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Judgments by the Court of Justice of the EU on the EU's Trade with Israel's Disputed Territories

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The EU is one of the largest trading partners of Disputed Territories (DTs) in the world. The Court of Justice of the EU (CJEU) reaffirmed the EU's differentiation policy between Israeli products from within or outside the DTs. This paper considers the aptness of the role played by the CJEU, the effects and effectiveness of the judgments, and their foreseeable significant implications for Israel.

A. Introduction

The European Union's (EU) search for identity as an international actor is sustained, among other things, by its trading power through a large network of trade agreements with third states. While acknowledging the illegality of occupation under Public International Law (PIL), the EU remains one of the largest trading partners of Disputed Territories (DTs) in the world. The latter is significant to the relations between the EU and Israel since the EU is Israel's largest trading partner and accounts for about a third of Israel's total trade.[1] Remarkably, its policy towards trade with Israeli DTs is inconsistent compared to its policy towards trade with other DTs.[2]

Although territorial disputes are some of the most politically charged issues in international law, claims regarding the legality of the EU's trade with third states controlling DTs have come before the Court of Justice of the EU (CJEU, Court) through seemingly mundane and technical controversies of trade. In 2010 and 2019, disputes regarding the EU's trade with Israeli DTs were adjudicated by the CJEU that reaffirmed the EU's differentiation policy between Israeli products from within the 1967 lines or from the DTs.[3] This paper does not intend to challenge the EU's differentiation policy nor the lawfulness of trade with DTs. Rather it focuses on evaluating the role played by the CJEU.

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[1] Annual trade flows between Israel and the EU in 2019 exceeded 45bn $, about one third of Israel's entire international trade. For comparison, in 2019 Israel's trade with the US amounted to 27.7 bn$ and with China to 11.2 bn $ (Israeli CBS, 2020). Israel is the EU's 24th biggest trade partner, representing 0.9% of the EU's total trade in goods in 2020.

[2] The lawfulness under PIL of economic activities in occupied territories is not unequivocal, see for example: Antoine Duval and Eva Kassoti (Eds.) *The Legality of Economic Activities in Occupied Territories International, EU Law and Business and Human Rights Perspectives*, (Routledge 2020). However, an inconsistent trade policy that discriminates among states controlling DTs might breach basic norms of international trade law, particularly relevant rules of the World Trade Organization (WTO).

[3] In these judgments the CJEU placed heavy reliance on general principles of PIL, but the judgments were subjected to fierce critique, see Section C.

Notably, these cases have not reached the International Dispute Settlement Mechanisms (IDSMs) established under the agreement between the EU and Israel and were decided by the CJEU in the absence and without the consent of the state of Israel.[4] Internally under EU law, the CJEU has extensive powers of judicial review on the EU's international trade agreements. Nevertheless, from the perspective of Israel, other third states and PIL, this might be considered problematic since international trade agreements are governed by PIL, therefore disputes concerning such agreements ought to be resolved by the IDSMs under the agreements and not by the court of one of the parties.[5] Furthermore, under PIL a court of one of the parties is not competent to determine the rights of the other state, party to the agreement, without its consent.[6] Thus, the appropriateness and the effectiveness of the assertion of jurisdiction by the CJEU is questionable from the point of view of Israel, other third states and PIL.

B. The Dispute between the EU and Israel on trade with the DTs

For about 30 years (1967-1997), the EU's policy and practice under trade agreements with Israel did not differentiate between Israeli products originating from within or outside the DTs (The West Bank, East Jerusalem, and the Golan Heights). Since the Oslo process in the mid-1990s, the EU has been trying to promote its role as a political influencer in the Israeli-Palestinian political conflict by pursuing a policy of differentiation between Israel and the DTs. For this purpose, the EU has used trade agreements as legal platforms for disseminating its norms and policies.

