.”

Furthermore, the Ordinance that developed the cited paragraph defined “basic sector” in a broad manner. Article 1 of the decree 1302

332 In the year 2002 SIC accepted a defense based on the third exemption. The authority considered that the usage of a reference exchange rate set by the international airlines' trade association (ALAIICO) was a conduct that entailed the adoption of “procedures, methods, systems and utilization forms of common facilities” and therefore the restrictive element of the conduct was discarded. Resolución No. 25,559 of 14 August 2002. *Cfr.* OECD, “Competition Law and Policy in Colombia: A Peer Review”, 2009, pág. 33.

of 1964 established that the “basic economic sectors” included all the economic activities that have or may have “*fundamental importance to rationally structure the country’s economy and procure the goods and services that are indispensable for general welfare (...)*”. The cited article contains a non-exhaustive list of such goods and includes as a basic sector the production and distribution of goods that are destined to satisfy the Colombian alimentation necessities.

It is important to point out that since the issuance of law 155 of 1959 the Superintendence of Industry and Commerce (SIC) has approved only one “block exception” request, presented by five textile firms in the year 2003. The authorization allows the firms to jointly purchase identical conditions from the sole national provider of textured filament³³³. Indeed, there have been few authorization requests filings and several have been withdrawn by the parties before the SIC issues its decision.

However, in the year 1995 SIC invoked the exception as part of its motivation for the closure of an investigation of supposed collusion in the market of production and processing of African oil palm³³⁴. The procurement agreement was entered by and between several trade associations and firms and its purposes were to guarantee the provision and absorption of the national production of African oil palm and guarantee a minimum price for national raw palm oil. The sectoral agreement was promoted by the Ministry of Agriculture under the provisions of law 101 of 1993 that will be explained below³³⁵. The

333 OECD, “Competition Law and Policy in Colombia: A Peer Review”, 2009, pág. 32.

334 SIC, Auto No. 2 of 1995.

335 GUTERMAN, LIA, “Colombia”, in “Distortions to agricultural incentives in Latin America”, World Bank, USA, 2008, pág. 183 (“*Under pressure from farmer associations, procurement agreements (convenios de absorción) were introduced for grains and oils in which agroindustries exercise oligopsonic power. The system was based on negotiations among the government, farmers and industrialists on an agreement about the prices paid to farmers and the volume of producers absorbed by buyers. In exchange, agroindustrialists were allowed to import under a preferential import tariff approved by the Ministry of Agriculture. The mechanism became a quantitative import restriction because imports were allowed only if domestic production had been completely absorbed by processors*”).

competition authority concluded that the agreement was consequent with the Constitution and competition law.

In the year 2005, the Government issued a complementary Ordinance that developed the article 1 of the law 155 of 1959 specifically for agricultural markets. The decree 3280 of 2005 established that in the proceedings for the authorization for agreements intended to defend the stability of agricultural markets (related with the provision of alimentation necessities) the SIC must request previous and non-binding opinion from the Ministers of Agriculture and Commerce on the necessity of stabilizing the respective agricultural market.

It is important to point out that article 64 of the Colombian Constitution established a mandate for the State to provide special attention for “agrarian workers” in terms of access to property rights of the land, commercialization of their products, technical and entrepreneurial assistance to enhance the income and quality of life of peasants. Furthermore, article 65 of the Constitution states that State will protect the production of food and, therefore, the State will give priority to the integral development of agricultural activities and the promotion of productivity.

The decree 3280 of 2005 was implicitly repealed by article 5 of the law 1,340 of 2009, which modified the authorization request proceeding for agreements intended to defend the stability of agricultural markets. Firstly, the law declared agriculture and livestock sector as “basic sector of interest for general economy”. Secondly, the law mandated that the Ministry of Agriculture must render a previous, motivated and binding opinion upon authorization requests for agreements intended to defend the stability of agricultural and livestock sector. Since the law 1,340 entered into force the Ministry of Agriculture has not issued a previous, motivated and binding opinion on this sort of proceedings.

Finally, the law 1,340 explicitly mandated that specific forms of State intervention are out of the scope of the competition regime. Although in practice sector-specific regulation may constitute an implicit exception from the enforcement antitrust laws, the Colombian Legislator was apparently interested in foreclosing any sort of discussion on the implementation of certain State intervention mechanisms, in particular

in agricultural markets. It is important to point out that SIC has interpreted in recent case law that State intervention does not rule out completely the applicability of antitrust to agricultural markets³³⁶ and therefore the authority has limited the scope of the exceptions to competition law.

Although the wording of article 31 of the law is not clear, a systematic interpretation of the rule leads to the conclusion that the following intervention mechanisms³³⁷ are explicitly considered exceptions to the enforcement of competition law: i) price stabilization funds; ii) parafiscal funds for the promotion of agriculture; iii) the establishment of minimum guaranteed prices; iv) the regulation of internal agricultural and livestock markets; v) the “value-chain” agreements; vi) the safe guards regime; and vii) in general all the intervention mechanisms established by the law 101 of 1993 (General Law of Agricultural, Livestock and Fishery Development) and by the law 81 of 1981 (e.g. price control).

Actually, most of the listed forms of intervention were developed by the law 101 of 1993, which established the rules on safeguards (article 5), parafiscal funds for the promotion of agriculture, livestock and fishery (articles 29-35), price stabilization funds for agricultural, livestock and fishery products (articles 36-47), the establishment of minimum guaranteed prices (article 50) and “value chain agreements” (articles 101-108).

Two nullification demands were filed before Andean Community’s Tribunal of Justice in regards to decisions of the Andean Community’s General Secretary where the main object of controversy was the Price stabilization fund for African palm oil. The allegation against the fund consisted in a price-fixing effect (for sale of African palm oil in the

336 SIC, Resolución No. 52,202 of 2009, págs. 41-44.

337 Article 3, numeral 15, of the decree 2478 of 1999 establishes the regulatory functions of the Ministry of Agriculture, which include the following: “*regulate domestic agricultural markets, determine price policy for these goods and their inputs when there are market failures, and to submit to the relevant agencies requests for the issuance of policy measures aimed at correcting the internal competition environment.*” See, RICARDO ARGÜELLO and MARÍA CLARA LOZANO, “The agricultural sector and competition policy in Colombia”, in *Competition Law and Policy in Latin America* (Fox and Sokol, editors), Hart Publishing, UK, 2009, pág. 471).

