The Agricultural Exemption in Antitrust Law: A Comparative Look at the Political Economy of Market Regulation

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In Memory of Shlomo Lubin

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I. INTRODUCTION

Using comparative law as an aid to the legislator can be a very enlightening exercise, in particular when countries with no experience in a particular field try to learn from those with more experience than themselves. However, it can also lead to unfortunate outcomes if the comparison is not done meticulously—viewing the particular foreign law that is being imitated within its full legal context and social, political and economic circumstances. Legal transplantation from a “donor” jurisdiction with a regulatory environment and market structure that is very different from that of the “recipient” jurisdiction is a recipe for rejection, as has been learned the hard way by many well-meaning law reformers. Sometimes the reference to foreign laws is only used as a convenient justification for the adoption of inefficient or unjust laws in order to conceal the real lobbying efforts and narrow interests that are behind them. This seems to be the case with the agricultural exemption in Israel’s competition law.

Indeed, special exemptions of the agricultural sector from the full application of competition rules can be found in many jurisdictions. Most developed countries consider agriculture as a special sector of the economy requiring intensive intervention by means of regulation, such as quota systems, price support mechanisms and protection from imports. These policies are felt strongly in the international trade arena, where agriculture has always been considered—at least by the developed countries—as a “special case” not amenable to the regular liberal trade rules. The refusal of these countries to open up their agricultural sectors to more international competition, especially for produce from developing countries, has caused the long impasse in the current Doha Round of multilateral trade negotiations within the World Trade Organization. Along with these policies, the developed countries also grant exclusions or partial exemptions to their farmers from domestic competition law. Economic, as well as non-economic rationales (such as the need to preserve rural communities), are claimed to preclude regulation of the agricultural sector by means of market mechanisms, and to mandate government regulation of this sector. Inelastic demand, unpredictable and seasonal supply, and the inability in many cases to store the produce for long time, call for government intervention and special market organization. Thus, it is argued, rules founded on and aimed at free and unobstructed competition cannot be applied to the agricultural sector and hence the need to exempt this sector from antitrust laws. In the United States (U.S.), the special exemption for the agricultural sector was enacted as early as in 1922—the Capper-Volstead Act. In the European Community (EC), the exemption is included in the Treaty Establishing the EC, in Article 36 (ex Article 42), ever since its inception in 1957. In the United Kingdom (UK), the Restrictive Trade Practices Act of 1956, which was quite influential in the

1. For a discussion of these claims and their critique as well as of the modern history of the attempts to regulate international trade in agriculture, see Michael J. Trebilcock & Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 321-348 (3d ed. 2005).
2. For an overview, see OECD, DIRECTORATE FOR FOOD, AGRICULTURE AND FISHERIES COMPETITION POLICY AND THE AGRO-FOOD SECTOR (1999).
legislation process of Israel’s first competition law in 1959, was also subject to such an exemption.5

Considering these circumstances, it was only natural that Israel’s first competition law—The Restrictive Trade Practices Act, 1959 would also include such an exemption. Indeed, in the course of the deliberations of the proposed act in the Knesset (Israel’s parliament), when the agricultural exemption was criticized by the opposition, it was defended by the ruling party through reference to its existence in other jurisdictions as well. “If other economies, much more developed than our own and with longer experience with competition law, have chosen to exempt their agricultural sector from the rules on restrictive agreements – why shouldn’t we do the same?” was in essence the striking argument of the ruling party.

As striking as it may be, the facts are somewhat different. As I will show, none of the agricultural exemptions in these foreign jurisdictions is nearly as wide as that adopted—and what is worse, as that maintained until today—by the Israeli legislature. I will argue that in fact what most probably stood behind the adoption of this wide agricultural exemption were strong economic interests of the Labor Movement, which at the time dominated the agricultural sector. As in the EC, the exemption was part of a general agricultural policy that favored heavy involvement of the government in this sector and protection of certain farmers’ interests, often at the expense of consumers. What is surprising, however, is that even after this policy has changed and regardless of the fact that the agricultural sector has been quite liberalized and opened up to private market forces, the exemption has remained and managed to withstand several attempts to abolish or amend it.

This paper will discuss the agricultural exemptions in the jurisdictions of some of the major developed economies—namely, the U.S., the EC and the UK—against the backdrop of their respective market structures. It will then discuss Israel’s agricultural exemption and its history and compare it to those discussed in the previous sections. It will show how political forces and narrow economic interests shaped the wide scope of the exemption and allowed anti-competitive practices to prevail way into the new era of an open market-based economy. I will then discuss the possible rationales for a special exemption for the agricultural sector and its

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5. The exemption was originally found in the Agricultural and Forestry Association Act, 1962, which provides that Part I of the Restrictive Trade Practices Act, 1956, shall not apply to certain agreements in the agricultural and forestry sector. Agricultural and Forestry Association Act, 1962, 11 & 12 Geo. 6, c. 38 (Eng.). It would seem that even before the enactment of the Agricultural and Forestry Association Act of 1962, the sector was partly exempt from the application of the Restrictive Trade Practices Act by virtue of Section 8(1) thereof, which exempts agreements authorized by any enactment or scheme made under an enactment. See Restrictive Trade Practices Act, 1956, 4 & 5 Eliz. 2, c. 68, § 8(1) (Eng.), reprinted in LORD WILBERFORCE, ALAN CAMPBELL & NEIL ELLES, THE LAW OF RESTRICTIVE TRADE PRACTICES AND MONOPOLIES § 1103 (2d ed. 1966). Since the Agricultural Marketing Act 1958 made provisions for approved marketing schemes in agriculture, restrictive trade practices implemented in furtherance of such schemes would seem to fall under this exemption.

6. Divrey HaKnesset, minutes of the 368th session (Dec. 3, 1957) 328. MK Zeev Tzur (Labour Unity-Poaley Zion party): “Surely you know just like me that also in England the anti-cartel supervision does not apply to the councils for production and marketing of agricultural produce.” (My translation – A.R.). Similarly during the deliberations in 1959, the exemption was defended several times by reference to the situation in other countries, such as England, United States, Germany and Austria. While the claims with regards to England were disputed by the opposition, the fact that the other jurisdictions mentioned had similar agricultural exemptions as that proposed was not disputed. See Divrey HaKnesset, minutes of the 686th session (July 28, 1959) 33-2739.
desirable limits and mechanics. Based on this normative analysis, amendments to the existing exemptions will be proposed.

II. THE AGRICULTURAL EXEMPTION IN US LAW

The agricultural exemption in U.S. federal law was granted by Congress through the Clayton Act of 1916 and the Capper-Volstead Act of 1922. They were preceded by many state laws with similar content and objectives—namely to authorize the existence of agricultural cooperatives and to exempt them from antitrust liability. 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, making them easy prey for cunning middlemen. The prevailing situation was described by Baumer et al.:

As the physical and economic distance between farmer and consumer widened, a growing lack of complete supply and demand information made it increasingly difficult for individual farmers to make accurate market predictions before locking themselves into production decisions for the next harvest. The generally high perishability of agricultural products, the technological inability to store them for very long, and the absence of efficient transportation left many individual farmers dependent on one or a few handlers (processors and distributors). On many occasions the middlemen abused this power. In an effort to force down prices, the middlemen could simple threaten not to buy; the prospect of rotten vegetables or spoiled milk was often enough to make the farmer capitulate. In the dairy industry, where individual farmers were dependent on handlers for weighing milk to specify its volume and for testing its butterfat content, short-changing was a common practice.

To countervail the power of the marketing firms and improve their lot, farmers sought to organize themselves in cooperatives. These organizations were intended to provide both transportation and marketing services for the farmers, thus connecting them better with the consumers. This would allow them to obtain fairer prices for their produce and establish a more efficient and equitable system of production and distribution. However, such organization of farmers was problematic from an antitrust standpoint: the cooperation between farmers for the sake of fixing common prices for their produce and marketing it jointly would seem to be in violation of the Sherman Act’s prohibition of agreements in restraint of trade. Indeed, a few cooperatives were found guilty of antitrust violations by the

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10. The Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared illegal....” Sherman Act of 1890, 15 U.S.C § 1.
The situation of the agricultural cooperatives in this regard was somewhat similar to that of the labor unions, in that both were necessary to put the individual workers/farmers on a level playing field with the more powerful firms that procured the fruits of their labor, but nevertheless may have been considered in violation of antitrust laws. Congress therefore came to their rescue through Article 6 of the Clayton Act of 1916, which provides:

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws should be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for the profit, or to forbid or restrain any individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organization, or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

This law provides merely an authorization for farmers to organize themselves in cooperatives (and to workers in unions) “for the purpose of mutual help.” As long as they “lawfully carry[...],” they cannot be held illegal under the antitrust laws. But what type of “mutual help” may they extend to their members, and what exactly are their “legitimate objects”? In order to clarify that, and also in order to allow the cooperatives to raise the capital necessary for their efficient operation, Congress passed the Capper-Vollstead Act in 1922. The Act identified the legitimate objects of agricultural cooperatives as “collectively processing, preparing for market, handling and marketing” the agricultural products of its members for their mutual benefit. Producers of such products were defined as “Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers.” While the Act allowed such cooperatives to issue capital stock, it also imposed several conditions aimed to ensure that the organization would retain its nature as a true cooperative for the benefit of its farmer members: (1) that no member of the association should have more than one vote because of the amount of stock or membership capital he may own therein; or (2) that the association should not pay dividends on stock or membership capital in excess of eight percent per annum; and in any case (3) that the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. An association that meets these conditions is allowed to act cooperatively in setting prices and selling conditions, and even cooperate with other such associations in setting up common

13. Id. at §6.
14. Id.
16. Id. at §291.
17. Id.
18. Id. § 291. The first two conditions are alternative, and it is enough if a cooperative complies with one of them. The third is mandatory.
marketing agencies—in manners which otherwise would have been considered illegal under the Sherman Act.\textsuperscript{19}

However, the Capper-Vollstead Act also added an important safety valve. It charged the Secretary of Agriculture with the responsibility of taking action if he believes that any such association “monopolizes or restrains trade . . . to such an extent that the price of any agricultural product is unduly enhanced.”\textsuperscript{20} In such cases, a decree can be issued against the association that requires it to cease and desist from such acts. In other words, the exemption is not an unfettered authorization to engage in anti-competitive behavior to the detriment of consumers. While the objective was to protect farmers from monopsonist buying power, it was recognized that this should not be done at the expense of the consumers. Congress was not willing to grant such immunity to farmers associations—so as to permit them to develop monopoly power over the consumers—thus substituting one market distortion for another. As stated in the House Report on the Act:

