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# Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)

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# Extra-territorial Application of Antitrust – The Case of a Small Economy (Israel)

Michal S. Gal

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## **Introduction**

International trade has changed some of the challenges faced by antitrust authorities: it has added an international dimension. While in the past competition issues were largely domestic, countries now face an increasing prospect that their economies will be harmed by anticompetitive conduct that takes place, at least to some degree, in another jurisdiction. Indeed, more than ever before, companies are seeking expansions or alliances that go well beyond domestic borders and a high percentage of the GDP of many countries is supplied by foreign firms. This requires countries to devise tools that enable them to deal with antitrust issues with extra-territorial dimensions. It also implies that countries may need to cooperate in order to regulate effectively international antitrust issues of mutual concern.<sup>1</sup>

Under the current system of international antitrust, the backbone of enforcement is unilateral: each country applies its own tools to deal with international antitrust issues within the constraints imposed upon it by public international law. This enforcement pattern is sometimes coupled with cooperation agreements (bilateral, multilateral and even international) which are based on the realization that while cooperation among firms might be anti-competitive, this is generally not true for cooperation among countries. Yet such cooperation is often limited to exchange of information, harmonization of antitrust

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<sup>1</sup> See Michal S. Gal, "International Antitrust: The Unique Challenges Faced by Small and Developing Jurisdictions," on file with author.

rules and positive comity rather than to joint efforts of enforcement. Some of the implications of this enforcement system are elaborated below.<sup>2</sup>

This paper analyzes the tools available to Israel to tackle international antitrust issues. The case of Israel is interesting not only as a stand-alone case study, but mostly because it provides useful insights into the reality of enforcing antitrust in a globalized world by a small economy.<sup>3</sup> As elaborated elsewhere, even when they possess the *legal* tools to tackle international antitrust issues, small economies often suffer from serious *practical* deficiencies.<sup>4</sup> Most importantly, they frequently cannot create a credible threat to large, multinational firms that engage in anti-competitive conduct which harms their economies. They also have limited resources and incentives to deal with international anti-competitive conduct, especially when such conduct is addressed by other jurisdictions. As a result, despite the sometimes severe effects of anti-competitive conduct on their markets, small economies are marginal players in the globalized antitrust regime and are generally passive bearers of the effects of international anti-competitive conduct and of the enforcement actions of larger jurisdictions rather than proactive confronters of such issues and actions. This is well reflected in the Israeli case study.

As elaborated below, this observation has important implications for a globalized antitrust regime, which is the focus of the second part of this book. Small economies would undoubtedly share some of the benefit from the convergence of competition policies. At the same time, it is far from clear that a negotiated outcome will grant such economies a piece of the total welfare pie that is proportional to their size or contribution to total global welfare.<sup>5</sup> This is because under the current balance of powers the interests of small economies are routinely overlooked both by international firms and by other jurisdictions.

The rest of the chapter is organized as follows. Sub-chapter two analyzes the current international antitrust regime in Israel. As elaborated, the analysis raises interesting theoretical and practical issues that are relevant to all jurisdictions that apply their domestic laws to foreign firms. Sub-chapter three analyzes the regime from a wider perspective which focuses on the practical aspects of antitrust enforcement. Sub-chapter four analyzes some of the implications of the findings for international antitrust. It also briefly suggests some ways that small economies can adopt in order to play a more effective role in the international antitrust arena.

## **II: The Israeli International Antitrust Regime**

The ability to contend with antitrust issues with a foreign dimension that affect domestic welfare is based on the existence of a legal basis for application and on practical

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<sup>2</sup> For an extension see *ibid.*

<sup>3</sup> A small economy is defined as "an independent, sovereign jurisdiction that can support only a limited number of firms in most of its industries." See Michal S. Gal, *Competition Policy in Small Market Economies* (Harvard University Press, 2003), chapter 1. As elaborated therewith, small size is influenced by three main factors: population size, population dispersion and openness to trade.

<sup>4</sup> Gal, *Unique Challenges*, *supra*, note 1.

<sup>5</sup> *Ibid.*

considerations of enforcement. This sub-chapter seeks to explore the former, whereas the following will focus on the latter.

## II. 1. Extraterritoriality

The scope of application of the Israeli Restrictive Trade Practices Law 1988 (hereafter: "the RTPL") to issues with an extra-territorial dimension is anchored both in customary public international law and in specific legal provisions, such as those included in the Israeli Penal Law.

Before analyzing the relevant principles and their application, it is useful to elaborate a bit with regard to the Israeli antitrust system. The Director of the Israeli Antitrust Authority (hereafter: "Director" and "IAA") is authorized, *inter alia*, to decide whether a restrictive agreement or an abuse of power exists.<sup>6</sup> Such decisions create a rebuttable presumption for their correctness in any legal procedure, although they do not carry any direct consequences.<sup>7</sup> The Director is also authorized to approve or condition a merger.<sup>8</sup> The decisions of the Director are subject to review by an expert Antitrust Tribunal, should such a suit be brought.<sup>9</sup> In addition, antitrust matters may arise in the general court system in civil (mostly damage and contracts) and criminal cases.

Under Israeli law the rules of customary public international law apply and constitute an integral part of Israeli law, unless an express contradictory legislative provision exists.<sup>10</sup> Such law is automatically incorporated, without any need for a formal legislative act.<sup>11</sup> Moreover, where there is a potential conflict between Israeli law and public international law, the court will attempt to interpret the Israeli law in a fashion coherent with public international law.<sup>12</sup> As elaborated below, except with regard to merger review, the RTPL does not contain specific contradictory provisions. Indeed, the Director specifically noted that no such contradictory provision exists with regard to restrictive agreements.<sup>13</sup>

Public international law includes several principles for the application of domestic laws to persons or enterprises located outside the jurisdiction.<sup>14</sup> An important basis for jurisdiction is territoriality. Israeli law, following International law doctrines, distinguishes between two bases: subjective territoriality, which applies when a person is within the territory of the jurisdiction and objective territoriality, which applies when a

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<sup>6</sup> Section 43(a) of the RTPL.

<sup>7</sup> Section 43(e) of the RTPL.

<sup>8</sup> Section 21 of the RTPL.

<sup>9</sup> Section 43(c) of the RTPL.

<sup>10</sup> See, e.g., Ruth Lapidot, "The Place of Public International Law in Israeli Law", *Mishpatim* 19 (4) (1990), 807; Yafa Zilberschatz, "The Adoption of the Public International Law into the Israeli Law" *Mishpatim* 317; For the adoption of this principle in other jurisdictions see, e.g., L. Oppenheim, *INTERNATIONAL LAW* (London, 9<sup>th</sup> ed., 1992).

<sup>11</sup> See, e.g. Criminal Appeal 174/54 *Shtampper v. Attorney General*, 10 Court Decisions 5.

<sup>12</sup> Bagatz 302/72 *Hilou et al., v. The Israeli Government et al.*, 27(2) Court Decisions 169, 177.

<sup>13</sup> Director, *Selective Perfume Market- James Richardson* in ANTITRUST (Lishcat Orchei Hadin, Tova Olshtein ed., 2002) Vol. D ("James Richardson").

<sup>14</sup> For exposition of these principles see, e.g., Christopher L. Blakesley et al., *THE INTERNATIONAL LEGAL SYSTEM* (New York: Foundation Press, 2001, 5<sup>th</sup> ed.), chapter 3.

conduct has an effect within the territory of the jurisdiction. The subjective territoriality principle may apply when a firm operates in Israel, for example where an international firm builds a production facility or opens a branch in Israel. In such cases, the RTPL may apply to its actions.