Colombian market and abroad) that damaged the Peruvian production of African palm oil. The Andean Tribunal dismissed the allegations and considered that the price stabilization fund didn't constitute a concerted practice among Colombian African palm producers and that it was an instrument for the Colombian Government's economic policy³³⁸.

In regards to “value chain agreements”, these are entered by and between the different economic agents of agro-food value chain (producers, processors, distributors, retailers, services and supplies providers, the respective trade associations’) with the participation of the National and local governments. The “commercial agreements” in a value chain organization may regulate their commerce and their binding character will be determined by the unanimous decision of the members of the organization (articles 104 and 105). These agreements are verified by the Ministry of Agriculture and the SIC must supervise their compliance³³⁹.

The law 101 of 1993 also regulated the creation of “agrarian transformation companies” (articles 109-131) that develop activities of post-harvest and marketing activities of perishable agricultural goods and the provision of common services. Article 110 of the law explicitly considered as objectives of these agrarian companies the increase of agricultural producers' income, the integration of agricultural producers' activities and the stabilization of prices for consumers and producers.

Finally, article 32 of law 1,340 of 2009 mandates that the State may intervene under the occurrence of external situations or due to situations alien to the national producers that “*affect or distort the competition conditions in the national product markets.*” The respective Ministry

338 Andean Tribunal, Judgment of 14 January of 2009, Accumulated proceedings 01-AN-2006, 02-AN-2006 and 01-AN-2007.

339 OECD, “Competition Law and Policy in Colombia: A Peer Review”, 2009, pág. 33 (“*There are currently 28 productive chains, many of them subject of Competitiveness Agreements promoted and facilitated by the Ministry of Agriculture. They exist in sectors such as cotton, rice, meat (poultry, pork, beef) balanced food and dairy products, cocoa, flowers and rubber*”).

will be in charge of implementing measures that “*compensate or regulate the markets’ conditions guaranteeing equity and the competitiveness of national production.*” Clearly these State interventions may occur in agricultural markets that are subject to the influence of external situations (e.g., depression of international agricultural commodities’ prices) and are subject to situations that are alien to producers (e.g. strong climate fluctuations).

3.7.2. COMPETITION LAW’S ENFORCEMENT IN AGRICULTURAL MARKETS

The Colombian competition law was enforced since the year 1994, when the Competition Promotion Office was established within the SIC³⁴⁰. In the period 1994 – 1998 the authority decided upon 45 cases of supposed anticompetitive conducts (anticompetitive agreements, anticompetitive acts and abuse of dominance)³⁴¹ and only two cases took place in agricultural markets (4,44 percent of overall cases) and none of them resulted in the initiation of a formal investigation.³⁴²

Table 6 summarizes the cases decided by the SIC (closure or fine imposition) and those finalized by consent decrees in the period 2000-2009.

340 SIC, “Actuaciones en Materia de Promoción de la Competencia 1994-1998”, Bogotá, 1998, pág. 6.

341 *Id.*, págs. 11-77.

342 SIC v. FEDEPALMA, FEDEGRASAS, ANALJA and others (1995), where the product market was the production and processing of African oil palm (SIC, Auto No. 2 of 1995). SIC v. Oleoflores Ltda. (1995), where the product market was the production and processing of African oil palm (SIC, Auto No. 13 of 1997).

Table 6
Cases in Colombia's in agricultural sector 2000-2009

Period	Cases in the agricultural sector	Total cases³⁴³
2000	1 case (10%)	10
2001	2 cases (8,33%)	24
2002	1 case (5%)	20
2003	2 cases (14,29%)	14
2004	1 case (6,25%)	16
2005	0 cases (0%)	10
2006	1 case (33%)	3
2007	0 cases (0%)	7
2008	1 case (6,67%)	15
2009	1 case (6,67%)	15
Total	10 cases (7,5%)	134

Source: SIC³⁴⁴

343 Total cases include: i) the cases where SIC completed the proceedings and issued final decisions upon the conduct of the investigated firms and ii) the cases that were closed before the finalization of the proceedings due to SIC's acceptance of the compromises offered by the investigated parties. The list does not include cases where preliminary investigations that didn't lead to the initiation of a formal investigation or cases where the SIC lacked of competence prosecute and adjudicate.

344 OECD, "Competition Law and Policy in Colombia: A Peer Review", 2009, pág. 46. SIC, "Informe de Gestión mayo 2003- septiembre 2007", October 2007, p. 11. SIC, "Informe de gestión 2007", February 2008, pág. 4. SIC, "Informe de gestión - 2008", January 2009, pág. 6. SIC, "Informe de gestión - 2009", January 2010, pág. 8.

Table 7
Summary of cases adjudicated in Colombia agricultural markets July 2000-2010

Case reference	Product market	Investigated conduct	Decision
<i>SIC v. FENAVI and others</i> (2000)	Egg production	Agreement to regulate the surplus of egg production (abstain from producing or affect the level of output).	Closure ³⁴⁵
<i>SIC v. Corabastos</i> (2001)	Production, distribution and commercialization of scallion	Horizontal market allocation agreement and agreement to affect the level of production and distribution.	Fine imposition ³⁴⁶
<i>SIC v Unión de Arroceros S.A. and others</i> (2001)	Purchase and processing of green paddy rice and commercialization of rice	In regards to the market of green paddy rice, a purchase price fixing agreement. Price fixing, price discrimination, market allocation and quota allocation conducts were investigated in regards to commercialization of rice	Closure due to acceptance of compromises ³⁴⁷
<i>SIC v Cooperativa Lechera Colanta</i> (2002)	Purchase of raw milk	Abuse of dominant position through the imposition of discriminatory conditions for purchase of raw milk, tying sales and market's access obstruction.	Closure due to acceptance of compromises ³⁴⁸