In the event that associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law. It is not sought to place these associations above the law but to grant them the same immunity from prosecution that corporations now enjoy so that they may be able to do business successfully in competition with them.\textsuperscript{21}

The U.S. courts also considered themselves authorized under the Act, along with the Secretary of Agriculture, to prevent abuse of the exemption. In Maryland & Virginia Milk Producers Association v. United States, for instance, the U.S. Supreme Court held that section 2 of the Capper-Volstead Act was not intended to give the Secretary of Agriculture exclusive jurisdiction over abuses, thereby excluding any prosecutions under the Sherman Act.\textsuperscript{22} Thus, when there is anti-competitive behavior on the part of the agricultural association that unduly enhances prices, it can be prosecuted by the courts under the existing antitrust laws. The Maryland & Virginia Milk Producers Association, for instance, which had been found to attempt to monopolize and entering several anti-competitive agreements, was ordered to cancel all those contracts and to divest itself of all assets purchased from a competing dairy. 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 that are not exempt cooperatives or using their dominant position to suppress competition with independent producers and processors.\textsuperscript{23}

\textsuperscript{19} Id.  
\textsuperscript{20} Id.  
\textsuperscript{21} H.R. REP. NO. 24, at 3 (Apr. 27,1921).  
\textsuperscript{22} Maryland & Virginia Milk Producers Ass’n v. United States, 362 U.S. 458, 462-63 (1959). Similar rulings were made in United States v. Borden Co. 308 U.S. 188, 206 (1939); and in Sunkist Growers v. Federal Trade Commission, 464 F.Supp 302, 309-310 (1979). It is possible that these rulings reflect some misgivings about the ability (or willingness) of the Secretary of Agriculture to strike the proper balance between competition and cooperation, and between the interests of the farmers and those of the consumers. The Supreme Court therefore preferred that anti-competitive behavior continued to be monitored by the antitrust authorities, and not only by the Department of Agriculture.  
\textsuperscript{23} Maryland & Virginia Milk Producers Ass’n, 362 U.S. 472 (stating “the privilege the Capper-Volstead Act grants producers to conduct their affairs collectively does not include a privilege to combine with competitors so as to use a monopoly position as a lever further to suppress competition by and among
To sum up: the agricultural exemption in U.S. antitrust law was enacted in order to correct distortion of competition in the agricultural sector and to allow farmers to counteract the monopsonist or oligopsonist market power of middlemen. Hence, it only extends to the formation of cooperatives among farmers, and only among them and to the legitimate activities of such cooperatives, including joint processing, handling and marketing. A cooperative must act to the mutual benefit of its members and divide its profits among them up to a ceiling of eight percent each, and they are not immune from administrative or judicial supervision where they engage in anticompetitive activities, such as combinations with competitors, abuse of dominant position, and mergers.

III. THE AGRICULTURAL EXEMPTION IN EC LAW

The agricultural exemption in the EC is similar in its contours to the U.S. one. Here too the main concern seems to be to allow the efficient functioning of associations of farmers in the form of agricultural cooperatives. In the absence of such an exemption, these associations could be considered as violating Article 81 of the EC Treaty. The background is the atomistic nature of the agricultural sector, which was made up of a multitude of small family-run farms, and the urgent need to encourage the establishment of cooperatives in order to improve the efficiency and competitiveness of the sector. In addition, and unlike the U.S., the exemption aims to allow the proper functioning of central governmental policies in the agricultural sector, mainly the EC’s Common Agricultural Policy (CAP), and occasionally Member States’ national policies. In other words, agricultural policy, and in particular the Treaty’s rules on agriculture takes precedence over its competition policy. The exemption was enacted in 1962 by the EC Council in Regulation 26
pursuant to an express Treaty authorization. Article 2(1) of the Regulation provides:

Article [81(1)] of the Treaty shall not apply to such of the agreements, decisions and practices [which relate to production of or trade in the products listed in Annex [I] to the Treaty] as form an integral part of a national market organization 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.

This exception relates only to Article 81 of the EC Treaty. Thus, Article 82, on the abuse of dominant position, as well as the merger regulations, applies in the agricultural sector just like in any other sector. Furthermore, even the application of the exception to arrangements falling under Article 81 has been significantly curtailed by the restrictive interpretation given by the Commission and the European Court of Justice (ECJ). It has been held to apply, as stated in the Regulation, only to the products listed in Annex I to the Treaty, and not to all agricultural products, as defined in Article 32(1) of the Treaty. The first part of the exemption (national market organization) has only been found to apply once, and has almost no significance today, since most national market organizations have been replaced by common organizations set up under EC Council Regulations.

The second part of the exemption (necessary for Article 33 objectives) has been held to require that all the objectives of Article 33 (i.e. the objectives of the CAP) must be fulfilled before it can apply, and it is not enough that the restrictive agreement fulfills the main objectives enumerated in this provision. The Commission also requires that it be proven that the agreement is the best means for achieving those objectives and that there is no other way, less restrictive of competition, to attain them. As noted by Bellamy and Child, in practice it would appear difficult to show

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28. EC Treaty, supra note 4, art. 36.
31. See Case 61/80, Coöperatieve Stremsel-en Kleursel Fabriek v. Comm’n, 1981 E.C.R. 851 (holding that rennet of animal origin, which is a product of first-stage processing and is used in making cheese, was not deemed to be covered by the exemption); Case T-63/89, Dansk Pelsdyravlerforening v. Comm’n, 1992 E.C.R. II-1931 (finding that furskins were also outside the exemption’s scope, even if they are ancillary to the production of another product which itself comes under Annex I).
that an agreement meets this requirement, unless the common organization of the market expressly contemplates or impliedly permits such an agreement.36

Thus, the most important and commonly used part of this provision is the second sentence.37 Like the U.S. exemption, but unlike the Israeli one, it applies only to farmers and their associations and not to marketing firms as such. It is, however, somewhat broader in that it is not limited to the agreements required for the establishment and proper functioning of the association, but extends also to any other arrangements between farmers, as well as to arrangements between farmers’ associations, or associations of such associations. There are, however, important qualifications. Firstly, these associations can only include farmers belonging to a single Member State. A situation where large parts of the Common Market are dominated by pan-European farmers’ associations is thus precluded. Secondly, the regulation expressly prohibits price fixing (presumably, horizontal).38 Finally, as in the U.S., there is a safety valve in the form of an authorization of the Commission to declare the exemption inapplicable if it finds that competition is excluded by the arrangement in question or that the objectives of Article 33 of the Treaty are jeopardized. As in the U.S., this authority can also be used by national courts whenever they are asked to apply the competition rules of the Treaty.39 They too can decide—taking into account the relevant case law of the European Court of Justice (ECJ) and the previous decisions and policies of the Commission—that the arrangement in question excludes competition, or jeopardizes the objectives of the CAP, and thus declare it void.40

Based on these principles, the Commission, the ECJ and national courts have examined various restrictive arrangements in the agricultural sector in order to determine which ones fall under the exemption, and which ones are overly restrictive.41 In particular, the Commission has withheld the exemption from

36. BE LLAMY & CHILD, supra note 33, at 828.
37. Lambros Papadias, Agriculture, in COMPETITION LAW OF THE EUROPEAN COMMUNITY 15-8, 15-11 (V. Korah ed., 2d ed. 2001). For many years it was unclear whether this second sentence was indeed an independent exception, or merely an illustration of the first sentence exception. The Commission had mostly held that it was an independent exception, and this interpretation was confirmed by the Court in Dijkstra, infra note 40.
38. In other words, it probably does not apply to minimum prices fixed between the farmers and their cooperatives through which they sell their produce, otherwise it would be virtually impossible for most cooperative arrangements to benefit from the Art. 2(1), second sentence, exemption. See BELLAMY & CHILD, supra note 33, at 829; Papadias, supra note 37, 15-12 n.26. Rather, it applies to horizontal price fixing arrangements between individual farmers, or between two or more farmers’ associations, or between one such association and other independent farmers.
39. Such as those based on art. 81(1) of the EC Treaty, supra note 4,
40. Joined Cases C-319/93, C-40/94 & C-224/94, Dijkstra v. Friesland, 1995 E.C.R. I-4471 (holding that if the national court finds that the agreement excludes competition or jeopardizes the objectives of Article 39, it may declare the agreement void pursuant to Article 85(2) of the Treaty if it is incapable under any circumstances of qualifying for an exemption decision under Article 85(3)).
41. See, e.g., Oude Luttikhuis, Case C-399/93 Oude Luttikhuis v. Coberro para. 25 [1995] ECR I-4515. (examining the statute of a milk cooperative that imposed excessive fees on its members upon their withdrawal from the cooperative, and holding that the cumulative effect of clauses in statutes tying the members to the association for long periods, and thereby depriving them of the possibility of approaching competitors, jeopardizes one of the objectives of the common agricultural policy, namely that of increasing individual earnings in the agricultural sector, and may therefore be prevented from enjoying the exemption). Likewise, in the matter of a large Dutch dairy milk cooperative (Campina), the exemption was considered to apply to an exclusive supply obligation, only after the cooperative amended its statutes so as to allow its members to terminate their membership on three different dates during the year, by
arrangements involving persons other than farmers and their associations, such as processors and traders of agricultural products, even if concluded with farmers. In *Meldoc* it was held that an agreement between five parties, four of which were farmers' associations and only one of which was a private company, did not fall under the exemption. The validity of this exception has even been challenged by a number of traders in agricultural products and their associations who claimed that the second sentence of Article 2(1) discriminates between producers of and traders in agricultural products, by excluding the latter from its benefits. The application was held inadmissible, based on the rule that individuals could not challenge regulations, only Member States. It has not been challenged ever since, and it is unlikely that such a challenge could be successful, considering that there are excellent reasons to distinguish between farmers and traders in this regard.