The subjective territoriality principle was applied by the Director in the *EMTA* case.<sup>15</sup> There, the Director declared an agreement among twelve foreign maritime shippers and an Israeli firm to charge a fixed handling charge for shipment, a "restrictive agreement" under the RTPL. The decision does not mention the effects of the extra-territorial dimension of the agreement on jurisdictional issues. Yet since all the foreign firms had offices in Israel, it was assumed that they were captured under the subjective territoriality principle, which is also part of customary public international law, and which applies when a person is within the territory of the jurisdiction. As noted in the decision, the parties did not dispute the extra-territorial application of Israeli law in that case. Thus, the Director did not see any need to elaborate on this point.

The objective territoriality principle (often called the "effects doctrine") enables a country to apply its domestic laws to foreign persons or enterprises when their conduct has an effect within the domestic jurisdiction. This doctrine thus broadens the application of domestic laws to acts performed outside the territorial boundaries, even if by foreign companies, provided that their conduct influences competition within the jurisdiction.<sup>16</sup> In essence, under this basis for jurisdiction, harm is used as a proxy for territory.

The effects doctrine was applied as a basis for the application of the RTPL to foreign firms by the Director in the matter of *James Richardson*.<sup>17</sup> James Richardson, as Israeli firm, held a franchise to operate a duty-free store at the national airport. It reached agreements with perfume manufacturers with regard to the maintenance of price margins of 30% between itself and other stores located in Israel. The perfume manufacturers, who were party to these agreements, were all foreign companies located overseas. The Director applied the RTPL to the perfume manufacturers by using the effects doctrine as a basis for such application.<sup>18</sup>

The *James Richardson* decision was not appealed and thus was not subject to the scrutiny of the court. However, it is reasonable to presume that the effects doctrine will also be applied by Israeli courts in a relevant case as part of established customary international public law, especially in the area of antitrust. The prospect of such adoption is strengthened by two main reasons. First, the effects doctrine- or a relatively similar version of it like the EU implementation doctrine- serves as a basis for the extraterritorial application of antitrust in many industrialized jurisdictions, including the US and the

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<sup>15</sup> Director, *Restrictive Agreement Among the Sea Carriers which are Parties to the EMTA Conference* (April 30, 2003, not published).

<sup>16</sup> See, e.g., *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945).

<sup>17</sup> *James Richardson*, *supra*, note 9. Although there are no more official decisions that apply the doctrine, the IAA applied the doctrine in several other cases as well, to justify their basis for extraterritoriality. This information is based on discussions with several senior IAA officials and with several lawyers.

<sup>18</sup> *Ibid.*

EU.<sup>19</sup> Israeli courts and quasi-judicial institutions usually look to these jurisdictions for guidance on antitrust issues.<sup>20</sup> Second, the adoption of the effects doctrine furthers the goals of the RTPL, which is to prohibit anti-competitive conduct within Israeli markets. Since Israel is a small jurisdiction, much of the anti-competitive conduct that affects it takes place elsewhere. For example, most of the international cartels that limit competition within Israeli markets are agreed upon and implemented outside its borders. Absent the effects doctrine, the RTPL would generally not apply and Israel would not be able to limit such anti-competitive conduct.<sup>21</sup>

It is also reasonable to assume that Israeli courts will condition the application of the RTPL on the conditions that are applied elsewhere, and are sufficiently followed in order to be regarded as customary public international law. All jurisdictions that adopted objective territoriality principles have applied significant limiting factors to their application. Jurisdiction is regularly recognized only if the alleged anti-competitive conduct has "substantial, direct and intentional" anti-competitive effects on competition in the jurisdiction. These conditions were specifically acknowledged in the *James Richardson* decision.<sup>22</sup>

*Salt industries*, another decision which involved foreign firms, however, did not mention the effects doctrine. Yet it cannot serve as a basis for an argument that the effects doctrine does not apply in Israel. First and foremost, if the effects doctrine is part of customary public international law, then the Director cannot override it. Rather, he is obliged to apply it in relevant cases. The doctrine would not apply only if an express contradictory legislative provision existed in the RTPL. However, no such provision exists except in the merger context. Moreover, as noted above, where there exists a potential conflict between Israeli law and public international law, the court will attempt to interpret the Israeli law in a fashion coherent with public international law.

In *Salt Industries* the Director issued an administrative decree which stated that an Israeli firm participated in a cartel between an Israeli and a Cypriot firm.<sup>23</sup> The decision did not mention the extra-territorial dimension of the cartel and its legal implications for the applicability of the RTPL. The decision supplies no explanation. Nonetheless, two possible explanations arise.<sup>24</sup> First, the Director proved a factual basis for significant and intentional harm to competition. She did so despite the fact that the case involved a cartel of a kind which does not ordinarily require proof of anti-competitive effects since a per se

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<sup>19</sup> The EU doctrine used for a similar purpose, the implementation doctrine, is in many ways similar to the effects doctrine, although some minor differences exist. See Cases 89, 104, 114, 16, 117 and 125-9/85, *Ahlstrom Oy v Commission* [1988] ECR 5193, [1988] 4 CMLR 901. See, e.g., Alison Jones and Brenda Sufrin, *EC Competition Law* (Oxford University Press, 2001), p. 1053. The European court applied the doctrine after it surveyed the position under public international law.

<sup>20</sup> For example, in the *James Richardson* decision, for example, the Director cited US and EU decisions.

<sup>21</sup> See the discussion of the Penal Code below.

<sup>22</sup> *Ibid.*

<sup>23</sup> Director, *Israeli Salt Industries Inc. – Party to a restrictive agreement with MP Theodorou (Salt Industry) & Co., Ltd.* (April 2, 2006, not published).

<sup>24</sup> It can be assumed that the Director was not ignorant of the doctrine. The Director mentioned in the decision a legal opinion, given to one of the parties, which applied the *James Richardson* decision to an agreement between an Israeli and a Jordanian firm. *Ibid.*, footnote 51.

presumption of harm is applied. Thus, it might be assumed that since the conditions for the applicability of the doctrine were proven, there was no need to mention its applicability.

Another possible explanation involves the fact that the administrative decree applied only to the Israeli firm. According to the facts elaborated in the decree, the Israeli firm aggressively coerced the Cypriot firm into the cartel, when the latter attempted to introduce competition into the Israeli salt market. It did so, *inter alia*, by dumping a huge amount of salt on the Cyprian market, which had a significant effect on prices there. Thus, the "blame" was mainly on the Israeli firm. It might be that given these circumstances, the Director decided not to declare the Cypriot firm an infringer of the RTPL. Thus, she assumed that it did not have to engage in questions of extraterritorial application.

This explanation raises an interesting set of questions, which is relevant whenever an anti-competitive conduct involves both a foreign and a domestic firm. In such cases, if the legal implications are only directed at the domestic firm, should the effects doctrine apply? In other words- does the effects doctrine act as a pre-condition for a finding of an anti-competitive conduct if some of the parties are foreign or does it apply only if there is a finding of an anti-competitive conduct that has direct legal implications for the foreign firm? If indeed the Director did not mention the effects doctrine in *Salt Industries* because the decision was not directed at the foreign firm, then this signifies that the Director adopted the latter proposition. In this sense, the effects doctrine is a precondition for prosecution of a foreign firm but does not prevent such a finding against a domestic firm. The legality of such a rule would have to be determined in accordance with public international law doctrines. However, given that the decision carries no direct legal implications and consequences for the foreign firm, it might fit with the rationale of the doctrine.<sup>25</sup>

This leads to another interesting set of questions: Many domestic antitrust laws include presumptions of harm (per se rules). Such presumptions would normally apply to domestic firms. Yet the effects doctrine normally requires proof of "a significant and direct" anti-competitive effect. Now, assume that the relevant conduct can normally come under the presumption of harm. Can the presumption then be applied as a proxy for the conditions of the effects doctrine? Can it be applied to the domestic firm but not to the foreign one? Most of these questions were not directly answered in Israel. Yet the case law and doctrinal considerations suggest that presumptions of harm cannot be used in order to prove the elements of the effects doctrine.