(Continúa)

345 SIC, Resolución No. 29305 of 2000,

346 SIC, Resolución No 8,233 of 2001.

347 SIC, Resolución No. 15,645 of 2001.

348 SIC, Resolución No. 4,323 of 2002.

(Continuación)

Case reference	Product market	Investigated conduct	Decision
SIC v. Cooperativa Lechera Colanta (2003)	Purchase of raw milk	Abuse of dominant position through the imposition of discriminatory conditions for purchase of raw milk, tying sales and market's access obstruction.	Closure ³⁴⁹
SIC v. Federación Nacional de Cafeteros (February, April and July 2003)	Purchase of coffee and export of coffee	Purchase price fixing agreement, discriminatory agreement, market allocation and quota allocation (export quotas).	Closure due to acceptance of compromises ³⁵⁰
<i>SIC v. Setas Colombianas S.A.</i> (2004)	Mushroom production and commercialization	Predatory pricing	Closure ³⁵¹
<i>SIC v. Molinos Roa S.A. and others</i> (2006)	Purchase of green paddy rice	Purchase price fixing agreement (consciously parallel conduct).	Sanction imposition, upheld after the parties presented an appeal for reconsideration ³⁵² . Confirmed by the AT. The defendants appealed and the SIC's decision is still pending.

(Continúa)

349 SIC, Resolución 588 of 2003.

350 SIC, Resolución No. 3,351 of 2003, Resolución No. 9,500 of 2003. Resolución No. 19923 of 2003.

351 SIC, Resolución 30,835 of 2004.

352 SIC, Resolución No. 22625 de 2005 and Resolución No. 8454 de 2006

(Continuación)

Case reference	Product market	Investigated conduct	Decision
<i>SIC v Luis Francisco Cardozo and others</i> (2008)	Production and commercialization of scallion	Agreement for output restriction.	Fine imposition, upheld after the parties presented an appeal for reconsideration ³⁵³
<i>SIC v. Casa Lüker S.A. and Compañía Nacional de Chocolates S.A.</i> (2009)	Purchase of cocoa	Purchase price fixing agreement (consciously parallel conduct).	Fine imposition, upheld after the parties presented an appeal for reconsideration ³⁵⁴ . The decision was challenged before the courts and the AT's judgement is still pending.
<i>SIC v. Ingenio del Cauca S.A and others</i> (2010)	Purchase of sugar cane	Purchas price agreement (concerted practice)	Fine imposition to eight of the thirteen mills ³⁵⁵ .

Of the recently adjudicated cases there are two cases that must be highlighted. In the case *SIC v. Molinos Roa S.A and others* (2005)³⁵⁶ five rice mills were found guilty of infringing competition laws due “conscious price parallelism” regarding the purchase of green paddy rice to croppers from the regions of Tolima and Huila. The fined rice mills had a market share of 64 percent, measured in total sales. The SIC established that the market for green paddy rice was an oligopsony.

In order to set the case, the SIC described the production chain of rice, starting from the industrial crops passing to its processing by the mills and finishing with its commercialization³⁵⁷. The SIC established

353 SIC, Resolución No. 39869 of 2008 and Resolución No. 90 of 2009.

354 SIC, Resolución 4,946 of 2009 and Resolución 52,202 of 2009.

355 SIC, Resolución No. 6, 839 of 2010 and Resolución No. 42411 of 2010.

356 SIC, Resolución No. 22625 of 2005.

357 Resolución 22,625 de 2005, págs. 13-18.

the places where green paddy rice is cropped, the seasons in which it is collected and the structure of the markets³⁵⁸. Secondly, the SIC analyzed the price movements regarding two types of rice during a period of six months and concluded that price parallelism was evident³⁵⁹.

Finally, the SIC concluded that taking into account the structure of the market, the conduct of the firms and the evidence exposed in the proceedings there was no economic explanation for the price parallelism besides the existence of tacit collusion³⁶⁰. In spite of the mill's justifications concerning their actions, the SIC considered that the coordinated conduct of the mills had the *objective* of avoiding competition or reducing the uncertainty generated by the necessity of setting a price autonomously.

The SIC built its argument by acknowledging that in imperfect markets, such as an oligopsony, economic agents are interdependent in such a way that any decision taken by one of the participating firms will provoke a reaction by competitors³⁶¹. The firms may mitigate the uncertainty regarding the conduct each firm will assume either by guessing the rival's reaction and acting beforehand or by colluding³⁶². In the case of collusion in an oligopsony the firms would seek to keep purchase prices low (by fixing maximum purchase prices) or would agree upon the quantity of product to be purchased.

The SIC argued that in free markets, even in interdependent markets where prices can have a similar tendency, the conduct of the agents should not be identical³⁶³. The agency argued that the market of green paddy rice was not a free market since the mills had eliminated the uncertainty of their conducts by agreeing upon prices. Furthermore,

358 According to the SIC, from the point of view of the offer the market resembles a perfect competition scenario, due to the thousands of croppers, and from the point of view of the demand the market is an oligopsony. SIC, Resolución 22,625 of 2005, págs. 18.

359 *Id.*, págs. 19-31.

360 *Id.*, págs. 37 and 47.

361 *Id.*, pág. 34.

362 *Id.*, pág. 34.

363 *Id.*, pág. 35.

the SIC concluded that the market didn't have a performance of a free market since the price changes were not correlated with the demand changes³⁶⁴. In effect, while the "demand" (measured by the SIC according to the volume purchased by the investigated firms) for green paddy rice decreased between the months January and February, the purchase price increased. The opposite occurred between the months of February and March, where the "demand" increased but the purchase price decreased³⁶⁵.

Based upon the circumstantial evidence and in previous case law the SIC found the five mills guilty of tacit collusion through conscious price parallelism. The fined firms applied for a rehearing before the Superintendent contesting the arguments of the SIC and especially arguing the economic rationality of their conduct. The SIC confirmed its decision through the *Resolución No. 8454 de 2006*.