The conclusion of the EU-Israel Association Agreement (AA) in 1995, which entered into force in 2000, and of the EU-PLO Interim Association Agreement in 1997, served the EU to enhance its new differentiation policy. Consequently, the EU applied various measures aimed to guarantee the exclusion of goods originating in Israeli DTs from trade benefits of the EU-Israel AA. In contrast, Israel tried to sustain the position that products from the DTs remained under the AA's scope and hence entitled to such benefits (the Dispute).

Since the Dispute had evident political implications, technical consultations between customs authorities and discussions in diplomatic channels for almost ten years, were unsuccessful and the EU authorities gradually applied more pressure and measures.[7]
In 2004 Israel surrendered to the EU's requirements and agreed to specify the geographic location of production for any product exported to the EU. However, this arrangement did not bring the Dispute to an end.

[4] Under internal EU law procedures, third states cannot participate in proceedings before the CJEU, except for very limited conditions.
[5] Although the CJEU is a powerful regional court, it may nevertheless be considered the domestic court of the EU and its Member States and not an international court, from the point of view of third states and of PIL.
[6] J Paulsson, *Denial of Justice in International Law* (Cambridge University Press 2005) 4. It could be argued that the CJEU's judgments are internal judgments that bind only the EU and therefore do not determine the rights of third states without their consent, but this argument is not convincing, see Section D. 'Effects and Effectiveness'.
[7] For example: labeling requirements for Israeli settlements' products; Warnings to European importers from Israeli DTs; Restricted European cooperation with Israeli banks operating in the settlements; Reducing tax benefits for European organizations which support the settlements; Revocation of the validity of official Israeli documents issued in the DTs (e.g., on behalf of Ariel University), etc.

In general, the EU does not apply the same approach towards trade with some 150 DTs, some within the EU,[8] and, its policy towards trade with Israeli DTs and other DTs around the world is inconsistent.[9]

C. CJEU's Judgments on Trade with DTs

On the legal front, and although the Dispute continued to escalate, Israel has decided to refrain from initiating arbitration under the IDSM set under the EU-Israel AA in an attempt to ascribe a technical character to the Dispute with its largest trading partner. Given the legally vague and poorly specified arbitration process provided for by the AA, the Israeli authorities were reluctant to start an international arbitration, concerned that a binding decision by trade arbitrators might affect the definition of Israel's permanent borders.

Furthermore, as both Israel and the EU are members of the World Trade Organization (WTO) and although Israel was backed by legal opinions that suggested that the EU has breached some of its WTO commitments, Israel did not lodge a complaint against the EU in the WTO for rather similar reasons. Nevertheless, the Dispute has reached the CJEU through internal EU law procedures. The claims were initiated by private parties and were based among other things on the EU-Israel AA.[10]

The *Brita* Case:
In 2008, while not all venues for dispute settlement under the EU-Israel AA were exhausted, the CJEU was asked by a German court, within the framework of an EU law procedure, to determine whether products imported by a German company (Brita) from the West Bank, are eligible for trade concessions under the EU-Israel AA.

In the *Brita* judgment of 2010, the CJEU determined that the controversy was not a mere technical customs dispute, rather it was about the territorial scope of the EU-Israel AA. The latter depended on the interpretation of the term "the territory of the State of Israel" under Article 83AA. By applying some principles of the international law of treaties and EU law, the *Brita* judgment deprived goods originating in the DTs of the EU-Israel AA's benefits, contending that they should be covered by the EU-PLO Agreement.

The *Psagot* Case:
The *Psagot* case was initiated in France by the Israeli Psagot winery, situated in an Israeli settlement in the DTs. Psagot's declared aim was to challenge France's labelling requirements that were based on the EU's policy, not only on business grounds but also on political grounds. The Israeli government concerned of the broad potential political consequences of such a judgment, asked Psagot to withdraw the claim, but they refused to do so.