The distinction has been further strengthened by another important regulation—Regulation 2200/96 on the common organization of the market in fruit and vegetables. One of the objectives of this regulation is to strengthen the position of the producers in the market in the face of “ever greater concentration of demand”, i.e., in the wholesale and retail trading sectors which purchase from the farmers. To counter this concentration and the market power that comes with it, “the grouping of supply through [producer] organizations is more than ever an economic necessity.” Thus, the Regulation encourages the establishment of such organizations by giving them a central role in the regulation of the market, entrusting them with special powers to intervene in the supply and demand side of the market, and channeling financial support to the farmers through them. They are authorized to withdraw from the market certain quantities of produce in order to protect domestic prices. This can be done either by purchase and destruction of produce, or through other means of removal from the market, such as subsidized exportation. Moreover, Member States may in certain circumstances extend the rules made by a representative producer organization to non-members of such organizations located in their region. Thus, rules on production, marketing, quality standards, environmental protection, and withdrawal of produce may be imposed giving two years notice, without having to pay any compensation, unless they gave three months notice, in which a resignation fee of 4% of the price received by them for milk delivered prior to the year of their withdrawal had to be paid. Commission of the European Communities, *XXI Report on Competition Policy 1991*, at 67-68, paras. 83-84.

44. Almost all of the special considerations that are invoked in support of the claim that agriculture is a “special case”, such as the atomistic nature of the farming sector, unpredictable growing conditions, seasonal supply, are only applicable to the farmers, not to the big marketing firms. See further discussion *infra* Sect. V.
45. Council Regulation 2200/96, On the Common Organization of the Market in Fruit and Vegetables, 1996 O.J. (L 297) 1 (EC) (applying to all the fruits and vegetables produced in the EC, except for potatoes, wine, grapes, bananas, sweet corn, olives and peas and beans for animal feed).
46. Id. at 2, para 7.
47. Id.
48. Id. at 3, paras. 16-17, tit. IV, art. 23.
49. Id. tit. IV, arts. 25, 30, tit. V, art. 35.
51. Id. Annex III. Non-members may be required to notify the producer organization on their growing intentions, anticipated tonnages and probable cropping dates. They may be bound by rules on,
on such non-members in order to boost the producer organization’s control of the market, to ensure uniform quality standards and to prevent free-riding by non-members. However, these rules must be notified to the Commission, and if the Commission finds that they exclude competition in a substantial part of the internal market, that they jeopardize free trade or that they fall under article 81(1) (i.e., that they have as their object or effect the prevention, restriction or distortion of competition within the common market), it may order the Member State to repeal them. 52

Regulation 2200/96 also provides for the recognition of “inter-branch organizations,” which are organizations made up of representatives of economic activities linked to the production, trading, and processing of fruits and vegetables. However the tasks of these organizations is to improve, in general, the production and marketing of fruits and vegetables by undertaking research and market studies and improving knowledge and transparency of production and the market. 53 While Article 20 of the Regulations provides that Article 81(1) of the EC Treaty shall not apply to agreements of recognized interbranch organizations intended to implement these type of measures, this exemption only applies if the measures have been notified to the Commission and the Commission has not found that they are incompatible with Community rules. The Regulations order the Commission to declare agreements, decisions, and concerted practices of such organizations as contrary to Community rules, whenever they may lead to partitioning of markets in the Community, or may affect the sound operation of the market organization, or may create distortions of competition which are not essential in achieving the objectives of the CAP pursued by the organization. 54 Agreements that entail price fixing, in particular, shall be declared incompatible. 55 These provisions are meant to ensure that interbranch organizations—i.e., those bodies that include actors other than the farmers—are not used in a manner that may harm competition, and that they will be under constant supervision in that regard.

To sum up: while the European Community has a much regulated and heavily subsidized agricultural sector, 56 it has made efforts to ensure that some competition is maintained in the sector. It has decided that the agricultural policy, with its strong emphasis on protecting the income of farmers and ensuring a steady supply of food, will take precedence over competition rules, but only insofar as is necessary to achieve the CAP objectives and to protect the farmers. A clear distinction is made in this regard between farmers and traders, so that only the former are exempt from some of the competition rules, but are nevertheless under the potential scrutiny of the Commission and of national courts so as to prevent disproportional distortion of among others, choice of seeds to be used, specified dates for commencement of cropping, staggering of marketing, minimum quality and size requirements, and rules of withdrawals of produce adopted under Article 23.

52. Id. art. 18(5). Similar rules apply to the common organization of raw tobacco (Council Regulation (EEC) No 2077/92 concerning inter-branch organizations and agreements in the tobacco sector, O.J. L 215 80 (1992)).
53. Id. art. 19.1.
54. Id. art. 20.3.
55. Id.
56. The EU common agricultural policy is in the process of several reforms which will make it more market-oriented and less distorting. Support is shifting from price support to "single-farm payments" which are decoupled from actual production decisions.
competition. The objectives of both Regulations 26 and 2200/96 are to improve the efficiency of the atomistic farming sector and to strengthen the farmers vis à vis the traders and processors who buy from them. The competition rules are compromised only insofar as is necessary for that purpose and to achieve other CAP objectives.

IV. THE AGRICULTURAL EXEMPTION IN THE UNITED KINGDOM

The first enactment in English Law imposing judicial supervision over restrictive agreements was the Restrictive Trade Practices Act of 1956. Part I of this Act provided that the details of a wide range of restrictive agreements must be entered on a public register and examined by the Restrictive Practices Court. The Court then had to decide in the light of the criteria laid down in Section 21 of the Act whether all or any of the restrictive provisions in those agreements are in the public interest. A similar, but amended, act was enacted in 1968 bearing the same name. Art. 8(1) of the 1956 Act exempts agreements authorized by any enactment or scheme made under an enactment, which could apply also to authorized marketing schemes in the agro-market.

In 1962, the Parliament passed the Agricultural and Forestry Associations Act, 1962 (AFA Act) which provided that Part I of the 1956 Act shall not apply to certain agreements in the agricultural and forestry sector (with the fisheries sector added later). Here again, as in the U.S. and the EC, the exemption is meant to enable farmers to organize themselves in cooperatives in order to market and process their produce and to make collective procurement of the supplies needed to run their farms. Thus, the AFA Act applies only to associations of persons occupying land used for agriculture or forestry, in which at least ninety percent of the voting power is attached to shares held by such farmers or foresters. The only business, or the principal business, carried on by the association can be marketing or preparation for market of produce produced by its members on land occupied by them and used as aforesaid, the supply to its members of goods required for the production of such produce on such land, and, in the case of a forestry association, the carrying out of forestry operations for its members on such land. The type of agreements that are exempted by the AFA Act are only agreements made by the members of such associations, or between the association and other persons, for the purpose of, or in connection with, the marketing or preparation for market by the association of agricultural produce produced by its members, or for the supply by the association to its members of goods required for the production of agricultural

59. Restrictive Trade Practices Act, 1968, c. 66 (Eng.).
60. See infra, note 73 and accompanying text.
61. Agricultural and Forestry Association Act, 1962, 11 and 12 Geo. 6. c. 38. (“An act to provide that certain agreements made by or between members of associations of persons occupying land used for agriculture or forestry shall be exempted from the application of Part I of the Restrictive Trade Practices Act, 1956”).
63. Id. art 1(1) chapeau, para. b.
64. Id. art 1(1)(c).
produce. Finally, the AFA Act grants powers to the Ministers of Agriculture\textsuperscript{65} to exclude various classes of agreements or various classes of associations by issuing an order to that effect.\textsuperscript{66}

Such an order was issued shortly after the enactment of the AFA Act,\textsuperscript{67} imposing several requirements in relation to the provisions that must be included in the memorandum or articles of association of these agricultural cooperatives, in order for them to be eligible for the exemption. These are meant to ensure that the exemption will be restricted to true agricultural cooperatives, where only farmers are members and where profits are shared out according to agricultural production.\textsuperscript{68} Thus, the profits of the cooperative must be divided among its members in proportion to the aggregate value of the produce bought from or marketed for each member; each member can be entitled to one vote only; and the association cannot market more than one third of the produce marketed by it for non-members of the association.\textsuperscript{69} Furthermore, the association may not be required to sell its produce, or to buy goods, only to or from a specified person or class of persons. Restrictive agreements between different associations are also excluded, as are agreements in relation to various manufactured agricultural products, as specified in a Schedule to the Order.\textsuperscript{70}

Along with this exemption for agricultural cooperatives, U.K. Law also provides for special exemptions for approved marketing schemes. Under section 45 of the Agriculture (Miscellaneous Provisions) Act of 1968,\textsuperscript{71} agricultural marketing boards may notify their agreements to the appropriate Minister and obtain exemption from the Restrictive Trade Practices Act if the Minister does not object. The types of agreements that may be exempt in this way are only agreements entered into by marketing boards in the exercise of their powers under sections 20(1) and 36 of the Agricultural Marketing Act 1958,\textsuperscript{72} agreements that are required for the implementation of officially approved marketing schemes.\textsuperscript{73} However, the

\begin{itemize}
\item \textsuperscript{65} Namely, the Minister of Agriculture, Fisheries and Food and Secretaries of State respective concerned with agriculture in Scotland and in Northern Ireland, acting jointly. \textit{Id.} art. 2(1).
\item \textsuperscript{66} \textit{Id.} art 1(3).
\item \textsuperscript{67} The Agricultural and Forestry Associations (Exceptions) Order, 1962, S.I. 1962/1892 [hereinafter The Order].
\item \textsuperscript{68} A common problem with many such cooperatives is that members who once were farmers, but who have ceased to work in agriculture, continue to be shareholders in the cooperative and demand dividends from its profits. The Order is meant to prevent this from happening, by precluding the application of the agricultural exemption from such cooperatives.
\item \textsuperscript{69} The Order, \textit{supra} note 67, § 3.
\item \textsuperscript{70} \textit{Id.} § 4(b)-(c). The excluded products listed in Schedule 1 include: butter, cheese and other milk products; canned, bottled, sliced, pulped or cooked fruit and vegetables, or such vegetables preserved by sterilizing, freezing, dehydrating, heat or chemical process; slaughtered cattle, sheep, lambs and pigs and any parts of such animals; building timber and wood pulp; and wool. Schedule 2 also excludes cars, car accessories and petrol from the goods that me be purchased collectively by the associations.
\item \textsuperscript{71} Agriculture (Miscellaneous Provisions) Act, \textit{supra} note 62, c. 34.
\item \textsuperscript{72} \textit{See} Agricultural Marketing Act, 1958, 6 & 7 Eliz. 2, c. 47 § 1 (Eng.).
\item \textsuperscript{73} Agricultural Marketing Schemes are schemes regulating the marketing of agricultural product by the producers thereof, which has been approved Minister of Agriculture. They can be submitted by the representatives of the producers of the product in question in the area to which the scheme is applicable. \textit{See} Agricultural Marketing Act, \textit{supra} note 72, § 1. Under section 20(1) of this Act, marketing boards have the powers, by virtue of the provisions of such a scheme, to buy the regulated product, to produce commodities from that product and to sell it or any commodity so produced. They may also determine the
Minister is required under the Act to safeguard the public interest and to consider the competition law aspects of the agreement and make appropriate directions to cure any harmful aspects of the agreement.  