In the cocoa case, the SIC initiated an investigation against two producers of chocolate products for supposed price-fixing in the purchase of cocoa and the sale of finished chocolate and cocoa products. According to the SIC, the investigated firms had a combined market share in the purchase of cocoa, in the year 2004, of 86,7 percent (54,8 and 31,9 respectively)³⁶⁶. The market is described by the SIC as an oligopsony where the quantity of cocoa produced is determined by seasons³⁶⁷. The SIC established that the purchase price of cocoa was not affected by seasons, in spite of the fact that the seasons determined the scarcity or the abundance of the input³⁶⁸.

The SIC concluded that the price parallelism had no explanation, taking into account that the purchase price was not affected by seasons and that volume of cocoa purchased by the firms was significantly different³⁶⁹. It is pertinent to mention that SIC explicitly considered that

364 *Id.*, pág. 35.

365 *Id.*, pág. 36.

366 SIC, Resolución No. 28065 of 2006, pág. 4.

367 *Id.*, págs. 4-5.

368 *Id.*, págs. 5.

369 *Id.*, págs. 6.

the existence of sector-specific regulation and in particular the existence of “value-chain” agreement doesn’t justify firms’ collusive conduct³⁷⁰.

There are two additional contrasting features of the enforcement of antitrust in Colombian agricultural markets that must be noted. On one hand, the creation in August 2005 of an Interagency Agricultural Monitoring Group within the SIC fostered by the Ministry of Agriculture³⁷¹. This group of lawyers and economists have boosted the investigation and surveillance of the agro-food sector in Colombia and have supported SIC in several antitrust conduct cases. On the other hand, in every December since the year 2006³⁷² and until the year 2009 the Ministry of Agriculture fostered price agreements between food producers, wholesalers and retailers to control inflation (2006-2008) or to raise prices due to output surpluses (2008-2009).

3.7.3. CONCLUSIONS

1. Agricultural exceptions to competition law

- a. In general the competition law is applicable to every economic sector. However, the law established different types of explicit agricultural exceptions to competition law.
- b. The main explicit exception consists on the “block exception” established in article 1 of law 1959 for agreements that are intended to stabilize a basic sector of interest for the economy. A special procedure for the agricultural sector was included by article 5 of the law 1340 of 2009, whereby the Ministry of Agriculture must render a previous, motivated and binding opinion on the authorization request for “stabilization agreements”.

370 SIC, Resolución No. 52,202 of 2009, págs. 41-44.

371 SIC, Resolucioin No. 00347 of 2005

372 Through the Presidential Directive No. 04 of the year 2006, the President of Colombia requested city majors and department governors, among others, to arrange periodic “price-freeze” agreements for products of massive consumption.

It must be noted that this procedure may have an important incidence in the future, but since the law 1,340 entered into force the Ministry of Agriculture has not issued a binding opinion in this sort of procedure. It is not clear how will the SIC will interact on this regard either.

- c. Before the enactment of the law 1,340 of 2009 several intervention schemes implemented by the Ministry of Agriculture were considered implicit agricultural exceptions from antitrust. This was the case of price stabilization funds, parafiscal funds for the promotion of agriculture, the “value-chain” agreements, and agrarian transformation companies. However, article 31 of the cited law explicitly states that these intervention schemes, among others, “restrict” the application of competition law and therefore they are explicit agricultural exceptions from antitrust. It must be pointed out that SIC has considered in recent case law that these agricultural exceptions do not rule out completely the application of competition law to these markets, therefore limiting the scope of the said exceptions.
- d. The current Government fostered informal agricultural exceptions manifested in the form of “stabilization” or “freeze” agreements related to agro-food products that might affect inflation (2006-2008) or that present output surpluses that might affect the producers’ income (2008-2009).

2. Competition law enforcement in agricultural markets

- a. In the period 2000-2010 the SIC adjudicated or settled ten antitrust conduct cases that took place in agricultural markets, which amounted to 7,5 percent of the overall antitrust conduct cases.
- b. Seven of the studied cases involved investigations on collusive agreements while the remaining three consisted on abuse of dominance cases. Furthermore, only three cases involved

investigations on producers' behavior while the remaining consisted on investigation on upstream economic agents (processors and retailers).

- c. In spite of the fact that Colombia presents explicit and informal agricultural exceptions from antitrust law, SIC has been very active in this sector.
- d. The Interagency Agricultural Monitoring Group within the SIC, fostered by the Ministry of Agriculture, is very proactive and has supported the competition authority in several antitrust conduct cases.
- e. The cases studied by the SIC covered the following markets: i) production and processing of African oil palm; ii) egg production; iii) production, distribution and commercialization of scallion (two times); iv) purchase and processing of green paddy rice and commercialization of rice (two times); v) purchase of raw milk (two times); vi) purchase of coffee and export of coffee; vii) mushroom production and commercialization; viii) purchase of cocoa; and ix) purchase of sugar cane.
- f. The percentage of antitrust conduct cases in agricultural markets is slightly below the weight of agriculture on Colombia's overall GDP.

3.8. MEXICO

The introduction of competition policies in Mexico was part of a broader reform that introduced market-oriented policies³⁷³. Since the Second World War and especially during the 1950s and 1960s the Governments

373 OECD, *Mexico - The Role of Competition Policy in Regulatory Reform*, 1999, pág. 5. FRANCISCO GONZÁLEZ DE COSSIO, "Competencia Económica", Fondo de Cultura Económica, México, 2005, págs. 17-18.

implemented an “import substitution” economic model³⁷⁴. Indeed, before the mid 1980s liberalization reform during the 1970s “*much of the Mexican economy was under price or entry control or in the hands of state-owned monopoly, in an environment of import protection and strong state supervision.*”³⁷⁵

Since the mid 1980s, and during the following decades the Government reduced its intervention in the Mexican economy, eliminated price controls, liberalized trade, and introduced privatization and deregulation³⁷⁶. Agricultural policy was also marked by this trend, especially since the late 1990³⁷⁷. The reform to agricultural policies included the following aspects: i) tariff reduction; ii) “liberalization of land property rights” (*ejidal* reform); iii) reduction of price support schemes; iv) reduction of direct and indirect subsidies; and v) government withdrawal from direct procurement and marketing functions³⁷⁸.