Let us first analyze the doctrinal basis. Some presumptions of illegality, like those contained in the RTPL, are very wide and capture under their wings conduct which does not always significantly harm competition.<sup>26</sup> In such cases, applying a presumption of

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<sup>25</sup> Indeed, this explanation also fits well with the structure of the *James Richardson* decision, as elaborated below.

<sup>26</sup> See, e.g., David Gilo, "Is it appropriate the Open the Dam of Restrictive Agreements and Block it by Ad Hoc Remedies?" (2004) 27 *Iyunei Mishpat* 751; David Gilo, "A Restriction which Harms Competition

harm would not necessarily fulfill the requirement that "significant, direct and intentional" anti-competitive effects be proven. Accordingly, applying the presumption in such cases goes against the doctrine's grain. This is because extraterritorial application of a domestic law is an exception to the rule that the laws of a state apply within its boundaries. The balance between the clashing jurisdictional interests is reached by ensuring that laws should be applied extraterritorially only where their application is necessary to prevent conduct with substantial and intentional anti-competitive effects within the jurisdiction. Thus, applying a presumption that does not ensure that all the agreements that come under its scope significantly harm competition clashes with the goal of the doctrine. This is especially true in the case of Israel. Beyond the problem created by the extremely wide scope of the presumptions of illegality, another problem arises which is based on the basic requirements of the law, The RTPL requires only proof of "probable harm to competition". The presumptions of harm included in it are intended to eliminate the need to prove this element. Since "probable harm" is a much lower standard than "significant harm," it cannot be presumed that the elements of the effects doctrine have been fulfilled even if one decides that the presumptions can apply to foreign firms.

Let us now turn to the case law. In both *James Richardson* and the *Salt Cartel* the Director applied a presumption of harm. However, it also proved significant anti-competitive effects on the Israeli market. Moreover, in *James Richardson* the Director specifically recognized the requirements of the effects doctrine and stated that the RTPL "should be applied in the spirit of the effects doctrine."<sup>27</sup> Furthermore, the structure of the *James Richardson* decision strengthens the conclusion that a presumption is not sufficient. There, the Director applied the presumption, analyzed the harm in practice and as a last step applied the effects doctrine. It can thus be assumed that the requirements of the effects doctrine were regarded by the Director as cumulative to those that apply in a case without an extra-territorial dimension.<sup>28</sup> Yet these considerations have limited relevance since regardless of what the Director intended, he cannot deviate from customary public international law doctrines.

In light of the above considerations, it is my view that a presumption of harm under the RTPL cannot be applied in order to fulfill the requirement of the doctrine of "significant harm" to competition. Moreover, the presumption does not prove intentional harm, which must be proven separately. It is noteworthy that in criminal or administrative proceedings initiated by the IAA these issues have little practical relevance. This is because despite the presumptions, the Authority has never brought a case in which it did not believe there was significant harm to the Israeli market. Nonetheless, these questions may arise in civil matters between private parties, in which one party argues that the agreement is illegal.

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Between the Party Enjoying it and a Third Party" (2004) 28 *Iyunei Mishpat* 517; Michal S. Gal, "Separating the Wheat from the Shaft: Restrictive Agreement in Light of the Supreme Court's Recent Decisions" (2004) 1 *Din Udvarim* 533.

<sup>27</sup> *James Richardson*, *supra*, note 9.

<sup>28</sup> In the conclusion of the decision, the Director states that a presumption applies. However, I do not think this should be read as rejecting the substantive requirements of the effects doctrine, since it would clash with its statement that the RTPL "should be applied in the spirit of the effects doctrine."



Where a conduct constitutes a criminal offense under Israeli law, as is the case of cartels, abuse of dominance and mergers without approval, chapter C of the *Israeli Penal Law*<sup>29</sup> sets out several principles for the territorial reach of the law. Chapter C dictates that for Israeli penal laws to apply, some factual element of the offense must take place within Israeli territory.<sup>30</sup> The theoretical application of this requirement in abuse of dominance offenses was recognized by the Director in the matter of *James Richardson*:<sup>31</sup>

“Where a monopolist acts in a way that might reduce competition in business in Israel or might harm the Israeli public— this is an internal offense which may be tried in Israel.” (emphasis added)

Yet despite the wide scope of the law, criminal cases are rarely brought in Israel. This raises an interesting question: does Chapter C of the Penal Code determine the scope of the jurisdictional reach of the RTPL in civil or administrative cases which involve conduct which could, potentially, also serve as a basis for a criminal offense, or whether it determines the applicability of the RTPL only in criminal cases. This question has not yet been answered. But should the answer be negative, the immediate result is that the practical scope of application of the Penal Code is quite limited.<sup>32</sup>

It is noteworthy that in the matter of *Tagar*<sup>33</sup> the District Court in Jerusalem stated, in obiter dicta, that an export cartel between Israeli firms that did not harm competition in Israel may still constitute an offense under Israeli law, if some of the elements of the offense took place in Israel, although it may be exempt if a proper request be made on "public good" grounds.<sup>34</sup> In my view, this wide application of the law is contrary to the

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<sup>29</sup> Israeli Penal Law, 1977.

<sup>30</sup> S. Z. Peller, *Elements of Criminal Law* (1, 5744-1984) 260. See also *James Richardson*, *supra*, note 9, pp. 43-4.

<sup>31</sup> *James Richardson*, *ibid.*

<sup>32</sup> In *James Richardson*, for example, the Director mentioned Chapter C of the Penal Code but did not analyze its applicability in his decision.

<sup>33</sup> Criminal case 385/98 *State of Israel vs. Tagar Co. et al.* (April 13, 2003, not published), para. 20-22. See also Bagatz 588/84 *Kesher Sachar Asbest*, Supreme Court Decisions 40(1) 29.

<sup>34</sup> In several discussions with market participants the IAA adopted a similar view, which considerably widens the scope of application of the RTPL. The IAA separated the question of the jurisdictional scope of the RTPL and the question of public policy- whether the IAA has an incentive to bring suit against foreign firms. In particular, the IAA understood the EU *Gencor* decision (case T-102/96 *Gencor Ltd. v. Commission* [1999] ECR II-753) as implying that the RTPL applies to any firm which is based in or operates in Israel, even if its conduct does not affect the Israeli market. Thus, an Israeli firm which participated in an international cartel which did not affect the Israeli market (given that the other cartel members' products did not fit demand in the Israeli market) was, under this view, caught under the RTPL. In my view, this wide interpretation should be rejected and would most likely be rejected by the courts. Most importantly, it does not fit within the purpose of the RTPL which is to promote competitive conditions in the Israeli market. Put differently, the RTPL has a territorial purpose, rather than maintaining the morality of Israeli firms in foreign markets. Indeed, the purpose of the subjective territoriality principle, which enables countries to apply their laws to firms and individuals within their territorial scope, is to enable countries to prevent conduct which implicitly affects competitive conditions within their jurisdictions. Indeed, the EU *Gencor* decision, on which the IAA relies, involved conduct which significantly affected competition within the EU market. There, the Commission prohibited the merger between two South African undertakings on the basis that it would have created a duopoly in the platinum

goals of the RTPL and should be rejected. Indeed, in the case of *Nesher*, the Tel-Aviv District Court stated that an exclusivity agreement between Israeli and Palestinian firms that affected only the Palestinian market was not caught under the RTPL "which is territorial in its scope."<sup>35</sup> The decision in *Nesher* was given before that in *Tagar*, but in accordance to Israeli law neither has precedence over the other. The issue has not, as of yet, arisen before the Supreme Court. Nonetheless, as noted above, it is my view that a purposive interpretation of the RTPL will lead to the recognition that the RTPL should only be applied to conduct which affects the Israeli market, either directly or indirectly.