The Restrictive Trade Practices Act of 1956 was repealed and replaced by the Restrictive Trade Practices Act of 1976. Under this law, registrable agreements that were not registered with the authorities were declared void and their parties could be sued in tort by anyone harmed by them. This new act also granted a special exemption to various agreements affecting agriculture, fisheries and forestry, which is essentially identical to the exemption that existed under the previous act. In 2000, all the existing legislation in this field was again repealed and replaced by a new act—the Competition Act of 1998. This law, which is now in force in the United Kingdom, is modeled on Articles 81 and 82 of the EC Treaty and therefore imposes a competition regime that is quite similar to that of the European Community. The same applies to the agricultural exemption, which also has been modeled on the EC exemption. It excludes from the prohibition of Chapter I (parallel to Article 81 of the EC Treaty) agreements that fall outside Article 81 by virtue of Regulation 26/62. The readers are therefore referred to the discussion of the EC exemption in section III above.

Until this amendment in 1998, the agricultural exemption in force in the United Kingdom was very similar to that of the U.S., and one may assume that there was a certain amount of influence on the AFA Act of 1962 by the Capper-Vollstead Act of 1922. Both acts were targeted on farmers’ cooperatives and they had rather similar provisions meant to ensure that the beneficiaries of the exemption would be true cooperatives of real farmers. However, the UK exemption was more limited than its U.S. counterpart: it did not apply to collective processing of the agricultural produce, but only to marketing and preparing for market. Unlike its U.S. counterpart, it also did not permit restrictive agreements between different

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quantity of the regulated product which any producer may sell, prescribe maximum or minimum prices, terms of sale, to whom they may sell, etc. Id § 20(1).

74. See Agricultural Marketing Act, supra note 72, § 20(2).

75. RICHARD WHISH, COMPETITION LAW 94 (1st ed. 1985).


77. Competition Act of 1998, c. 41 (Eng.).

78. Even though the United Kingdom is of course a Member State of the EC, the EC competition rules do not apply to commercial activity within the United Kingdom (or another Member State) that does not affect trade between Member States. Such purely domestic activity is subject to U.K. domestic competition law.

79. Competition Act, supra note 77, sched. 3, para 9. This provision also provides that if the European Commission decides that an agreement is not excluded from Article 81 by Regulation 26/62, the exclusion from paragraph 9 of Schedule 3 ceases on the same date. One may wonder why a parallel authority to deny the exemption from certain harmful agreements or practices has not been given to U.K. competition authorities.

80. Under both U.K. and U.S. law, each member of the cooperative can be entitled to one vote only, and the cooperatives are not permitted to deal with more than a certain percentage of non-member produce (one third in the United Kingdom and one half in the United States). Under both laws, the association may not pay dividends on stock or membership capital in excess of a certain percentage: 8% per annum in the United States, and 7% in the United Kingdom.

81. See Agricultural and Forestry Associations Act, supra note 61, § 1:1(c); the Order, supra note 67, §§ 4(b)-(c) (expressly excluding most processed agricultural products).
associations. On the other hand, it lacked the safety valve of judicial and administrative supervision by competition authorities that is an important component of both the U.S. and the EU regimes. Of course, now that the United Kingdom has adopted an exemption modeled on the EU regime, this component has been introduced as well.

V. THE AGRICULTURAL EXEMPTION IN ISRAELI LAW

A. Background: Israel's Competition Law

Israel's current antitrust law, the Restrictive Trade Practices Law, 1988 (the “Law”), deals with three different types of trade restraints: Restrictive Arrangements, Mergers, and Monopolies. Restrictive Arrangements are agreements between two or more parties wherein at least one of the parties restricts itself in a manner liable to eliminate or reduce business competition. This is usually understood to include both horizontal and vertical arrangements that may have anticompetitive effects. Article 2(b) of the Law has been interpreted by the Israel Supreme Court as creating irrebuttable presumptions regarding the anticompetitive effects of certain types of restrictive provisions, such as those relating to price, profits, division of the market and the quantity, quality or type of assets or services in the business. Israeli law thus has a wide range of arrangements that are prohibited per se. A restrictive arrangement is prohibited unless it obtains the approval of the Antitrust Tribunal, or an individual exemption by the Antitrust Authority, or if all restraints in the arrangement are exempt in accordance with a block exemption issued by the Antitrust Authority. The first two types of exemptions require the filing of a petition by the parties to the arrangement, unlike the third one, where the arrangement is automatically exempt if it fulfills all the conditions of the block exemption. However, the Law also includes a list of statutory exemptions (in Article 3), which grants quite broad exemptions to various types of arrangements by declaring them to be not restrictive. These exemptions are usually unconditional and leave no discretion to any of the antitrust authorities.

82. The Order, supra note 67, § 3.
84. See id. § 2(a).
86. Article 2(b) provides:

Without derogating from the generality of the provisions of subsection (a), an arrangement involving a restraint relating to one of the following issues shall be deemed to be a restrictive arrangement: (1) The price to be demanded, offered or paid; (2) The profit to be obtained; (3) Division of all or part of the market, in accordance with the location of the business or in accordance with the persons or type of persons with whom business is to be conducted; (4) The quantity, quality or type of assets or services in the business.

88. The opening sentence of Article 3 of Restrictive Trade Practices Law, supra note 75, provides: "Notwithstanding the provisions of section 2, the following arrangements shall not be deemed restrictive arrangements. . . ."
to withdraw the exemption in cases of abuse or when severe anticompetitive consequences ensue.89

B. The Statutory Agricultural Exemption

One of these statutory exemptions is the agricultural exemption (Article 3(4)). It extends to:

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, honey, cattle, sheep, poultry or fish, provided all parties thereto are growers or wholesale marketers of such produce; the above provision shall not apply to goods manufactured from such agricultural produce.90

Thus, the exemption extends to practically all types of agricultural products, but only to the produce itself, and not to goods manufactured from such produce. It exempts any types of arrangements, whether horizontal or vertical, from the prohibition against restrictive arrangements, but not from the other prohibitions and provisions of the Law. Mergers between companies in the agricultural sector are not exempt from the Law’s provisions subjecting them to the prior approval of the Antitrust Authority, nor are they exempt from its chapter on monopolies.

Unlike the U.S. Capper-Volstead Act and the EC exemption discussed above, this provision exempts not only the growers of agricultural products, but also the wholesale marketers of such products, even if these marketers are not involved in the growing or production of such products. Also, the provision grants a broad exemption to all types of arrangements made in relation to the growing and marketing of agricultural products, not only to collective arrangements between farmers, as in the U.S. exemption. Finally, the exemption is absolute and is not subject to supervision or possible withdrawal by the authorities or the courts in cases of harmful anticompetitive behavior.

C. Exemption of Statutory Marketing Boards

Another statutory exemption that has been important for the agricultural sector in Israel and in the past virtually insulated it from any type of competition is found in Article 3(1) which exempts arrangements “involving restraints, all of which are established by law.” The agricultural policy since the fifties was based on central planning of both production and marketing and strong regulatory involvement. For

89. The Restrictive Trade Practices Law, supra note 83, provides that “the [Minister of Industry and Trade] may, by order with the agreement of the Minister of Agriculture and the approval of the Knesset Economic Committee—add or detract categories of agricultural produce. . . .” Id. § 3(4). This authority, that has never been used, could probably not be used against specific cases of abuse or severe harm to competition, since it authorizes only to delete (or to add) types of products, and not types of behavior or specific parties, from the exemption. It appears thus more like a mechanism to determine the definition of the types of products that will be considered as “agricultural products” in case of uncertainty in this regard. The onerous legislative process that is required in order to make such an order also supports this understanding and helps to explain why it has never been used.

90. Restrictive Trade Practices Law, supra note 83, art. 3(4).
this purpose statutory marketing boards were established for the various agricultural sectors, such as the Citrus Fruit Board, the Vegetables Board, the Flowers Board and the Milk Board. These bodies were authorized by law to allocate production quotas, set prices and regulate marketing of the products within its mandate. They also established an export monopoly—Agrexco Ltd.—with exclusive rights to export Israeli agricultural produce to other countries. The members of the marketing boards were representatives of the producers, of the marketing firms, of the government and of the consumers, with the producers having at least 50% of the membership (and often more) and hence effective control of the boards. These arrangements, which otherwise would be incompatible with the prohibition against restrictive arrangements, were thus exempt under Article 3(1) as restraints “established by law.” There is almost no parallel to such elimination of competition in the U.S. system, but it is quite similar to the European system of central planning in some of the agricultural sectors, especially in the past.

D. Historical Background: The Special Role of Agriculture

To understand the agricultural exemptions in Israel’s antitrust law, one must turn to the history of agriculture in the young state and of the political and economic role that it has played in the Zionistic movement. The agricultural sector has been pivotal in the resettlement of the Land of Israel ever since the end of the 19th century, in the defense of its borders and in the development of its economy. Indeed, working in agriculture was perceived as a major means in achieving the greatest of Zionist ideals—the return of the nation to its land and redemption of the land of the forefathers. It represented the very essence of the Zionist ethos of conquering the desolation, greening the desert, and building a new type of “strong and healthy” Israeli attached to the land, different from the detached, ghetto-like Jew of the exile. The prevalent form of cooperative settlement of the land, in the form of Kibbutzim and cooperative Moshavim, was also the embodiment of the socialist ideology that permeated much of the Zionist movement in those years.

Thus, it was only natural that the agricultural sector would have a special status in relation to other economic sectors and enjoy special treatment from the authorities. After the establishment of the State in 1948, agriculture became even more important and central to its national strategy of settling the land and taking control of its territories. Security concerns and the conflict with its Arab neighbors required settlement along the long borders and in remote areas with sparse population. There was an urgent need to ensure a rapid increase in the supply of food to the growing population, as Jews were flocking into the land from Europe and North-Africa. Agriculture also played an important role in providing work for all the new immigrants, whether as settlers or as employees of the farmers. And there

91. While the Milk Board is not formally a Statutory Board, but rather a private corporation established pursuant to a government decision, in the past its director or deputy director had statutory authority to establish production quotas for the milk sector. Such quotas would therefore come under the exemption of Article 3(1) of the Restrictive Trade Practices Law.
94. For an explanation of these forms of settlement, see infra note 98.
was an ideological-political affinity between the financing bodies (the Ministry of Agriculture and Rural Development, and the Jewish Agency) and the settlement movements, such as the Kibbutz movements and the Moshav movement. They were all members of the Socialistic-Zionistic movement. Indeed, Israel is unique in the world in having almost all of its agricultural settlements organized under the umbrella of political movements. To receive allocation of land and means of production, farmers had to be organized by a settlement movement, all of which were affiliated with one or another political party.