Since the mid 1990s the Government has implemented different programs that provided assistance for the transition to an “open market”. These programs included marketing activities subsidies (aimed at reducing price uncertainty and assure surplus absorption), support household income with direct cash transfers, low-interest and collateral-free credit for small producers and programs that stimulate the increment of productivity³⁷⁹.

374 *Id.*, págs. 13-15.

375 OECD, *Mexico - The Role of Competition Policy in Regulatory Reform*, 1999, pág. 7.

376 *Id.*, págs. 5-7. OECD, *Competition Law and Policy in Mexico: A Peer Review*, 2004, págs. 10-11. ISIDRO SOLOAGA and GABRIEL LARA, “Mexico” in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, pág. 246.

377 OECD, *Mexico - The Role of Competition Policy in Regulatory Reform*, 1999, págs. 5-7. OECD, *Competition Law and Policy in Mexico: A Peer Review*, 2004, págs. 10-11.

378 OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, págs. 121. ISIDRO SOLOAGA and GABRIEL LARA, “Mexico” in *Distortions to agricultural incentives in Latin America*, World Bank, USA, 2008, págs. 246-250.

379 *Id.*, págs. 253-257.

Mexico's rural inhabitants represent 23 percent of the total population and 20 percent of the economically active Mexicans are employed in agriculture³⁸⁰. However, in the period 1980–2005 agriculture's share in total GDP was 6,3 percent, it slightly declined in the last decade to an average of 5,4 percent in the period 2000-2005³⁸¹ and to four percent in the year 2009³⁸².

3.8.1. AGRICULTURAL EXCEPTIONS TO COMPETITION LAW

Article 28 of the Mexican Constitution establishes several exceptions to the enforcement of competition law. The Constitution establishes that the following do not constitute a monopoly: i) labor associations, ii) copyright and patent privileges; iii) associations or cooperatives that directly sell their products abroad and iv) the “strategic sectors” reserved exclusively for the State. However, according to articles 5 and 6 of the Federal Law of Economic Competition (LFCE) these economic agents are subject to the law regarding deeds that are not covered under the constitutional protection³⁸³.

The LFCE doesn't establish specific agricultural exemptions and exceptions to competition rules³⁸⁴. However, agricultural producers that comply with the requisites set forth by article 6 of the LFCE may constitute trade associations or cooperatives to market directly their products abroad. However, if the association's activities restrict the local markets the LFCE could be enforced against these conducts.

Farmers are allowed to form part cooperatives that allow them “*to pool their input requirements, or to market jointly their*

380 *Id.*, pág. 243.

381 *Id.*

382 World Economic Forum, “The Global Competitiveness Report 2009-2010”, 2009, pág. 55.

383 *Cfr.* OECD, *Mexico - The Role of Competition Policy in Regulatory Reform*, 1999, pág. 23.

384 *Cfr.* OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, págs. 127-128.

products”³⁸⁵. These cooperatives are attractive to small farmers, rather than to large producers, to attain more bargain power in regards to the purchasers³⁸⁶. Furthermore, the Economics Ministry has promoted and administered a program that incentives small farmers to join together and coordinate their activities³⁸⁷.

Besides the exceptions explained above, articles 1 and 3 of the LFCE establish that the law is applicable to “all economic agents” regardless of their nature and purposes and to “any economic activity”³⁸⁸.

385 OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, pág. 125. The Agrarian Act of 1993 (Title IV, “On agrarian societies”) allows the union of “*ejidos*”, the constitution of rural production societies, and of collective interest rural associations to coordinate the production and marketing of agricultural producers. Furthermore, the Rural Sustainable Development Act of 2007 establishes the Intersecretariat Commission (article 20 and 21), a Federal Executive entity, that must promote the creation of committees (with the participation of agrarian producers and retailers) that have the objective of generating agreement mechanisms between primary producers, industrials and the Government on the characteristics and quantities of products and prices (article 149).

386 OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, pág. 126 (“*However, the continued existence of a large number of small growers in Mexico makes the cooperative concept still pertinent for some products. Given the very small scale of production that most small farmers have, joint marketing can be the only way, in which product conditioning, storage, packaging, presentation and promotion can attain economies of scale.*”)

387 OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, p.128 (“*The program is designed to help small and medium sized firms in several economic sectors to take advantage of scale economies and purchasing efficiencies in order to attain bargaining power in the provision, commercialization, financial and technology markets. The CFC considers that firms participating as partners or shareholders in such an entity are not acting as competitors. Consequently, their price standardization practices are not considered illegal the under the LFCE. Currently, 210 integrating firms exist in the agriculture sector and eight of them are considered successful*”).

388 Cfr. OECD, *Mexico - The Role of Competition Policy in Regulatory Reform*, 1999, pág. 23.

“Thus, the state, its agencies, and all state-owned commercial enterprises operating outside the strategic areas are covered. When a government agency is acting as a regulatory authority and not as an economic agent, however, the CFC ordinarily has no law enforcement jurisdiction. If the government entity is engaging in regulatory conduct that inappropriately restricts competition, the Commission may issue an opinion to the agency in question, but not an order with binding legal effect”³⁸⁹.

Finally, the Federal Competition Commission (CFC) has rejected as a valid defense the fact that a conduct has been authorized by a government agency, although it could derive in a lessening of the fine imposed to the infringer³⁹⁰.

3.8.2. COMPETITION LAW’S ENFORCEMENT IN AGRICULTURAL MARKETS

According to the CFC’s annual reports, in the period 2000-2008 most of the monopolistic practices cases decided by the authority took place in the consumer goods and services sector³⁹¹, which includes the agro-food sector among others³⁹². Regarding the processed food sector, the *tortilla*’s antitrust cases must be highlighted³⁹³. The CFC has investigated cases on price fixing and market allocation by corn

389 OECD, *Competition Law and Policy in Mexico: A Peer Review*, 2004, pág. 15.

390 *Id.*, pág. 16.