Accordingly, customary public international law as well as the Israeli Penal Code form the possible basis for the extra-territorial application of the RTPL. An exception exists in merger regulation, which specifically limits the application of the RTPL beyond what would have applied otherwise. Since the RTPL narrows Israeli jurisdiction, there is no clash with international law principles, since sovereign independence is impinged less, rather than more. A "merger" is defined in the RTPL as a merger among firms that are either registered in Israel or that have a business location in Israel.<sup>36</sup> The first requirement is interpreted to include international firms with local subsidiaries or with other means of direct control over Israeli firms.<sup>37</sup> The second requirement is interpreted widely by the IAA to include foreign firms with significant influence over their local representative (be it a distributor or the holder of another title). The IAA inquires whether the foreign firm can determine the quantity, price, quality, display or other commercial decisions regarding its imported products. The more control the foreign firm has over these parameters, the more likely that it will come under the merger provisions.<sup>38</sup> The merger provisions do not capture, however, foreign firms that have not as of yet done business in Israel or firms whose products are sold in Israel through independent importers. Merger law thus excludes mergers among such international firms or even between such international firms and an Israeli one. Accordingly, the IAA does not have jurisdiction to block such mergers, or impose any conditions upon them, even if they significantly harm the Israeli economy. Indeed, to give but one example, when KLM and Air France merged, they did not notify the IAA, despite the fact that the merger affected competition in some routes to and from Israel. This application pattern, which might be partly justified by practical enforcement considerations as elaborated below, nonetheless creates skewed incentives for Israeli firms to merge with international firms even if a merger among Israeli firms might have been more efficient otherwise.<sup>39</sup>

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and rhodium markets, as a result of which effective competition would be significantly impeded in the common market. Richard Whish, *Competition Law* (Oxford University Press, 6<sup>th</sup> ed., 2008), p. 483.

<sup>35</sup> HP 1407/94 *Magrizo vs. Nesher Cement co. et al.* (unpublished, 7 August 1995).

<sup>36</sup> Articles 1 and 17 of the RTPL.

<sup>37</sup> Director of IAA, Conditional Approval of Merger between Osem and Tnuva (unpublished, December 22, 1996); IAA Merger Guidelines, pp. 23-4, <http://www.antitrust.gov.il/NR/rdonlyres/27ACCAE2-53E3-45CFAD0C2C9F43DEF249/539/MergersGuidelines1.pdf>

<sup>38</sup> It is noteworthy that this interpretation of the IAA is relatively wide, and might clash with the wording of the RTPL. However, it was for as of yet challenged in court. This interpretation is still narrower in scope than the effects doctrine.

<sup>39</sup> Michal S. Gal, " Monopolies in Competition: The Balance between Innovativeness and Competition in the Israeli Competition Law", (2006) 2 *University of Haifa Law Review (Din Udvarim)* 425, text around footnote 155.

## II. 2 Comity considerations

Comity is the use of moderation and restraint by a jurisdiction in the extraterritorial application of domestic laws, having due regard both to international duty and convenience, and to the rights of its own citizens. Comity thus recognizes certain circumstances in which the interests of another state are sufficient that the exercise of jurisdiction should be restrained.<sup>40</sup>

As with the effects doctrine, under Israeli law comity limitations on jurisdiction will apply so long as they are part of established customary international public law, unless a clear provision in the relevant law states otherwise. However, here the case for adoption is much weaker, given that comity principles are much less established in international law.

Nonetheless, comity principles were recognized in Israel. In *Berman v. TWA*<sup>41</sup> the district court held:

“Comity principles have significant importance in the modern world and especially in the U.S.-Israel relationship. They imply honoring the sovereignty of foreign countries by limiting, to the extent possible, “invasion” of the domain of a foreign country by giving a judicial decision that has effects outside Israeli borders. These principles point towards the respect of the authority of the jurisdiction in which the foreign firm has its center of business... and abstention from interrupting the process by giving conflicting decisions.”

Accordingly, although there is no case law dealing with this issue in the antitrust context, an argument can be made that Israeli courts will apply international comity principles in relevant antitrust cases. The language of the RTPL does not limit the applicability of comity considerations.

Yet the scope of comity principles to be applied is questionable, as there is no international consensus with regard to their scope, and thus it might be quite difficult to argue for a specific set of comity principles which constitute customary public international law. For example, in the U.S. there is an on-going debate with regard to the scope of comity. In the much-cited *Timberlane* case, the U.S. court applied a balancing of interests test to the extraterritorial reach of the *Sherman Act* to ensure that the interests of the U.S. are sufficient to support the exercise of extraterritorial jurisdiction.<sup>42</sup> The *Restatement* has also adopted similar criteria to determine the “reasonableness” of applying the law. Reasonableness is a necessary requirement for existence of a

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<sup>40</sup> *Timberlane Lumber Co. v. Bank of America*, 549 F. 2d 597 (C.A.9 1976) and other cases cited by Justice Scalia in *Hartford Fire Insurance Co. et al., v. California et al.*, 113 S. Ct. 2891 (S. Ct. 1993).

<sup>41</sup> Pshitat Regel (Tel Aviv) 1255/01 *Berman v. TWA*, Takdin- Mehozi 2001 (1) 29449, at 29448.

<sup>42</sup> *Timberlane*, *supra*, note 30.

jurisdiction in the first place.<sup>43</sup> The majority in *Hartford Fire*, however, adopted a narrow test for the application of international comity principles.<sup>44</sup> It stated that international comity principles are only relevant if there is a “true conflict” between U.S. and foreign law. The majority held that such a conflict did not exist where a person subject to regulation by two nations can comply with the laws of both, although they involve different requirements and are based on somewhat clashing policy goals. The majority opinion in *Hartford Fire* was much criticized.<sup>45</sup>

Comity and balancing principles were included in the *Agreement Regarding the Application of Their Competition Laws, between the U.S. Government and the Israeli Government*.<sup>46</sup> Article VI of the Agreement, titled “Avoidance of Conflicts,” states that “each party shall...give careful consideration to the other party’s important interests throughout all phases of its enforcement activities, including decisions regarding the initiation of an investigation or proceedings...”<sup>47</sup> The agreement adopts a balancing test for cases in which the enforcement activities of one party may adversely affect the important interests of another party. Accordingly, section VI(5) states that in such cases the party assessing the measures it will take, shall consider all appropriate factors, including:

- a. “The relative significance to the anticompetitive activities involved of conduct occurring within one state as compared to the conduct occurring within that of the other;
- b. The relative significance and foreseeability of the effects of the anticompetitive activities on one Party’s important interests as compared to the effects on the other Party’s important interests;
- c. The presence or absence of a purpose on the part of those engaged in the anticompetitive activities to affect consumers, suppliers or competitors within the enforcing state;
- d. The degree of conflict or consistency between the first Party’s enforcement activities (including remedies) and the other Party’s laws and other important interests;
- e. Whether private persons, either natural or legal, will be placed under conflicting requirements by both parties;
- f. the existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;
- g. The location of the relevant assets;

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<sup>43</sup> Restatement, Section 403(2), Comment g to Section 403, and Reporter’s notes to Section 415, p. 291.