In later years, when industry took over as the more important foundation of the young economy and agriculture was losing its centrality (in particular because of the limited availability of water supply), it became difficult to change policies and abolish special rights and privileges acquired by the agricultural sector. It had established a very strong and coherent lobby with much power within the political parties. Its central role in the Zionist ethos, as well as its importance for national security, continued to have a significant effect. This power was used to obtain government subsidies and import protection and to secure the political interests entrenched in the existing institutional arrangements.

E. The Agricultural Cooperatives

Unlike the United States, where the agricultural exemption was adopted as a counterweight to the marketing firms in order to allow the farmers to organize themselves in cooperatives, in Israel agricultural marketing was organized in cooperatives almost from the outset. At the time of the enactment of the Restrictive Trade Practices Law in 1959 (which first introduced the agricultural exemption and on which the 1988 Law is based), these cooperatives were already major forces in the market.

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96. Aharoni, supra note 92, at 207.
97. For a strong critique of this situation, see Ezra Sohar, Israel’s Dilemma: Why Israel is Falling Apart and How to Put it Back Together 210-225 (1989). The political affiliation with a “settlement movement” was crucial not only for the establishment of the village itself, but also in order to get allocation of water and production quotas. These were allocated according to movement affiliation pursuant to agreements between the political parties. Individual private farms were almost non-existent until some 20-30 years ago. Since then, the strength of the political parties and their affiliated settlement movements in agricultural settlement has been in decline.
98. Not only marketing, but most of the Jewish agricultural settlement in Israel was organized in cooperative structures. These took four main forms: 1. Workers’ Moshav, a village with some 60-150 farmers organized in a cooperative for the purpose of selling their agricultural produce and common purchase of all needs, both for private purposes and for the agricultural production; 2. Kibbutz, a large cooperative settlement of some 80-250 families based on common ownership of all property, private and productive, common work by everyone and equal sharing of all income. All members eat in a common dining room, where the food is prepared by a common kitchen, and all needs are supplied by common storerooms according to rules decided by the Kibbutz assembly and secretariat; 3. Cooperative Moshav, a hybrid of the former two: the production and marketing is common and proceeds are shared out equally, as in a Kibbutz, but each family runs their own household individually, as in a Workers’ Moshav; 4. Private Farms, organized in different forms, but where each farmer is the owner of his own farm and runs his business privately. 6 Encyclopaedia Hebraica 837-838 (1957) (Hebrew). However, even in the non-cooperative agricultural sector, many farmers became members of large marketing cooperatives for the purpose of marketing their produce or exporting it.
One of them in particular, Tnuva-Cooperative Center for the Marketing of Agricultural Produce Ltd. (Tnuva), incorporated the entire Labor Movement settlement, i.e., the agricultural production of all of the Kibbutzim and Moshavim, and held some 75% of the market in many products.\textsuperscript{99} Its involvement spanned the entire spectrum of agricultural production, from milk, meat, and fish, to vegetables and fruit. Another cooperative, Tene, incorporated many private farmers and held market shares of between fifteen percent and twenty percent in some products.\textsuperscript{100} These cooperatives were very powerful and politically well connected.\textsuperscript{101} Tnuva, in particular, was considered as part and parcel of the Labor Movement and the Labor party, which was in power uninterruptedly since the establishment of the State in 1948 until the electoral victory of the Likud party in 1977. The ruling party until then thus saw it as its natural mandate to protect the interests of Tnuva and the agricultural establishment, while the opposition from the right tried unsuccessfully to prevent such protection. That this was the background to the adoption of the agricultural exemption is very clear from the parliamentary discussions in connection with this exemption.\textsuperscript{102} This explains why the exemption is not limited to arrangements between farmers, but extends to marketers, as well. Also, at the time, the marketers and the farmers were almost the same, since it was the farmers, in particular those of the Kibbutzim and cooperative Moshavim, who controlled the largest marketing firms, i.e., the cooperative marketing organizations. As a result of this exemption, Tnuva could enter any type of restraining arrangements, both horizontal, with competing marketing firms, as well as vertical, with its suppliers, the farmers, and (in the past) with its downstream customers, the retailers.\textsuperscript{103} Examples of problematic vertical agreements are those prescribing exclusivity of supply, i.e. that the farmer is precluded from selling any of his produce to any other marketer, or that the retailer is precluded from carrying products of any other marketing firm.

\textbf{F. The Impact of the Exemption}

As a result of the heavy regulation and lack of competition, the Israeli agricultural market was characterized by very high marketing margins, with huge differences between the consumer price and what the farmer actually received for

\textsuperscript{99} \textit{Id.} at 947.
\textsuperscript{100} \textit{Divrey HaKnesset}, Minutes of the 368\textsuperscript{th} Session (Dec. 3, 1957), 325 (speech of MK Benjamin Avniel, Herut Party); 6 ENCYCLOPAEDIA HEBRAICA, supra note 98, at 832 (according to this source, Tene was a cooperative marketing organization established to serve so-called “Rasco settlements”, which were private middle-class agricultural settlements established between 1935-1945 by the Rasco Settlement Company). In the mid-fifties, while Tnuva controlled the marketing of some seventy-two percent of the Jewish agricultural produce, Tene together with three other cooperatives marketed another 12% of this produce. \textit{Id.} at 947.
\textsuperscript{101} On the power of the agricultural lobby and its sources, see AHARONI, supra note 92, at 212.
\textsuperscript{102} \textit{Divrey HaKnesset}, Minutes of the 368\textsuperscript{th} Session (Dec. 3, 1957), DK (1957) 325-28 (argument between MK Benjamin Avniel of the market-oriented Herut Party and MK Zeev Tsur of the ruling Labour Unity-Poalei Zion party); DK (1959) 2733 (argument between MK Benjamin Avniel and MK Shmuel Shores of the coalition).
\textsuperscript{103} It should be noted that the original agricultural exemption that was found in the Restrictive Trade Practices Law of 1959 did not limit the exemption to wholesale marketers. Thus restrictive agreements between a wholesaler like Tnuva and retail marketers would also come under the exemption. This was changed in 1963, when the law was amended so that all parties to a restrictive arrangement had to be either wholesale marketers or farmers.
his produce. In citrus products, for instance, the individual grower received only about fifteen percent of the price paid by the final consumer. Under the marketing board system, in most sectors production quotas were allocated by the boards, and marketing was allowed only through “licensed marketers.” Exportation could only be done through the monopoly Agrexco Ltd. or through the marketing boards. Thus, with much of the marketing heavily regulated and subject to quotas and price arrangements that were strictly enforced, the impact of the agricultural exemption itself was probably limited, although not insignificant, that is, until the market was deregulated and opened up to private market forces.

Towards the end of the eighties, the Israeli agricultural sector found itself in a serious crisis. The many boards and cooperative organizations involved in purchasing, production and marketing had grown into inflated and inefficient bureaucracies. Cheap financing and subsidized water led to imprudent choices of production venues. In addition, some irresponsible investment and loan decisions by the cooperative purchasing organizations caused heavy losses that put unbearable debts on all of its members. When interest rates went up, farmers were unable to repay their debts. The government was forced to step in to prevent total collapse of many Kibbutzim and Moshavim. This was done by legislation that provided for debt adjustments and partial relinquishment by the banks. The crisis, along with the switch to market-oriented ideologies, convinced the policy makers that serious reforms were needed in the agricultural sector.

This process started with the decision in 1991 to allow private firms to engage in the marketing of citrus fruits, both for export and in the domestic market. The process continued with other fruits and vegetables, and culminated with the dissolution of most of the marketing boards in favor of privatization and freer competition. Thus, for the first time, the Agrexco export monopoly was faced with competition.

105. A HARONI, supra note 92, at 213.
106. For instance, it would seem that if not for Section 3(4), the collective agreement by all of the marketing boards to establish a single export monopoly (Agrexco) may also have been problematic under the Restrictive Trade Practices Law. See ITZCHAK YAGUR, RESTRICTIVE TRADE PRACTICES LAW 345 n.44 (2002) (Hebrew).
108. In 2003, all of the marketing boards in the fruit, vegetable and flower sectors (the Fruit Board, the Citrus Fruit Board, the Vegetables Board, and the Flowers Board) were amalgamated into one board (the Plants Board), and their establishing legislation was repealed and substituted by one law: the Plants Board Law (Production and Marketing), 1973, S.H. 310 (as amended by the Law for the Improvement of the Israeli Economy (Statutory Amendments for Achieving the Budget and Policy Targets for FYs 2003 & 2004), 2003)). The law transferred most of the regulatory powers of the Boards to the Minister of Agriculture, thus taking away these powers from the farmers and their organizations, and giving it to the government. It, in turn, used these powers much more sparingly than had previously been done by the Boards, thus in essence, ushering in much more competition to the sector. The reform was unsuccessfully challenged by the boards and many of the farmers’ associations before the High Court of Justice. For the judgment, see HCJ 4885/03 Org. of the Chicken Growers, et al. v. Gov’t of Israel 59(2) 14. The economic reform of the marketing in the agricultural sector is described in detail in the judgment. In July 2006, the Minister of Agriculture, Shalom Simchon, decided to reevaluate the need for the Plants Board, and therefore refused to sign the order allowing the Board to impose charges on the farmers, thus in essence, freezing its ability to function. Press Release, Ministry of Agric. (July 24, 2006), available at http://www.moag.gov.il.
As a result of these developments, the anticompetitive impact of the exemption has increased. There is evidence of several attempts of cartelization, some of which may have been successful. For instance, for many years Tnuva, which was the co-owner of two of the largest poultry slaughterhouses, had an arrangement with four of the other poultry slaughterhouses whereby it would be the sole marketer of all the produce of these six producers. Due to this arrangement, Tnuva could control a major share of the poultry and turkey-meat market, and prevent any competition between these major producers. Pursuant to the agreement, Tnuva sold the produce of all the slaughterhouses at the same prices, paid them the same commissions, and determined their production quotas. The policy in this regard, was agreed at regular weekly meetings between the parties. For years, Tnuva claimed that its actions were exempt under the Agricultural Exemption of Article 3(4), and only in 2003 did the Antitrust Authority decide to challenge this position in court, arguing that packed meat was a manufactured product and therefore fell outside the exemption. This legal disagreement on the scope of the exemption was never resolved by the Court, because the parties eventually decided themselves to discontinue the arrangement and pursue independent marketing.