391 The CFC’s annual report presents divides the sectoral information in four sectors: i) consumer goods and services sector, ii) the telecommunications sector, iii) the financial services sector, and iv) the infrastructure services sectors.

392 CFC, “Informe de competencia económica 2000”, 2001, p. 20. CFC, “Informe de competencia económica 2001”, 2002, pág. 120. CFC, “Informe de competencia económica 2002”, 2003, pág. 88. CFC, “Informe de competencia económica 2003”, 2004, pág. 104. CFC, “Informe de competencia económica 2004 - Apéndice Estadístico”, 2005, pág. 7. CFC, “Informe de competencia económica 2005”, 2006, pág. 27. CFC, “Informe de competencia económica 2006”, 2007, pág. 29. CFC, “Informe de competencia económica 2007”, 2008, pág. 26. CFC, “Informe de competencia económica 2008”, 2009, pág. 92.

393 CFC, “Informe de competencia económica 1999”, 2000, pág. 3.

dough and tortilla producers in the years 1997³⁹⁴, 1999³⁹⁵, 2000³⁹⁶, 2001³⁹⁷, 2003³⁹⁸, 2004³⁹⁹ and 2005⁴⁰⁰.

One of the first conduct cases that took place in agricultural markets was decided in the year 1999 when dairy firms were accused of fixing the purchase price of raw milk. However, the CFC found that prices were dissimilar and decided against the plaintiff⁴⁰¹.

Table 8 shows that the monopolistic practice's cases adjudicated by the CFC in the period 2000-2008 represent only 1,75 percent of the total cases while the food and beverage had a significant participation of 14,69 percent.

394 CFC, "Annual Report on Competition Policy Development in Mexico - 1997", 1998, pág. 4.

395 CFC, "Informe de competencia económica 1999", 2000, pág. 3.

396 OECD, *Competition Law and Policy in Mexico: A Peer Review*, 2004, págs. 19.

397 OECD, *Competition Law and Policy in Mexico: A Peer Review*, 2004, pág. 23.

398 CFC, "Annual Report on Competition Policy Development in Mexico - 2003", 2004, pág. 4.

399 CFC, "Annual Report on Competition Policy Development in Mexico - 2004", 2005, pág. 4.

400 CFC, "Annual Report on Competition Policy Development in Mexico - 2005", 2006, pág. 4. CFC, "Informe de competencia económica 2005", 2006, pág. 39.

401 CFC, "Annual Report on Competition Policy Development in Mexico - 1999", 2000, pág. 2.

Table 8
Cases in Mexico's in agro-food sector (2000-2008)

Period	Cases in the agricultural sector	Cases in food and beverage sector	Total adjudicated cases
2000	4 cases (6,34%) ⁴⁰²	7 cases (11,11%) ⁴⁰³	63 ⁴⁰⁴
2001	1 case (1,56%) ⁴⁰⁵	7 cases (10,94%) ⁴⁰⁶	64 ⁴⁰⁷
2002	1 case (1,47%) ⁴⁰⁸	13 cases (19,12%) ⁴⁰⁹	68 ⁴¹⁰
2003	0 case (0%) ⁴¹¹	5 cases (13,16%) ⁴¹²	38 ⁴¹³
2004	1 case (2,44%) ⁴¹⁴	6 cases (14,63%) ⁴¹⁵	41 ⁴¹⁶
2005	1 case (1,61%) ⁴¹⁷	15 cases (24,19%) ⁴¹⁸	62 ⁴¹⁹
2006	0 cases (0%) ⁴²⁰	11 cases (28,21%) ⁴²¹	39 ⁴²²
2007	2 cases (4,35%) ⁴²³	12 cases (26,09%) ⁴²⁴	46 ⁴²⁵
2008	0 cases (0%) ⁴²⁶	8 cases (5,26%) ⁴²⁷	152 ⁴²⁸
Total	10 cases (1,75%)	84 cases (14,69%)	572

Source: CFC

402 CFC, "Informe de competencia económica 2000", 2001, pág. 101.

403 *Id.*

404 CFC, "Informe de competencia económica 2000", 2001, pág. 20.

405 CFC, "Informe de competencia económica 2001", 2002, pág. 121.

406 *Id.*

407 CFC, "Informe de competencia económica 2001", 2002, pág. 120.

408 CFC, "Informe de competencia económica 2002", 2003, pág. 88.

409 *Id.*

410 CFC, "Informe de competencia económica 2002", 2003, pág. 83.

411 CFC, "Informe de competencia económica 2003", 2004, pág. 105.

412 *Id.*

413 CFC, "Informe de competencia económica 2003", 2004, pág. 25.

414 CFC, "Informe de competencia económica 2004 – Apéndice Estadístico", 2005, pág. 9.

415 *Id.*

416 CFC, "Informe de competencia económica 2004", 2005, pág. 4.

The reason for the fact that agricultural cases are relatively low and while the number of food cases is relatively high (in contrast with agriculture's share in Mexico's overall share) is not clear. There is no explicit agricultural exemption or exception from antitrust (besides the generic export cartel exception established by the Constitution) that may explain the few cases assessed by the CFC in this sector.

Sector-specific regulation, that allows commercial chambers that fixed prices and that frequently imposed price control, may partially explain the low number of cases in the agricultural sector but it is not consistent with the interest of the authority in the food sector which was also influenced by this type of State intervention.

Furthermore, small farmers compose the farmers' marketing cooperatives and therefore this implicit exception to the application of antitrust doesn't seem to explain the low number of cases in the agricultural sector.

Table 9 summarizes the relevant features of the principal antitrust conduct cases in agricultural markets assessed by the CFC in the period 2000-2008.