<sup>44</sup> *Hartford Fire*, *supra*, note 30. The European ruling in the matter of *Eastern Aluminium*, is strikingly similar. *Aluminium Imports from Eastern Europe*, OJ 1985 L92/1, [1987] 3 CMLR 235, sec. 14.7.

<sup>45</sup> See, e.g., A. V. Lowe, “Blocking Extraterritorial Jurisdiction: The British Protection of Trading Interests Acts, 1980,” 75 *American Journal of International Law* 257 (1981); Phillip R. Trimble, “The supreme Court and International Law: The Demise of Restatement Section 403,” 89 *American Journal of International Law* 53 (1995); Kenneth W. Dam, “Extraterritoriality in an Age of Globalization: The Hartford Fire Case” 1993 *Supreme Court Review* 289.

<sup>46</sup> Signed on March 15, 1999.

<sup>47</sup> *Ibid.*, Section VI(1).

- h. The degree to which a remedy, in order to be effective, must be carried out within the other state; and
- i. The extent to which enforcement activities of the other party with respect to the same persons, including judgments or undertakings resulting from such activities, would be affected.” (emphasis added)

Accordingly, in case the conduct in question violates both the U.S. and Israeli competition laws, the Agreement sets out positive comity principles to be applied. Article V states that in such cases “a party may request that the other Party’s competition authorities initiate enforcement activities against anticompetitive activities carried out in the requested State, if the requesting Party believes that such activities adversely affect its important interests.”<sup>48</sup> Although Article V states that “nothing in this Article...precludes the requesting Party’s competition authorities from undertaking enforcement activities with respect to such anticompetitive activities,” it seems that if the conduct having “direct, substantial and intended” effect in the Israeli market also violates U.S. law, the IAA should first try to stop the conduct by requiring the U.S. antitrust authorities to apply their own rules domestically, especially if the U.S. authorities are already engaged in such enforcement activity which is liable to remedy abuse of power problems within the Israeli market as well. This limitation conforms with the purpose of the Agreement, which is “to promote cooperation and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties’ competition laws and to minimize the impact of differences on their respective important interests.”<sup>49</sup> It is noteworthy, however, that the Agreement was never formally rectified. Thus while it might impact the decisions of the IAA, it does not bind Israeli courts.

Comity and avoidance of conflict provisions are also commonplace in many other bilateral agreements.<sup>50</sup> That is, many jurisdictions have agreed to limit their enforcement activities when foreign interests are involved. Most importantly, comity principles were incorporated in the 1995 Recommendations of the Council of the OECD Concerning *Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade*.<sup>51</sup> The Recommendations recognize “the need...to give effect to the principles of international law and comity and to use modernization and self-restraint in the interest of co-operation in the field of anticompetitive practices.” Since Israel is in the process of joining the OECD, it will most likely adhere to these recommendations. Moreover, these agreements may strengthen the case for recognizing comity principles as part of customary public international law.

### II.3 Cooperation with other Jurisdictions

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<sup>48</sup> *Ibid.*, Section V, titled “Positive Comity.”

<sup>49</sup> *Ibid.*, Section I. 1.

<sup>50</sup> See, e.g., *Agreement between the Government of the United States of America and the Government of the Federative Republic of Brazil* (October 26, 1999), secs. IV and VI; *Agreement between the Government of the United States of America and the Commission of the European Communities Regarding the Application of their Competition Laws* (September 23, 1991), secs. V and VI; *Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws* (June 4, 1998), secs. III and VI.

<sup>51</sup> OECD Doc. No. C (95) 130 (July 27, 1995).

Cooperative agreements are an important tool for tackling international antitrust issues of mutual concern. Indeed, Israel is party to several agreements which are relevant in the antitrust context. It is party to one multilateral convention and several bilateral treaties concerning criminal assistance (with Austria, Germany, U.S., Australia and Canada).<sup>52</sup> While these agreements are not competition-specific, they can play an important role in international cartel cases as they provide the authority with the ability to engage in formal cooperation, including the exchange of information, if the conduct under investigation amounts to a criminal offence.<sup>53</sup> As noted, under the RTPL restrictive agreements and abuses of dominance are considered criminal offenses. Indeed, Israel received assistance from a foreign jurisdiction in the pre-investigation stage of an international cartel. The foreign jurisdiction provided the IAA with the alleged anti-competitive agreements that it sought.

In addition, free trade agreements usually contain basic provisions on cooperation in competition matters. Israel has concluded such agreements with several countries and organizations. Most notably, The EU-Israel Association Agreement<sup>54</sup> declares that anti-competitive practices and abuses of a dominant position are incompatible with the agreement if they affect trade between the EU and Israel. It also states that when such a practice arises, "which threatens to cause serious prejudice to the interests of the other party or a material injury to its domestic industry, each party may take appropriate measures after consultation of the Association Committee" or after 30 days of the referral of the matter to the committee. It also contains a provision on exchange of information, subject to secrecy limitations.<sup>55</sup>

As noted in the previous sub-chapter, Israel is also party to a bilateral antitrust agreement with the U.S. Under the agreement, competition authorities on both sides exchange information and coordinate their enforcement activities. Each side may ask the other to take enforcement action (positive comity); and each side must take account of the other's significant interests when enforcing competition rules (traditional comity). However, there has not yet been a case in which the IAA was requested to reduce its involvement due to the interests of the U.S. Authorities. Thus, in practice, the Agreement has had so far little effects.

The lack of additional cooperation agreements is due, in part, to the fact that their signing requires the cooperation of the Israeli Ministry of Foreign Affairs and the Israeli Ministry of Justice. Due to lack of resources of both the IAA and the aforesaid ministries, the IAA

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<sup>52</sup> *European Convention On Mutual Assistance in Criminal Matters* signed in Strasbourg in 1959; *Treaty for mutual Assistance in applying the European Convention on Mutual Assistance In Criminal Matters with Austria* (signed in 1975); *Treaty for mutual assistance in applying the European Convention on Mutual Assistance In Criminal Matters with Germany* (signed in 1975); *Treaty for mutual assistance in criminal matters with the U.S.A* (signed in 1998); *Treaty for mutual assistance in criminal matters with Australia* (signed in 1994); *Treaty for mutual assistance in criminal matters with Canada* (signed in 1999).

<sup>53</sup> Any exchange of information concerning private parties is subject to confidentiality rules.

<sup>54</sup> *Euro-Mediterranean Agreement*, Signed November 1995 and entered into force in June 2000.O/J/ L 147/3 (21.6.2000). Can be downloaded from [http://www.delisr.ec.europa.eu/english/content/eu\\_and\\_country/asso\\_agree\\_en.pdf](http://www.delisr.ec.europa.eu/english/content/eu_and_country/asso_agree_en.pdf)

<sup>55</sup> *Ibid.*, Articles 36-7.

was unable to sign additional agreements.<sup>56</sup> As will be elaborated in the next sub-chapter, this is also a direct result of the limited effectiveness of such agreements.