Interviews by the present author with some senior actors in the agricultural market have revealed that the exemption has enabled cartels and other restrictive arrangements in several agricultural sectors. For instance, in the potato sector, following the abolition of the statutory quota regime, there were several attempts to create cartels, to coordinate prices and share markets between the marketers, not all of whom were also potato growers. Many of these arrangements were unsustainable and therefore quite unsuccessful, as often is the case with cartels.
because of the Prisoners’ Dilemma involved for each participant. There were however several successful arrangements to eliminate surpluses, so as to keep the domestic price of potatoes high. This was achieved either by destruction of this surplus or through its subsidized export. In either case, funds were needed to pay the growers whose produce was destroyed or exported. These funds were successfully collected from all of the marketers and thus the surplus was removed from the market. Similar arrangements were achieved and executed in the carrot sector and in the banana sector. Moreover, in the potato sector the largest marketing firm (an agricultural cooperative) is known for binding its growers with very restrictive agreements, which precludes them from selling any of their produce (whether potatoes or other produce marketed by the firm) through any other outlet. A grower who wants to leave the cooperative may be severely fined by losing all of its invested capital. A similar arrangement can be found in the wine growing sector, where members of the largest and oldest wine production cooperative, the Carmel Winery, are legally required under the by-laws of the cooperative, to sell all of their produce to the winery, and can be punished by high fines if they fail to do so.

In the milk sector, there is a strict regime of production quotas, minimum prices, barriers to entry, surplus elimination and other restrictive arrangements. It is supervised and enforced by the Milk Sector Board, which is not a statutory body, but rather a corporation that is run by representatives of the dairy farmers, the milk production plants and the government. Some of the arrangements in this sector

115. The reason cartels are faced with the Prisoners’ Dilemma is that while each participant in the game can gain much from colluding with the others, she can gain even more from cheating, for example, from a situation where all the other parties to the cartel abide by it except for herself. See Keith N. Hylton, Antitrust Law: Economic Theory and Common Law Evolution 68-69 (2003).

116. Such export subsidies may be problematic under various international trade agreements. See generally Multilateral Agreements on Trade in Goods, Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994. Whether or not they are is a complicated question that is outside the confines of the current article.

117. In order to collect the funds, the marketers received assistance from the Plants Board, which collected them and paid them out according to the criteria that had been agreed upon by the members of the cartel. While the Plants Board is a statutory body entrusted to regulate the plants and vegetable sector, it does not have the authorization to initiate on its own such an arrangement as described here. Only the Minister of Agriculture can do so by issuing regulations. See The Plants Board Law, supra note 83. Thus, in the absence of such regulations, the arrangement could not have been legally achieved and executed without the agricultural exemption. Restrictive Trade Practices Law, supra note 83, § 3(4).

118. See Korman & Shlissel, supra note 114. In the carrot sector, a fund was established in order to subsidize export of surpluses, so as to remove them from the domestic market. In the banana sector, a successful cartel was established between the producers of about 80% of the produce.

119. The Maon District Settlements Agricultural Cooperative for Regional Development Ltd., is a cooperative of Kibbutzim, Moshavim and other farmers in the western Negev area. The firm is the owner of the brand-name “Uncle Moshe” and the biggest exporters of potatoes to Europe. See www.dodmoshe.co.il.

120. See Korman & Shlissel, supra note 114.


122. Information obtained from Mr. Jacob Ben-Dor, business manager of Moshav Beit Yatir, a member of the cooperative.

123. Amiram Cohen, The Milk Producers Threaten to Exacerbate their Struggle Against the Privatization of Tnuva: Threaten to Create Blocking Minority, HA’ARETZ, Nov. 5, 2006 (Hebrew), available at
are sanctioned under the Israel Dairy Sector Planning Law, 1992, but many others can only exist by virtue of the Agricultural Exemption. Here too, the large marketing firms often use their market power to tie the dairy farmers to them and to prevent sales to other firms. Similarly, the fish growers are organized in a voluntary organization which for some time marketed all of their produce for them, and wherein lately agreements on minimum prices were concluded. These arrangements could not be legally maintained without the Agricultural Exemption.

The courts have usually interpreted the exemption narrowly, thus breaking up many cartels in the agricultural manufacturing sectors. Recently, the Jerusalem District Court convicted the participants of a cartel in the frozen vegetable sector. It ruled that frozen vegetables are industrially processed products and hence fall outside the exemption. However, for the production and marketing of the agricultural produce itself the exemption has remained intact.

G. Attempts to Abolish the Exemption

One would expect that the same policy considerations that led the government to dissolve the marketing boards would lead it to abolish, or at least limit, the provision that prevents full application of competition rules to the agricultural sector. And indeed the government, especially under the leadership of the more free-market oriented Likud party, has attempted several times to do so, with the strong encouragement of the Antitrust Authority and the consent of the Ministry of Agriculture. The first attempt was in 2002, when the Government decided to limit the exemption to growers, and exclude marketers. The second was in 2003, when the same decision was taken again, and in 2004 the same ritual was repeated for the third time. All these attempts, however, have failed as the bills in this regard have been met with staunch opposition in the Knesset. Strangely, the opposition has come from both Opposition and Coalition parties. Analysis of the discussions indicates that the Knesset members in doing so seemed to be convinced that they

http://www.haaretz.co.il/hasite/pages/ShArtPE.jhtml?itemNo=562985&contrassID=2&subContrassID=6&sbSubContrassID=0.

126. Tnuva, for instance, extends long-term loans to the farmers under beneficial terms, under the condition that they sell all their produce to it. Should a farmer choose to switch to a competing firm, he is required under the loan agreement to return the loan immediately with significantly higher interest than if he had remained with Tnuva.
127. Kachal & Finkelstein, supra note 125, at 8.
129. CrC (Jer) 960/05 Gen. Dir. of the Antitrust Auth. v. Avi Margalit [2006] (pending appeal to the Supreme Court in Cr. A. 7128/06).
133. See DK (2005) 396 (Economy Committee Member Daniel Benlulu: “Mr. Chairman, today we are going with the Opposition. We proposed [to take it out of the Law] not MK Avshalom Vilan [from the Opposition; Member of left-wing Meretz Party].”).
were acting for the protection of the farmers. What they did not seem to realize is that by maintaining the exemption for the marketing firms they are in effect harming the farmers by empowering the marketing firms to coordinate purchasing policies vis-à-vis the farmers. This can allow them to exercise oligopsonistic market power against the farmers and dictate prices to their detriment. It is possible that there are lobbying efforts by powerful firms such as Tnuva and industrial food conglomerates that are behind this voting pattern. It may also be the power of inertia and habit that cause the politicians to continue to identify farmers’ interests with those of former agricultural cooperatives, even though this is no longer the case. Not only is Tnuva no longer the only or even the major player in the agricultural marketing sector, but it has also ceased to be a true cooperative of farmers, since many of its shareholders have long ago abandoned farming, it is run like any other corporate conglomerate, and recently it was sold off to a global private equity group.

Lately, the Government has again decided to try to limit the exemption. However, this time a much less ambitious amendment is being proposed, namely to exclude from the exemption wholesale marketing firms that are connected to retail marketers (by holding five percent or more of their stock). The reasons given are that an examination of the excessive differences between the producer and the consumer prices in the fruit and vegetable market shows that much of it originates in the retail phase. The government analysts suggest that it may be a result of the mounting concentration in the retail market, as a result of the growing market power of the large food retailers. Since most of these retailers have set up their own wholesale marketing firms, they are able to take advantage of the exemption of

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134. Id. See, e.g., the statement by MK Rochama Avraham, of the Likud Party: “This Law is too complicated and I must admit I need to study it . . . I think we have to separate it from the Arrangements Law . . . and besides I am for the agriculture and if it may harm the farmers at this time, even if only a little, we have to stand firm and not allow it.” When the Chairman of the Committee, MK Amnon Cohen, explained the Committee’s decision to take it out from the Law before the Knesset plenary, he said: “[S]ince we are dealing with a topic that it has been said may have wide repercussions, including harming the farmers, and thereby [harming] the agriculture in Israel, the Committee has decided to request that the bill should be separated.” Once this amendment is separated from the main law, it gets postponed to some undefined date in the future and, in practice, never reaches the floor.

135. While industrial food conglomerates are of course not included under the exemption, if the large marketing firms bring the prices down, the food conglomerates that process agricultural produce will also be able to purchase this produce for less. It also seems that the farmers’ organizations are afraid of the “slippery slope” syndrome, and believe that once the exemption it limited, it may get abolished altogether.

136. These original shareholders, which represent a large part, perhaps even a majority, of the current shareholders, have been pushing for the payment of dividends from the cooperative’s profits and for a corporate reform, under which Tnuva will be converted into a regular commercial corporation and part of it will be sold to a financial investor. Their efforts were successful and in November 2006, following an international auction, the control of Tnuva was sold off for over $1bn to Apax Partners Worldwide LLP, a British buyout firm. See http://www.foodanddrinkinsight.com/file/41872/apex-triumphs-in-tnuva-bidding-war.html

137. Economic Policy 2007, supra note 104, at 19. The proposal uses the term “Interest Holder” and refers to the Companies Law, 1999 for the definition of the term. There it is defined as five percent holding (art. 1). According to the proposal, both if the wholesale marketer has such an interest in a retail marketer, or that the retail marketer has such an interest in the wholesale marketer, such a marketer will be excluded from the exemption.

138. In 2005, one of the food retail chains, Clubmarket, which had attempted to challenge the dominant position of the two other large chains, collapsed and went into bankruptcy. It was eventually sold by the receiver to one of these two chains, causing a significant increase in the concentration in the food retail market. See Anat Roeh & Chaim Bior, Court Okays Supersol-Clubmarket Deal, Lock, Stock and Collective Work Agreement, HA’ARETZ.
wholesale marketers from the antitrust rules, even though they are in essence retailers. They can therefore leverage their market power in the retail sector against the growers to their detriment and to the detriment of consumers who are forced to pay higher prices for fruits and vegetables.