[8] E.g., North Cyprus, Ceuta, and Melilla.
[9] For example, under the EU's Council Decision of December 2012 the EU is committed to ensure that all agreements between Israel and the EU must explicitly indicate their inapplicability to Israel's DTs. Such a policy was not adopted with respect to other states controlling DTs. The 2015 EU's Commission 'Interpretative Notice' on labelling goods from DTs only addresses products imported from Israeli DTs. In contrast, the EU is willing to allow Turkish Cypriot products to enter its internal market as if they were imported from the Republic of Cyprus. Similarly, the EU openly accepts products originating in Western Sahara (WS) under trade agreements with Morocco.
[10] According to the CJEU's caselaw, EU's international agreements are considered part of EU law and as such are subjected to the interpretative jurisdiction of the CJEU. In this manner, where the interpretation of an EU's agreement with a third state is raised in a case before a national court of an EU Member State, if the conditions of Article 267 TFEU are met, the national court refers a request for a preliminary ruling to the CJEU. The referring court is obliged to apply the CJEU's interpretation to the case before it.

The claimant Psagot thus activated France's domestic court, which referred an interpretative question to the CJEU. The CJEU, was asked to determine whether foodstuffs imported from a territory occupied by Israel must, under EU law, bear a specific indication that they come from an Israeli settlement. Although the CJEU underlined that the case is centered on EU consumer and customs legislation, it has, nevertheless, interpreted the relevant provisions in light of PIL principles, such as the Palestinian people's right to self-determination and the rules of international humanitarian law, which prohibit policies of population transfer into occupied territories. In its judgment of 12 November 2019, the CJEU laid down that the labelling of products originating in a territory occupied by Israel must bear, not only the indication of that territory, but also the indication of an Israeli settlement.

The CJEU's judgment regarding the EU's trade with Morocco and Western Sahara (WS) provides a relevant example for comparison with the *Brita* and *Psagot* cases since Morocco's control over WS bears comparable features in terms of PIL to Israel's control of the DTs.[11] Yet, with respect to Israel, the EU determined that the EU-Israel AA is not applicable to the DTs, whereas it insists that its AA with Morocco is applicable to WS.

The *Front Polisario (FP)* Case

In the *FP* case of 21 December 2016, the EU Council appealed before the CJEU, the judgment by the EU General Court (GC).[12] In its judgment the GC upheld the action brought by the FP, a national liberation movement for WS, for the partial annulment of Council Decision 2012/497/EU of 8 March 2012 on the conclusion of certain trade and fisheries agreements between the EU and Morocco. The FP asserted that the EU had violated both EU law and PIL regarding the rights of the Saharawi people by concluding these trade agreements with Morocco, insofar the agreements applied to the territory of WS. In the Appeal the CJEU decided to set aside the GC's judgment based on an interpretation of the scope of the contested EU-Morocco agreements as excluding WS's territory.

It could be argued that in the *FP* ruling the CJEU narrowed the gap between the EU's approach towards Morocco and Israel by laying down a consistent approach towards the DTs – a policy of non-recognition entangles non-application of the AAs. However, the CJEU was criticized for disregarding the practice, where the EU institutions clearly declared that they *de facto* apply the agreements with Morocco to WS, and thereby avoiding a potential

[11] The EU concluded AAs with both Israel and Morocco under the same aegis (the Common Commercial Policy and the Barcelona Process) and in the same time span (1995 and 1996, respectively). In the case of Israel, the EU has concluded a separate agreement with the Palestinians while in the case of Morocco there is no agreement between the EU and WS. In both cases, the territorial applicability of the bilateral AAs was left equivocal, referring 'to the territory of the State of Israel' and 'to the territory of the Kingdom of Morocco', respectively. Both Israel and Morocco are accused by the international community of long-standing occupation and of a wide-scale settlement policy in breach of the right of self-determination (of the Palestinians and of the Sahrawi population, respectively).

[12] T-512/12, *Front Polisario v Council*, EU:T:2015:953, 10 December 2015.