By far, the most significant liaison of the IAA, based on both formal and informal relationships, is with the U.S. Informal cooperation involves, inter alia, discussing such matters as investigative strategies, market information and witness evaluations. It also involves long and short visits of IAA members to the U.S. Antitrust Agencies in order to learn, first hand, how they handle cases, and sometimes even joint seminars and conferences. Such informal cooperation can be quite useful in advancing investigations.<sup>57</sup>

In addition, Israel regularly discusses competition issues with other countries in multilateral forums such as the International Competition Network (ICN), United Nations Conference for Trade and Development (UNCTAD), and the OECD's Competition Committee as well as in its Working Parties and the Global Forum on Competition. It is noteworthy that the IAA takes an active role in the ICN and was appointed as a member of its interim Steering Group. It headed the Merger Investigation Techniques Subgroup, operating within the ICN's Merger Working Group, which focuses on the development of best practices for the investigation of mergers. Importantly, these forums have created informal and inter-personal ties with many agencies that enable the IAA to informally request assistance on specific issues from other authorities. Such cooperation is mostly case or issue- specific. This is due, in part, to the fact that long-term macro-cooperation requires investment of resources which the IAA does not have. Most importantly, it cannot spare the personnel to work on such issues when resources are not sufficient to enable it to deal with all domestic anti-competitive issues.

However, all of these relationships have limited effects on international antitrust enforcement in Israel, as they do not solve the two main problems faced by it: limited enforcement resources and a limited ability to create a credible threat, which are elaborated below.

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<sup>56</sup>IAA, *International Cooperation, Including Exchange of Information in Cartel Investigations*, submitted to the OECD, 2000,

<sup>57</sup> OECD, *Hard Core Cartels: Third Report on the Implementation of the 1998 Council Recommendation* (2005), can be downloaded from <http://www.oecd.org/dataoecd/58/1/35863307.pdf>

### III. Practical Obstacles in Applying Antitrust to Foreign Firms<sup>58</sup>

Conduct that takes place elsewhere can significantly harm Israeli markets. International cartels or abuse of dominance by internationally dominant firms might increase prices and lower quality or quantity. The world-wide Vitamins cartel, for example, affected prices of vitamins in Israel.<sup>59</sup> Similarly, Microsoft's abusive conduct affected the price and quality of operating systems of personal computers for Israeli consumers.<sup>60</sup> Mergers among foreign firms can also significantly affect the Israeli market. One example involves the Unilever-Best Foods merger of a European and an American food producer. The merger was approved by the EU and the U.S., as it did not raise anti-competitive concerns in their markets. Yet it substantially lessened competition in Israel given that it was preceded by the merging of each of the parties with a dominant competitor in some Israeli food markets. The merger raised concerns regarding its effects on competition in Israel -both the strengthening of a food conglomerate as well as the lessening of competition in several specific food markets, such as chocolate and snacks.<sup>61</sup> The large proportion of foreign-produced products that are traded in Israel and the reduced ability of domestic market forces to effectively regulate foreign importers, often imply that the anti-competitive conduct of dominant foreign importers will have strong negative effects on Israeli markets with which they trade, without significant offsetting efficiencies.

Yet, as elaborated elsewhere,<sup>62</sup> the current system of national laws and unilateral enforcement coupled with limited cooperation significantly limits the practical ability and the incentives of small economies, such as Israel, to prevent the anti-competitive conduct of foreign firms that has negative effects on their jurisdiction. The unilateral approach is based on the fundamental assumption that extra-territorial conduct that significantly affects the domestic market can be redressed at the national level through national competition laws. This proposition does not hold true for small economies, as they face severe challenges to effective prosecution.

The main problem is that small economies can rarely make a credible threat to prohibit the conduct of a foreign firm, especially if it has positive effects elsewhere that do not result only from the negative effects in the small jurisdiction. Even those small economies that have signed bilateral agreements with large ones are not much better off, as positive comity does not reduce their concerns with regard to extra-territorial conduct with negative effects on their domestic markets that does not infringe foreign law.

Let us take the example of a merger that has no negative welfare effects on a large economy, such as the merger between KLM and Air France. If trade in Israel is only a

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<sup>58</sup> This sub-chapter is largely based on Gal, *Small Economies*, *supra* note 3, chapter 6 and Gal, *Unique Challenges*, *supra*, note 1.

<sup>59</sup> For an analysis of the self-nicknamed "Vitamins, Inc." cartel see, e.g., John M. CONNOR, *GLOBAL PRICE FIXING: OUR CUSTOMERS ARE THE ENEMY* (2001).

<sup>60</sup> *U. S. v. Microsoft Corporation*, 84 F. Supp. 2d 9 (D. D. C. 1999) (findings of fact) ; 87 F. Supp. 2d 30 (D. D. C. 2000) (conclusions of law); 97 F. Supp. 2d 59 (D. D. C. 2000) (final judgment); appeal rejected.

<sup>61</sup> *Conditioned Approval of the Director of the Merger between Tozeret Mazon Israelit Baam and Unilever N.V.* (M/4006) (Director of Israeli Competition Authority, unpublished, 27 September 2000).

<sup>62</sup> Gal, *Unique Challenges*, *supra*, note 1. See also Andrew T. Guzman, *Antitrust and International Regulatory Federalism*, 76 N.Y.U.L. REV. 1142 (2001); Guzman, *Is International Antitrust Possible?* 73 N.Y.U.L. REV. 1501 (1998).



small part of the foreign firm's total world operation, were the IAA to place costly restrictions on the merging parties, it would, most likely, choose not to fly to Israel and trade only in other jurisdictions. The foreign firm would exit the Israeli market if its loss of revenues from terminating its trade and the possible increase in overall production costs if the firm faces scale economies over the whole range of production, are smaller than the increase of revenues it anticipates to achieve as a result of the merger elsewhere. Also, the negative welfare effects on Israeli markets of the exit of the foreign firm may well be greater than the negative welfare effects from its continued operation within the economy's borders. Accordingly, Israel usually has limited power or incentives to prevent it from trading within its borders even if it engaged in the harmful merger. The foreign firm, acknowledging this effect, will not take into account, in its merging decision, the effect of its decision on the Israeli market. It will only consider the effects of the merger on its own profits in such a market. In fact, an empirical study conducted on twenty small economies confirmed this result: in no small economy did the Antitrust Authority attempt to prohibit a merger that was approved by large ones, except to limit its direct consequences within the small jurisdiction.<sup>63</sup> This can have significant consequences, as exemplified by *Unilever/Best Foods* merger, noted above. There, the IAA did not interfere in the merger, which was approved by the U.S. and the EU, despite its significant effects on the Israeli market. Instead, it imposed limited behavioral limitations that applied among the merging parties' Israeli subsidiaries.

Accordingly, small economies such as Israel act, in practice, as if they were applying a world-wide total welfare standard, since the large economies that have approved the merger represent a much larger share of consumers than they do. Yet even if the increase in market power is accompanied by increased efficiencies, these will rarely be realized by the small economy, as in many cases the production facilities are located outside its borders and more often than not markets in the small economy are highly concentrated and thus more prone to the realization of market power.