Indeed, there is no reason to doubt the wisdom of precluding the retail chains from taking advantage of an exemption that was not meant for them. However, this official explanation does not explain why other wholesale marketers can continue to take advantage of the exemption, allowing them to collude against the farmers and use their market power to gain excessive rents from both farmers and consumers. The most likely explanation of the fact that the more extensive amendment of the exemption has not been attempted at this time is that the Government has resigned itself to the reality of the strong agricultural lobby, and is therefore trying now a more limited amendment. Eventually, however, even this limited amendment was opposed by members of the “agricultural lobby” and failed to get approved by the Knesset.

H. The Exemption in Light of International Agreements

Israel’s agricultural exemption appears to be problematic from another perspective as well, namely that of International Trade Law. The problem stems from the fact that the exemption applies only to “the growing or marketing of domestic agricultural products.” This means that imported agricultural products are not covered by the exemption and may not benefit from it. Such discrimination between domestic and imported products, which did not exist under the previous law, would seem to be inconsistent with several international trade agreements to which Israel is a party, in particular the General Agreement on Tariffs and Trade (GATT). Article III:4 of GATT provides:

139. See Restrictive Trade Practices Law, supra note 83, § 3(4).
140. See Protocol of the Finance Committee of the Knesset, Dec. 24, 2006, on the Economic Arrangements Law (Statutory Amendments to Achieve the Budget Targets and the Economic Policy for FY 2007), 5767-2006, www.knesset.gov.il/protocols/data/rtf/ksafim/2006-12-24-05.rtf. As can be seen from the protocol, the main opponent of the amendment of the agricultural exemption was MK Avshalom Vilan, from the left-wing Meretz Party, who serves as the Chairman of the Agricultural Lobby in the Knesset, and formerly served as the Secretary-General of one of the three Kibbutz movements ("HaKibbutz Ha’Artzi"). He was joined by several Knesset members from the Labor Party. Eventually, the amendment was separated from the Economic Arrangements Law and hence never reached the Knesset for a final reading, just as happened with all the previous attempts to limit the exemption.
141. Restrictive Trade Practices Law, supra note 83, art. 3(4).
142. The previous 1959 Restrictive Trade Practices Law also had an agricultural exemption (in Section 8), but it was not confined to domestic produce. Restrictive Trade Practices Law, 5719-1959, 13 LSI 159 (1958-59) (Isr.).
143. General Agreement of Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. It should be pointed out, that even though agriculture is considered a “special case” in international trade law, the “agricultural exemptions” in this field do not have any bearing on the case at hand. These “exemptions” are embodied in the Agreement on Agriculture, which is one of the WTO agreements. This agreement deals with the generally high tariffs and subsidies in the agricultural sector. It provides for progressive reduction of these tariffs and subsidies (both domestic support and export subsidies). Sanitary and phytosanitary import measures that affect agriculture are dealt with in the Agreement on Sanitary and Phytosanitary Measures. See Agreement on the Application of Sanitary and Phytosanitary Measures, Art. 2.1, Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter SPS Agreement], available at...
The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.\(^{144}\)

In *Korea – Various Measures on Beef*, the Appellate Body of the World Trade Organization (WTO) explained that there are three elements of a violation of this provision: (1) That the imported and domestic products at issue are “like products”; (2) that the measure at issue is a “law, regulation, or requirement affecting their internal sale, offering for sale, purchase, transportation, distribution or use”; and, (3) that the imported products are accorded “less favorable” treatment than that accorded to like domestic products.\(^{145}\)

The first element, “like products,” is not an issue in this case because the legal provision in question—Article 3(4) of the Restrictive Trade Practices Law—extends the exemption to a wide range of products provided that they are *domestic* agricultural products. It is not hard to find a wide range of foreign agricultural products that are similar in all relevant aspects to the domestic products that currently are enjoying the benefits of this exemption and therefore fulfill the requirement of “like products,” but nevertheless are precluded from enjoying the same benefits just because they are not domestic. As for the second element, clearly Israel’s Restrictive Trade Practices Law is a “law”, and it would also seem that its prohibition against restrictive agreements is a law that affects “the internal sale, offering for sale [or] purchase” of imported agricultural products. Pursuant to this prohibition—that only applies to imported agricultural products, but not to like products of domestic origin—firms that market these products in the Israeli market are not permitted to make cartels and other restrictive agreements with their competitors, suppliers or customers in relation to these products. Such agreements, by definition, affect the internal sale, offering for sale or purchase of such products: they may fix their prices, divide the areas or type of customers to which they are to be sold, or coordinate other trading conditions, such as credit terms. Clearly, then, a law prohibiting such agreements affects “their internal sale, offering for sale, purchase, transportation, distribution or use.”\(^{146}\)

Also the third element of “less favourable treatment” seems to exist here, even by virtue of the mere fact that imported products are subject to more stringent rules than like products of national origin. While in *Korea – Various Measures on Beef*, the Appellate Body stressed that different treatment in itself is not necessarily inconsistent with Article III:4, however, if the different treatment is also “less...

\(^{144}\) GATT, *supra* note 143, art III:4.


\(^{146}\) In *Canada—Certain Measures Affecting the Automotive Industry*, a WTO Panel held that “the ordinary meaning of ‘affecting’ implies a measure that has ‘an effect on’ and thus indicates a broad scope of application.” Panel Report, *Canada—Certain Measures Affecting the Automotive Industry*, para. 10.80, WT/DS139/R (Feb. 11, 2000). In *Korea—Various Measures on Beef*, the Appellate Body considered a Korean measure that established a dual retail distribution system for the sale of beef as a “measure affecting the internal sale etc.” of such products. Under this system, imported beef had to be sold either in specialized stores selling only imported beef or, in the case of larger department stores, in separate sales. See *Korea—Various Measures on Beef*, supra note 145.
favorable”, then the element is fulfilled. This should be assessed by examining whether the measure modifies the conditions of competition in the relevant market to the detriment of imported products.

If marketing firms could enter into cartels and other restrictive agreements in relation to domestic agricultural products, and thus benefit from higher prices and better sales conditions, but are precluded from making the same agreements in relation to like imported products, then the latter products will be less profitable and less attractive to them. Such difference in treatment would therefore modify the conditions of competition in the relevant market to the detriment of imported products.

On the other hand, under accepted WTO jurisprudence, there is no need to show that this difference in treatment actually leads to protection of domestic production. As held by the Appellate Body in EC-Bananas III:

Article III:4 does not specifically refer to Article III:1. Therefore, a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure ‘afford[s] protection to domestic production’.

Article 3(4) of Israel’s Restrictive Trade Practices Law may also be problematic under some of its bilateral free trade agreements.

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147. See Korea—Various Measures on Beef, supra note 145, para. 135. See also Report of the Panel, United States—Section 337 of the Tariff Act of 1930, para. 5.11, L/6439.


149. One could of course make the argument that due to the fact that restrictive agreements between the marketing firms in relation to imported products are not allowed, competition on the consumer market is bound to go up, and prices for consumers will come down. This then would actually improve the competitive conditions of imported products, in relation to like domestic agricultural products, and not vice versa. This argument can be dismissed based on two reasons: 1. If real competition exists between domestic and imported products, domestic products are bound to come down as well. There is nothing in the Law that prevents the marketing firms from lowering the prices of domestic produce, in order to compete better. 2. The situation on the consumer level of the market may be as it may, but on the wholesale level imported agricultural produce clearly suffers from less favorable treatment by the Law. This situation is likely to lead to a competitive disadvantage of imported produce in relation to domestic produce, in that the wholesale firms have good reasons to prefer the latter.


151. There are also bilateral agreements that include National Treatment obligations similar to GATT Article III. See, e.g., Article 4.1 of the Free Trade Agreement between the Government of Canada and the Government of the State of Israel. Free Trade Agreement between the Government of Canada and the Government of Israel, 1997 Can. T.S. No. 49. There are some exceptions to this prohibition that are listed in Annex 4.1 of the Agreement, but the measure discussed here is not one of them. Id.

152. See, e.g., Euro-Mediterranean Agreement Establishing an Association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, art. 16, 2000 O.J. (L147) 3 [hereinafter EC-Israel Association Agreement]; Agreement on the Establishment of a Free Trade Area between the Government of Israel and the Government of the United States of America,
preclude this type of discriminatory treatment. The phrase “measure of equivalent effect” has been interpreted by the European Court of Justice ever since the famous Dassonville case as including “all trading rules enacted by member States which are capable of hindering, directly or indirectly, actually or potentially” trade between states. While this interpretation relates to the term as it appears in the Treaty Establishing the European Community and is not formally binding on states outside the EC and in relation to other agreements, it is nevertheless instructive as to the possible meaning of the term. In any case, if it could be shown that the more stringent competition rules that apply to imported agricultural products actually serve to hinder, obstruct or reduce the importation of such products, this would certainly prove that the prohibition has been violated. Article 3(4) would also seem to be in violation of the competition rules that are included in the EC-Israel Association Agreement, which provides that “all agreements between undertakings, decisions by associations of undertakings and concerted practices, which have as their object or effect the prevention, restriction or distortion of competition” shall be “incompatible with the proper functioning of the Agreement.”

One could argue that by permitting such restrictive agreements in the agricultural sector, but not allowing the same for imported products, the Law in effect causes restriction and distortion of competition in this sector.

The problem described above is mostly connected to the exemption of the marketers, and not of the producers, of the agricultural products. The reason for this is that the producers of imported agricultural products are by definition located in foreign countries. They, therefore, are in any case outside the territorial scope of Israel’s antitrust law and are not in need of its agricultural exemption. Since most developed countries have their own agricultural exemption for producers, they are likely to benefit from such exemptions. It would therefore be much harder to make a case for a violation of GATT Article III:4 if all that Article 3(4) of Israel’s Restrictive Trade Practices Law did was to exempt growers of domestic agricultural products. For that to be possible there would have to be an attempt on Israel’s part to apply its antitrust law extra-territorially to foreign growers, something which is extremely unlikely both legally and politically. Thus, if my proposal to abolish the...
agrarian exemption insofar as it applies to marketers were accepted, the problem under international law would also be solved.