417 CFC, "Informe de competencia económica 2005", 2006, pág. 86.

418 *Id.*

419 CFC, "Informe de competencia económica 2005", 2006, pág. 84.

420 CFC, "Informe de competencia económica 2006", 2007, pág. 84.

421 *Id.*

422 CFC, "Informe de competencia económica 2006", 2007, pág. 18.

423 CFC, "Informe de competencia económica 2007", 2008, pág. 110.

424 *Id.*

425 CFC, "Informe de competencia económica 2007", 2008, pág. 13.

426 CFC, "Informe de competencia económica 2008", 2009, pág. 93.

427 *Id.*

428 CFC, "Informe de competencia económica 2008", 2009, pág. 10.

Table 9
Summary of adjudicated cases in Mexico's agricultural markets 2000-2008

Case Reference	Product Market	Investigated Conduct	Decision
<i>Harinera Seis Hermanos v Cargill de México and Asociación de Proveedores de Productos Agropecuarios</i> (2000) ⁴²⁹	Commercialization of hard wheat imported from the US and Canada	Collusive Boycott. The defendants had a joint market power and their conduct ⁴³⁰ had the objective of displacing the plaintiff from the market. ⁴³¹	Fines imposition ⁴³² . Confirmed by Appeals Court.
<i>CFC v pasteurizing companies</i> (2000)	Purchase of raw milk	Price-fixing agreement on the purchasing of raw milk and price discrimination against producers.	Closure ⁴³³
<i>CFC v Harinera de Yucatán</i> (2001)	Production, distribution and commercialization of corn flour for human consumption	Collusive refusal to deal. The defendant, with regional market power, " <i>had celebrated agreements with mill and tortilla associations (...) by means of which the former refused to sell flour and machinery to businesses located within a given distance from already established ones.</i> " ⁴³⁴	Fine imposition
<i>CFC v bean marketing firms</i> (2001)	Purchase of beans	Price-fixing agreement on the purchasing or selling prices of beans.	Closure ⁴³⁵
<i>Asociación Mexicana de Engordadores de Ganado Bovino, AC v sugar cane molasses producers</i> (2002) ⁴³⁶	Commercialization of sugar cane molasses	Refusal to deal and price discrimination.	Closure ⁴³⁷

429 Case reference No. DE-52-98; RA-13-2000 and RA-15-2000.

Another pertinent case on a related sector took place in the market of phytosanitary laboratory diagnostics of fresh potato imports⁴³⁸. The four authorized laboratories were summoned by the CFC, under price-fixing agreement charges, and “*committed themselves to restore the violation, establish prices based on the costs of providing the service, and to cease fixing prices in the future for any of their services*”.⁴³⁹

The CFC’s has been very active through competition advocacy activities in the agricultural and food sectors. Indeed, the CFC has issued opinions on state regulations that, in terms of article 14 of the FLEC, constitute “interstate trade barriers” requiring its repeal on the following markets: tomatoes, breeding cattle, meat, poultry, lard, milk, eggs, tortilla, fruits and vegetables⁴⁴⁰.

430 According to the CFC the anticompetitive conduct consisted on a “*cooperation between a wheat distributor and an association of agricultural product suppliers whereby a rival of the distributor was denied access to imported supplies of high-protein hard wheat*”. (OECD, Competition Law and Policy in Mexico: A Peer Review, 2004, pág. 23.)

431 *Cfr.*, CFC, “Annual Report on Competition Policy Development in Mexico - 2000”, 2001, pág. 5. OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP (2005) 44, 2005, pág. 130.

432. CFC, Resolución of 28 January of 2000.

433 OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP(2005) 44, 2005, pág. 130.

434 CFC, “Annual Report on Competition Policy Development in Mexico - 2001”, 2002, pág. 4.

435 OECD. “Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling”, DAF/COMP(2005) 44, 2005, págs. 128-129.

436 Case reference No. RA-13-2002.

437 CFC, Resolución of 15 November of 2001 and confirmed by Resolución of 16 May of 2002.

438 *CFC v Laboratorio de Alta Tecnología de Xalapa, SC and others* (2003). Expediente: Case reference No. IO-09- 2003.

439 CFC, “Annual Report on Competition Policy Development in Mexico - 2004”, 2005, p. 4. Resolución of 19 August 2004.

440 CFC, “Annual Report on Competition Policy Development in Mexico - 1998”, 1999, pág. 5. CFC, “Annual Report on Competition Policy Development in Mexico

Finally, in the year 2005 the CFC issued an opinion on two bills that regulated the markets of sugar cane and coffee. The bills allowed sugar cane and coffee producers to, among others, fix prices, agree on payment conditions and pool their output. According to the CFC, these bills were against public interest and article 28 of the Constitution; therefore the authority recommended not approve them since they would entail the elimination of competition among producers of these agricultural goods⁴⁴¹.

3.8.3. CONCLUSIONS

1. Agricultural exceptions to competition law

- a. The LFCE does not establish an agricultural exception or exemption to competition law.
- b. However, article 28 of the Constitution considers that the constitution of export trade associations that directly sale their output abroad doesn't constitute a monopoly. Hence, under the strict circumstances mandated by article 6 of the LFCE, the creation of an association composed of agricultural producers that export all their output wouldn't be considered, by itself, as a monopoly. Still, this wouldn't grant absolute immunity to the export trade association.
- c. Furthermore, under the legal framework of the Agrarian Act of 1993 and the Rural Sustainable Development Act of 2007, the Government has fostered cooperative and other forms of

- 2001", 2002, pág. 5. CFC, "Annual Report on Competition Policy Development in Mexico - 2003", 2004, págs. 5-6. OECD, Competition Law and Policy in Mexico: A Peer Review, 2004, pág. 34. CFC, "Annual Report on Competition Policy Development in Mexico - 2004", 2005, pág. 4. OECD. "Competition and Regulation in Agriculture: Monopsony Buying And Joint Selling", DAF/COMP (2005) 44, 2005, págs. 134-135.

441 CFC, "Informe de competencia económica 2005", 2006, pág. 42.

associative schemes among small and medium size agricultural producers that pool their output and perform marketing activities, that constitute implicit exceptions to the enforcement of antitrust.