For similar reasons, small economies often face problems in regulating the anti-competitive conduct of multinational firms that serve a large part of their domestic demand. Empirical evidence demonstrates that this is not just an academic concern. Rather, large foreign importers frequently use an explicit or an implicit threat of exit, should the small jurisdiction impose upon them limitations which they may agree to if imposed by a large economy.<sup>64</sup> Microsoft, for example, has declined in the past to sign an agreement that limits its conduct in Israel, which contained conditions similar to those included in the agreement it reached with the EU, even though such conditions were necessary in order to address the unique characteristics of the Israeli market.

Political obstacles might also stand in the way of a small economy attempting to prevent a merger or joint venture among foreign firms, or even taking a strong stance against an export cartel. If the effects of such conduct are positive in the home jurisdiction or in other jurisdictions (higher taxes, lower unemployment, lower production costs), the small economy might encounter political resistance to its decision, especially because foreign firms have an advantage in shaping public

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<sup>63</sup> Gal, *Unique Challenges*, *supra*, note 1. Some of these jurisdictions are also developing ones, a fact that may further reduce their ability to deal with international issues.

<sup>64</sup> *Ibid.*

opinion in their home jurisdiction. This consideration is based on a presumption that the small economy's size is positively correlated with its political power.

Add in the limited resources a small economy often has to combat anti-competitive conduct, with the result that small economies often have no incentive or a limited ability to take on international conduct that negatively affects their jurisdiction.

Indeed, the Israeli Authority has chosen not to bring cases even where harm to the Israeli economy might be relatively easy to prove. International mergers that are caught under the RTPL are rarely limited or conditioned. Likewise, international cartel or abuse cases are rarely tackled. Let me give two recent examples. The U.S. is currently investigating the international freight cartel. El-Al, which is the largest freight carrier to and from Israel and has limited routes elsewhere, has publicly declared that it has set aside USD 20M to cover possible liability costs arising from the U.S. antitrust suit. Despite this obvious signal that the Israeli economy had suffered some harm resulting from anti-competitive conduct, the IAA decided not to pursue the case. Similarly, Siemens, a large supplier of the Israeli Electricity Company, was declared in a report issued by the EU Commission to be part of the Gas Insulated Switches International Cartel. The Israeli Electricity Company declared that it suffered significant damages from such high prices. Despite this fact, the IAA decided not to bring suit against Siemens.

These examples raise the question of whether the enforcement decisions of the authority are rational. The answer is generally positive. Proof of an international cartel is long and costly. Since the IAA cannot rely on the findings of a foreign court or an antitrust agency, it would have to prove in court not only the domestic effects of the cartel, but also its existence. Such large cases may well be beyond its means. This is strengthened by the following facts: (a) fines imposed on such cartels in Israel are generally relatively low; (b) the U.S. often imposes imprisonment sentences on top officials of international cartels. Israel would generally not impose additional imprisonment sentences; (c) the cartels often cease to exist as a result of the enforcement activities of foreign jurisdictions; (d) the IAA has a limited budget. Given these facts, it might well be rational to decide not to prosecute such cartels.<sup>65</sup> Nonetheless, these considerations should not prevent the IAA from assisting private plaintiffs who bring damage suits against such cartels.

In some cases sub-optimal enforcement levels result from the inability of small economies to obtain the relevant information. For example, the IAA considered bringing a case against the Vitamins cartel after it was prosecuted elsewhere. However, the Authority could not obtain the relevant information as the U.S. Department of Justice was prevented, under its consent agreement with the relevant firms, from transferring the relevant materials to most other jurisdictions. In this case the U.S. Authority made a strategic decision, limiting the number of possible worldwide prosecutions against the cartel in order to ensure that it be brought to trial in a handful of large jurisdictions. Even from a world-wide welfare point of view, this might be a sound decision. As elaborated below, one of the immediate outcomes of the prosecutorial efforts of large jurisdictions is generally the discontinuation of the

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<sup>65</sup> If, however, enforcement costs are reduced significantly, it might then be rational for the IAA to bring such cases. For a suggestion that countries be allowed to rely on the cartel findings of other jurisdictions and only prove the elements of the offense which are unique to it see Michal S. Gal, "Free Movement of Judgments: Increasing Deterrence of International Cartels through Judicial Reliance" at <http://ssrn.com/abstract=1291844>.

international cartel.<sup>66</sup> Thus, small jurisdictions such as Israel can enjoy positive externalities. Yet, as elaborated below, this state of affairs is still far from optimal. The main reason is that limited enforcement leads to limited deterrence effects for future cartelists.<sup>67</sup>

Still, Israel has strong incentives to assist other jurisdictions in bringing down a cartel or abusive conduct or prohibiting an anti-competitive merger. Indeed, it provides such information unless it is prevented from so doing under domestic laws.<sup>68</sup>

The above factors lead to the following conclusion: Extraterritoriality is an efficient tool for large jurisdictions that possess sufficient power over foreign firm to command obedience. Small ones often lack the requisite power to discipline foreign entities that harm them. It is thus not surprising that most do not have developed doctrines of extraterritoriality and of comity. Rather, small jurisdictions often act as "free riders" on the prohibitive efforts of other jurisdictions in the international arena.

It is not obvious, however, that when a large jurisdiction prevents the continuation of abusive or cartelistic conduct, that small jurisdictions also benefit from such prevention. Do the US and EC findings of a world-wide cartel prevent the operation of a cartel outside their borders? Often the answer is positive. Yet it depends on whether or not the cartel can operate outside their borders without affecting their domestic welfare. In fact, several cartels have been set up especially so that they will not create negative welfare effects on large economies, such as the Minerals cartel. In addition, such limited cartel enforcement cannot provide sufficient deterrent for firms not to engage in international cartels.<sup>69</sup> Similarly, the prevention of abusive conduct in one jurisdiction does not necessarily create positive externalities on others. Yet in some cases prohibiting some type of abusive conduct in one jurisdiction has positive externalities on others. For example, when Microsoft was prohibited by U.S. and EU courts from bundling its operating system with its web browser, it then changed the packages it sold worldwide.<sup>70</sup>

It is noteworthy that where domestic effects are significant, they can be dealt with separately, and the cost to the foreign firm is not prohibitive so that it would not result in its exit from the Israeli market, the IAA might apply remedies that pertain to Israeli markets. This is exemplified by international mergers. The IAA generally takes changes in the market structures of its large importers as a given. Yet an attempt is sometimes made to regulate the merged entities with regulatory tools that relate to the actions of these foreign firms within their domestic markets, although such tools are, generally, more costly and less effective than prohibiting the merger from occurring.

One such option is the imposition of structural and behavioral conditions on the merging parties that apply only to their operation within the small economy. In *Unilever/Tami*,<sup>71</sup> for example, the IAA conditioned its approval of the merger between the U.S. and European food companies on limitations of joint business

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<sup>66</sup> In some cases, however, the cartels will continue to operate in those jurisdictions in which prosecution is unlikely.

<sup>67</sup> See, e.g., Gal, Free Movement, *supra*.

<sup>68</sup> One example involves the information provided by the IAA to the U.S. Department of Justice in the international cartel case against LSL Biotechnologies Inc. et al. (tomato seed market allocation cartel).

<sup>69</sup> See, e.g., Gal, Free Movement, *supra*.