V. CONCLUSION: IS THERE A JUSTIFICATION FOR AN AGRICULTURAL EXEMPTION?

The rationale of competition law is that competition is good for the economy and for the consumers and that attempts by firms to restrict competition should be prevented by law. Competition is seen as the pillar of modern market economies and the foundation of capitalism, in that it stimulates innovation, encourages efficiency, and drives down prices. According to microeconomic theory, in general, no system of resource allocation is more efficient than competition. It causes commercial firms to develop new products, services, and technologies, which in turn gives consumers greater selection and better products. The greater selection typically causes lower prices for the products compared to what the price would be if there was no competition. While competing firms have a clear interest in restricting competition to capture monopoly or monopsony rents at the expense of consumers or suppliers, respectively, the general efficiency of a society requires that such strategic behavior is prevented so that competition is preserved.

The question that has to be asked is whether there is anything peculiar to the agrarian sector that justifies departure from this rationale in countries where it is followed and implemented in all other economic sectors? One such peculiarity which, as we have seen, seems to have motivated legislators in the U.S., EU and the UK to grant certain exemptions to farmers, is the atomistic nature of the farming industry, which often is made up of family-run farms and other relatively small units of production. This nature is sometimes contrasted with the concentration in the agricultural marketing and processing sector. Under such conditions—and under the assumption that countries have an interest (usually, for non-economic reasons) in preserving these traditional characteristics of the farming industry—there may be efficiency and distributive justice rationales for cooperation and coordination among farmers. Efficiency may be promoted by allowing farmers to organize in cooperatives so as to rationalize their production, transportation and distribution processes, provide the farmers with up to date information on market trends, consumer preferences and agricultural know-how, and to establish common brands and quality standards. Such cooperation may also help put the farmers on a more equal footing with marketing and processing firms, thus allowing a more efficient bargaining outcome and preventing oligopsonistic rents in the pockets of the latter. Organization into cooperatives in effect serves as an alternative to corporate mergers of small farmers into larger farming conglomerates, which in any case would

158. The setting of quality standards can be seen as a means to overcome market failure due to lack of sufficient information among consumers at the point of sale on the quality of the produce. While both in the EU and the United States there is legislation enabling farmers’ organizations to establish quality standards, it is not clear why such a function should be entrusted exclusively with farmers—whose interests do not necessarily coincide with those of the consumers—and not with an independent standard setting organization, where along with the farmers, consumers and government representatives also have a say.

158. territory if such acts have a negative effect on their market. Such claims are highly controversial and quite rare, in particular among smaller countries.
not be prevented under most merger regimes.\textsuperscript{159} Preserving the livelihood of family-run farms would also be more in line with distributive justice, considering the generally hard living conditions of small farmers in relation to large marketing firms. Finally, by preserving family farms and traditional farming communities, we would also be serving communitarian values as well as contributing to the protection of the environment.\textsuperscript{160}

However, such rationales could only be invoked to permit small or perhaps medium-sized farmers to organize into cooperatives. It certainly cannot justify exempting marketing firms as such from the regular competition rules. And even as far as farmers are concerned, the exemption can be justified only under certain conditions, similar to those described. Thus, an exemption must be granted by a very fine-tuned instrument that sets appropriate conditions for the right to invoke it. Such conditions should include provisions to ensure that the cooperative does not obtain market power (for instance, that the exemption is limited by a maximum market share of the cooperative), that only small- or medium-sized farms or agricultural producers can benefit from the exemption, that the cooperative only incorporates active farmers and deals almost exclusively with the produce of its members; and that the cooperative is managed by and for the benefit of its members. One should also ensure continuous supervision by competition authorities and courts, who ought to be authorized to withdraw the exemption whenever it is used to excessively restrict competition or distort markets.

Another peculiarity of the agricultural sector is the relatively inelastic demand for its produce, the unpredictable and seasonal supply, and the inability in many cases to store the produce for long periods of time. However, these problems can hardly be solved by merely allowing coordination between growers. If these problems exist, and to the extent that they cannot be overcome by regular market mechanisms, they would require government intervention and special market organization. If, for instance, there is justification for regulation of production quantities and allocation of quotas, surely this cannot be effectively done by voluntary agreements between the producers. Such quotas would need to be imposed and enforced on all of the producers in the market, in particular on those producers who have an incentive to produce more than their allocated quotas and would therefore never join a voluntary arrangement that restricts their ability to do so. Even if agreement could be reached between all the producers, because of the Prisoners’ Dilemma involved, it would be a very fragile agreement that would be

\begin{itemize}
\item Since the acquisition of each individual farm usually falls under the prevailing value thresholds of merger supervision, unless the acquiring firm has acquired a market share that gives it a dominant position in the market, the merger will not be precluded by most merger regulations. Under Israeli law, for instance, a merger falls under merger supervision only if it fulfills at least one of three conditions: 1. If the merger will lead to a market share of over 50%; 2. That the joint turnover of the merging entities is more than 150 Million Shekel and that each entity has a turnover of at least 10 Million Shekel (1 Million Shekel=approx. US$ 230,000); 3. That one of the merging entities is already a monopoly (Article 17 of the Act). In the EU, a “Community Dimension” is required, which means that the combined aggregate worldwide turnover of all the undertakings concerned is more than 5 Billion, and that this turnover of each of them is at least 250 Million. Council Regulation 139/2004, EC Merger Regulation, art. 1(2), 2004 O.J. (L 24) 6 (EC). An alternative criteria requires a lower worldwide threshold of “only” 2.5 Billion, a turnover of 100 Million in each of at least three EU Member States, and individual turnovers of 25 Million in those three Member States, and worldwide turnover of at least 100 Million each. Id. art. 1(3). Clearly, any farm acquisition would fall under this threshold.

\item In many countries, preservation of farms and agricultural land is one of the major factors that prevent large-scale urbanization and gradual elimination of green areas and natural habitats.
\end{itemize}
extremely hard to enforce. Therefore, states that have reached the conclusion that they want to impose such special centralized market organization have done so by means of mandatory regulation in one form or another.\footnote{For example, in the EC through the Common Agricultural Policy, which provides for an extremely regulated market in the agricultural sector. In the United Kingdom, mainly prior to its joining the EC, through the Agricultural Marketing Act of 1958, \textit{supra} note 72, and in Israel through the various marketing boards legislation, as discussed above.} Such regulation, to the extent that it is in conflict with existing competition rules, would usually be exempt by a general exemption of statutory mandated arrangements\footnote{Examples include § 3(1) of Israel’s 1988 Restrictive Trade Practices Law, \textit{supra} note 83, and § 8(1) of the UK Restrictive Trade Practices Act of 1956, \textit{supra} note 5.} and not by a specific exemption for restrictive agreements in the agricultural sector. In any case, such specific market regulation, which often has the effect of almost eliminating competition altogether, ought to be pursued with utmost caution, after extensive study of the market and only after the regulators are completely convinced that no other market-based solution is possible. Certainly, there is no place for a comprehensive elimination of all competition in the agricultural sector, as can be learnt from the Israeli (and the EU) experience.

In light of this analysis, all of the agricultural exemptions discussed in this article would require some amendments. The U.S. exemption, found in the Capper-Volstead Act of 1922, could benefit from some more clear-cut market-share caps, which would ensure that the exemption is not utilized whenever it leads to market-power by the parties to the arrangement. In this connection, it should be kept in mind that the Act permits not only agreements between the farmers and their respective cooperatives, but also agreements between various cooperatives,\footnote{\textit{See supra} note 19 and accompanying text.} something that could lead to cartelization of the market. The same applies to the EU exemption, which also permits arrangements between farmers’ associations, or associations of such associations,\footnote{Provided that they belong to a single Member State. \textit{See supra} note 37 and accompanying text.} but fails to set market-share caps or other clear limitations. Since both the U.S. and EU exemptions, unlike the U.K. and Israeli exemptions, extends not only to joint marketing and preparation for market (sorting, packaging etc.), but also to processing, there is also a risk that the exemption will be used by industrial food producers, owned by various farmers cooperatives, to restrict competition between them. While such problematic developments could be thwarted by the authorities or the courts if they discovered them, it would seem much more effective to define expressly the scope of the exemption so as to remove doubts and to make prosecution and civil proceedings in case of abuse easier. Clearly defined rules also create a more predictable business environment which is an important component of an efficient market. As for the U.K. exemption (prior to its harmonization with the EU regime in 1998), it lacked the safety valve of judicial and administrative supervision by competition authorities and the courts, to ensure that the exemption is not used to restrict competition and distort markets excessively.

This last shortcoming (lack of supervision) is also one that the Israeli exemption suffers from. In addition, there can be no justification for an extension of the exemption to marketing firms. The exemption should therefore be amended so that it is confined to farmers. It should be modeled upon the previous UK exemption, so that only farmers’ cooperatives are exempted under similar conditions as provided.
for therein. In fact, in order to achieve a well-balanced and fine-tuned exemption in line with the principles elaborated above, it would be best if the exemption was removed from the Law itself, and incorporated into a new block exemption. Such exemptions can be issued by the General Director of the Antitrust Authority, with the consent of the Advisory Exemptions and Mergers Committee, and are the more appropriate instruments for granting fine-tuned exemptions to specific sectors or to certain categories of agreements. They are often restricted by market-share caps and other sector-specific conditions. Another advantage of using a block exemption is that it remains in force for a maximum period of five years only, after which it can be renewed as is or in an amended formula, if it is still deemed necessary. This mechanism ensures periodical reviews of the exemption, of the structure of the market to which it applies, and of its continuing necessity. Also, by taking the exemption out of the law once and for all, required amendments to it will no longer be blocked by the agricultural lobby. Instead, the exemption will be designed and amended by the Antitrust Authority, in conjunction with the Advisory Committee, which is made up of independent civil servants and antitrust experts. Finally, by using a block exemption, instead of a statutory exemption as is done today, we would achieve the safety valve that today is missing. Under Article 15A(g) of the Law, the General Director has the authority to withdraw the exemption from a specific restrictive arrangement, and would do so presumably if she finds that the competition is being excessively restricted to the detriment of consumers or other market participants.

165. See art. 15A of Restrictive Trade Practices Law, supra note 83. According to this provision, a block exemption can be issued, provided that all of the following conditions are met:

(1) That the restraints in the restrictive arrangement do not reduce competition in a considerable share of the market affected by the arrangement, or that they may reduce the competition in a considerable share of the market, but do not result in a substantial reduction of the competition in such market.

(2) That the objective of the arrangement is not the reduction or elimination of competition, and that the arrangement does not include any restraints which are not necessary in order to fulfill its objectives.

166. See Restrictive Trade Practices Law, supra note 83, art. 23.