2. Competition law enforcement in agricultural markets

- a. In the period 2000-2008 the CFC adjudicated ten conduct antitrust cases in agricultural markets that amounted to 1,75 percent of the total cases while the food and beverage had a significant participation of 14,69 percent of overall cases.
- b. The cases studied by the CFC covered, among others, the following markets: i) commercialization of imported hard wheat; ii) purchase of raw milk, iii) Production, distribution and commercialization of corn flour, iv) purchase of beans; and v) commercialization of sugar cane molasses.
- c. Most of the conduct cases entailed some sort of collusive behavior.
- d. The percentage of antitrust conduct cases in agricultural markets is no consistent with the weight of agriculture (5,4% in the period 2000-2005 and 4% in 2009) on Mexico's overall GDP.
- e. The CFC has been very active in competition advocacy activities on agricultural markets through the issuance on opinions of state regulations that amounted to "barriers for inter-state trade" in several agro-food markets.

SECTION IV

CONCLUSIONS

The main objective of this document was to assess agricultural exceptions to antitrust from a theoretical and a comparative law

approach. For this purpose, the study of eight jurisdictions (United States, European Union, Israel, Canada, Argentina, Brazil, Chile, Colombia and Mexico), focused on two aspects: i) the existence and implementation of explicit, implicit and informal agricultural exceptions to competition rules and ii) the specific features of competition law's enforcement in agricultural markets, with emphasis on the Latin American jurisdictions.

The comparison of the mentioned jurisdictions laws and enforcement allowed the identification of convergent and divergent features of agricultural exceptions to antitrust:

1. The enforcement of competition law and its economical context in the studied jurisdictions' is heterogonous, and agricultural markets are not the exception.
2. However, the majority of the jurisdictions (US, EU, Colombia, Chile and Mexico) have enacted an explicit or implicit exception to the application of competition law in agricultural markets.
3. The scope of the exceptions in the studied jurisdictions is limited; they don't represent a blanket exemption for all agricultural activities. The main limits of the agricultural exceptions to antitrust are the following:
 - a. **The agricultural exceptions do not cover any type of entrepreneurial conduct.** Only certain types of agreements are allowed under the agricultural exceptions. Specifically, abusive conduct from firms that have market power is not covered by the exception. While the US's laws are more ample in the conditions of the agreements that may take place among producers and handlers, the EU's and Chile's law and case law limits the scope of the agreements that may be entered by and between producers and producers' associations. It is important to take into account that in the US, EU, Israel, Chile and Mexico the exceptions have been explicitly justified to allow producers to join together in order to

achieve synergies in marketing activities and gain bargain power to negotiate with processors or retailers⁴⁴².

- b. **Not all markets related to agricultural activities are covered by the exception.** In the case of the US, EU and Israel both production and marketing of agricultural markets are included in the exception. However, the products covered are only those allowed at a statutory (plus marketing agreement or marketing order) or at a treaty level. In the case of Israel, processed goods are excluded and in Canada only fish is included.
 - c. **Control by an authority.** In the US, the Secretary of Agriculture may impede that action of agricultural associations that result in monopolization or restraints of trade. In the EU, the European Commission has the sole power, subject to review by the Court of Justice, to determine which agreements, decisions and practices fulfill the conditions stated for exception. In Israel, the Minister of Industry and Trade may initiate a proceeding to exclude certain categories of agricultural products from the exception. In Colombia, the Ministry of Agriculture has the faculty of delivering a previous and binding opinion on agreements that have as an object the stabilization of an agricultural sector.
4. Two of the jurisdictions (Argentina and Colombia) presented informal or *de facto* exceptions to the application of antitrust. Competition law enforcement (or actually, the lack of

442 Agricultural cooperatives and associations of producers present two opposing effects: i) the increment of producers' productive efficiency due to the lowering of production, distribution and marketing costs and ii) the increment of purchase prices' due to the increase of the agricultural producers' bargaining power with respect to purchasers and retailers, intended to assure higher and stable prices for agricultural producers and to maintain their income. Therefore, it is not possible to determine *a priori* the net effect of producers' cooperatives on the consumers' welfare, in each case it will depend of the impact of the cooperative on cost reduction and the capacity of the cooperatives to raise the goods' purchase prices and/or decrease overall output.

enforcement) signals that agricultural and/or macroeconomic public policies' goals have displaced totally or partially competition law goals.

5. Regarding the Latin American jurisdictions, only in Chile and Colombia the number of agricultural cases decided by the competition authority was proportional with the weight of agriculture in their overall GDP.
6. Furthermore, regarding the Latin American jurisdictions, the contrast of the number of agricultural cases with the number of food cases is important in Argentina (five percent in the period 1998-2006), Brazil (4,92 percent in the period 1996-2008, 1999 excluded) and most notably in Mexico (19,64 percent in the period 2000-2008). The competition authorities' activity in the food sector has incidence in the primary agricultural goods sectors since the latter are the main input for the processing of food. This may also be explained by the fact that food production markets and food retailing markets are more concentrated than agricultural goods production markets. Food prices have an enormous effect on inflation and this phenomenon is more dramatic for the developing countries' poor households income⁴⁴³. This sets out more tradeoffs that must be assessed by Governments and competition authorities: ¿Low food prices for consumers or attractive purchase prices for producers? ¿Hundreds of small inefficient producers or few but efficient producers?

443 FARINA, ELIZABETH, "Distribution and the price of food: Competition and the Hunger Millennium Development Goal", 2006, pág. 6. (According to the ex President of CADE the competitive process cannot be excluded from the food system: "*Consumers of developing countries also benefit from lower food prices that are provided by big retailers. They cannot afford to pay higher food prices in order to preserve small retailers and food processors or even small farmers. What is desirable is that the small have the opportunity to be efficient and respond to market trends ...*").

7. Finally, it is important to point out that most of the studied cases in the Latin American jurisdictions address monopsony or oligopsony conducts, rather than collusion cases among producers or producer's unilateral conduct. This trend may imply an effort to mitigate the asymmetry of power (both bargain and market dominance) between the agricultural producers and the processors or retailers. However, it may also be a consequence of the existence of exceptions (explicit, implicit or informal) to certain horizontal conducts of agricultural producers and associations of producers.

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