<sup>70</sup> This was recognized by the IAA. See answer to Bagatz 6623/03 *Oded Lavie vs. Director of Antitrust Authority* (September 30, 2003): "It makes no sense to bring a case against a company when as a result of a foreign prohibition it has already refrained from the abusive conduct worldwide")

<sup>71</sup> *Tozeret Mazon/Unilever*, *supra*, note 51.

activity between Elite and Tami, the two Israeli food companies that became, as a result of the merger, parts of the same international food conglomerate. The conditions included limiting information transfer and maintaining a structural and personal division between the two Israeli firms. Similarly, when Unilever next acquired control over Ben & Jerry's and the merger raised concerns regarding competition in the Israeli ice cream market, the IAA conditioned its approval on the distribution of Ben & Jerry's ice cream in Israel through an independent distributor who will be free to determine prices charged for the products. The Authority also required that the quality or quantity of the products be at least as high as those in the pre-merger situation, and that any new product would be made available to the distributor.<sup>72</sup> These are limited remedies since they cannot totally erase the fact that both firms are controlled by the same entity that determines their strategic decisions. At the same time, the IAA often relies on the fact that the international firm will not change its strategic decisions (such as Ben & Jerry's introduction of a new product in world markets) only to reduce competition in it. Moreover, such remedies are applied only in rare cases, in which harm to the Israeli market is considerable, the remedy does not prevent the international firms from merging or does not increase the costs of merging significantly, and the remedy is relatively easy to administer.

#### **IV. Some Implications for International Antitrust<sup>73</sup>**

The obstacles small economies like Israel face in applying their competition laws to combat international antitrust issues have important implications for efforts to reach international cooperative solutions.

The past decade has seen an upsurge in attempts to reach international cooperative solutions. Such efforts are largely concentrated in the International Competition Network ("ICN"). The ICN is a voluntary, quasi-private association of public actors, based on persuasion and common agreements rather than on coercion and hierarchical mechanisms of control.<sup>74</sup> Other international bodies, including the OECD, UNCTAD and the WTO have also taken important steps in this direction.

Undoubtedly, Israel stands to benefit from international cooperation and coordination. Harmonization reduces the transaction costs of importers that might otherwise find it uneconomical to invest in learning and complying with its laws. Small economic size often implies that there are limited profits to be had. Accordingly, the lower the costs of trade in Israel- including the costs of learning and complying with domestic antitrust laws- the higher the incentives of foreign firms to import their products into it.<sup>75</sup> Likewise, similarity of laws may reduce export costs of domestic firms.<sup>76</sup> Both effects strengthen one of the most important tools for overcoming the limits created by smallness: expanding the boundaries of the market by export and import.<sup>77</sup>

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<sup>72</sup> Director, *Conditions for the Approval of a Merger between Ben & Jerry's Homemade Inc. and Unilever N.V.* (16 December 2001, unpublished).

<sup>73</sup> This sub-chapter is based, in large part, on Gal, *Unique Challenges*, *supra*, note 1.

<sup>74</sup> See [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org). The author has been a non-governmental advisor to the ICN since its inception.

<sup>75</sup> Of course, foreign trade is not without its problems. For example, it exposes economies to the vulnerabilities of fluctuations in world-wide demand levels. See, e.g. Lino Briguglio, *Small Island Developing States and Their Economic Vulnerabilities* (1995) 23 *WORLD DEVELOPMENT* 1615; Commonwealth Consultative Group, *Vulnerability: Small States in the Global Society* (London: Commonwealth Secretariat, 1985).

<sup>76</sup> Michal S. Gal, *The 'Cut and Paste' of Article 82 of the EU Treaty in Israel: Conditions for a Successful Transplant* 9 *EUR. J. OF LAW REFORM* 467 (2007).

<sup>77</sup> See Gal, *Small Economies*, *supra*, note 3, Ch. 1.

The creation of global antitrust standards may also assist antitrust advocates in advancing the adoption of welfare-based competition rules. Indeed, it is more difficult for interest groups to put forward a set of rules which significantly diverges from the ICN's recommendations than if such recommendations were absent. Such effects are especially important for small jurisdictions like Israel, in which political and business elites are often intertwined.<sup>78</sup> Moreover, joining forces to prevent anti-competitive world-wide cartels, mergers, and joint ventures will benefit all directly and indirectly, by creating stronger deterrence effects.

Yet the limited ability of small jurisdictions such as Israel to tackle international antitrust issues undoubtedly affects their bargaining position in reaching international cooperative agreements that go beyond voluntary compliance, especially on those issues that matter most to them. Harmonized rules that are likely to emerge from voluntarily negotiated agreements are likely to be tilted towards the interests of the large countries. This is because diverse unilateral enforcement levels create different degrees of dependency which, in turn, create a pattern of power that affects the negotiations. This is because large jurisdictions have a limited motivation to consent to changes in their antitrust policy which moves them closer to the global optimum but which might reduce their own welfare.<sup>79</sup>

This is especially true with regard to the current ICN cooperation efforts. While no jurisdiction controls the agenda or the final choice, the dynamics of the organization inevitably lead to an outcome that does not significantly change the status quo. Since agreements are voluntary, any rule which changes the current status-quo should make all better off.<sup>80</sup> Jurisdictions would thus not agree to concessions that reduce their benefits from the current situation. The fact that negotiations are generally area-by-area and even rule-by-rule strengthens this outcome, since no "trading" on benefits in different areas can be achieved, as Guzman has suggested.<sup>81</sup> While the importance of international agreements should not be belittled, a more realistic approach to their possible outcomes is warranted.

Let me provide here one example, and refer the reader elsewhere for additional ones.<sup>82</sup> This example involves the use of market shares as indicators of market power in abuse cases. Given the costs involved in a full-fledged market analysis and the fact that in many cases market shares do indeed provide a good estimate of market power, small jurisdictions often use market share indicators.<sup>83</sup> However, the ICN committee on unilateral conduct reluctantly and only partially acknowledge the benefits of the use of market shares and at one point suggestions were made to criticize this practice.<sup>84</sup> Indeed, market shares are imperfect indicators of market power. But requiring the use of much more complicated indicators may imply that in small jurisdictions no cases of abuse could be brought in practice, given prohibitively high costs of proof.

Small jurisdictions do have, however, a strong card up their sleeve, should they join forces: their pre-merger notification procedures. This card is worthy not because of

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<sup>78</sup> *Ibid.*

<sup>79</sup> *See also* For the seminal work on this issue see Guzman, *supra*, note 52.

<sup>80</sup> At least it should make the strongest negotiators are better off.

<sup>81</sup> Guzman, *supra* note 52.

<sup>82</sup> Gal, *Unique Challenges*, *supra*, note 1.

<sup>83</sup> *See, e.g.*, Gal, *Small Economies*, *supra* note 3.

<sup>84</sup> [www.internationalcompetitionnetwork.org](http://www.internationalcompetitionnetwork.org). The author is a non-governmental advisor of the working group on unilateral conduct.

how it is used to remedy the problems of each jurisdiction by itself, but due to the sheer number of small jurisdictions which have adopted merger notification requirements. These procedures impose high transaction costs on firms wishing to merge that operate in global markets, which are generally located in large jurisdictions. Thus, small jurisdictions can potentially "trade in" this card, as Guzman suggested, for concessions in other fields of antitrust, such as export cartels which harm their jurisdictions.<sup>85</sup>

#### **IV. Conclusion**

This chapter studied the application of Israeli competition law in international antitrust cases. It analyzed both the existing legal regime as well as the practical considerations in applying the RTPL in such cases. It showed that the current system of limited national vision and the unilateral non-cooperative and cooperative enforcement approaches which currently predominates international antitrust creates high obstacles to Israel in enforcing its laws on large, foreign firms. Moreover, current harmonization efforts hold little promise to solve these enforcement problems.

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<sup>85</sup> For a general idea of mutual payoffs see Guzman, *supra* note ?, at ?.