EU liability for breaching certain PIL principles.[13] In any case, the *FP* judgment did not and would not eliminate this gap altogether.[14]

Much of the scholarly debate on the CJEU's judgments on trade with DTs, pointed to flaws in the CJEU's selective application of PIL through an EU law lens,[15] and for opting for a political approach, by applying PIL rules such as the right of self-determination, instead of a pragmatic legal approach of applying relevant principles of international trade law.[16] The latter could have resulted in a different decision that could help to avoid the political effects of the cases on third states' essential interests without their consent.

D. Effects and Effectiveness

One may wonder whether the legal result of the judgments, that effectively excluded the DTs from the scope of the AAs, provided the claimants with the most beneficial remedy. The *Brita* decision deprived the European claimant from trade benefits that were the practice for many years under the EU-Israel AA. In *FP*, some argued that the rulings are a political victory for the FP against Morocco, however it remains to be seen whether the WS population will benefit as much. In *Psagot*, the French court's reference triggered an interpretation of EU law on labeling products from Israeli settlements that is now mandatory in all EU Member States, despite some criticism of the CJEU's interpretation. Time will tell how the power given to the consumers by labeling the Israeli settlement products will impact the practice.[17] All in all, the exclusion of the DTs from the scope of the AAs might prevent future claimants from claiming breaches of their rights in the DTs under the AAs.

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[13] Following the *FP* judgment, the EU Council adopted in 2019 two decisions to revise the EU-Morocco AA and fisheries agreements to expressly extend their territorial scope to WS claiming that it is beneficial for the WS population. This demonstrates that albeit the *FP* judgment, the EU institutions do not intend to change their trade practice towards Morocco and WS. Consequently, the FP challenged the 2019 Council decisions before the EU's General Court (GC). By its judgments of 29 September 2021 in Case T-279/19 and T-344/19, the GC annulled the contested decisions relating to the AA, and dismissed as inadmissible the FP's action in Case T-356/19 regarding the fisheries agreement. The GC found that the 'consultations' conducted by the EU institutions could not be regarded as expressing the consent of the people of WS to the agreements as required by PIL. The EU Council will appeal the GC judgment before the CJEU, and the GC delayed the effects of its judgment pending such appeal. Given the previous *FP* judgement by the CJEU in appeal on a GC judgment, it is possible that, on the coming appeal, the CJEU will similarly find a way to maintain the legal effects of the EU-Morocco Agreements.

[14] For example, the exclusion of DTs from eligibility for EU funds by the 2013 Guidelines and the requirement of an indication of the location of production by the 2015 Interpretative Notice, is required only with relation to Israeli settlement products but was never adopted in relation to Morocco even after the *FP* judgment. Also, the EU Council's decision of 2012 of an announced policy of refraining from applying its agreements with Israel to the DTs was not adopted with respect to Morocco and WS.

[15] See for example Eckes, Christina, 'International Law as Law of the EU: The Role of the ECJ' in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), International Law as Law of the European Union, (Martinus Nijhoff Publishers, 2011), 353-377, CLEER Working Paper 2010/6, Available at SSRN: https://ssrn.com/abstract=2096203

[16] It could be suggested that the controversies under the trade agreements would be treated as predominantly trade issues. Therefore, in accordance with principles of international trade law, in particular GATT principles, the definition of the 'territory' of the AAs, could include occupied or administered territories without recognizing Israel's sovereignty in the DTs. See: Rachel Frid de Vries, 'EU Judicial Review Of Trade Agreements Involving Disputed Territories: Lessons From The Front Polisario Judgments' (2018) 24 Colombia Journal of European Law 498; Olia Kanevskaia, 'Insights Special Section – What's in a Name ? The Psagot Judgment and Questions of Labelling of Settlement Products Misinterpreting Mislabelling : The Psagot Ruling' (2020) 4 763, 764.

[17] The EU's position on labeling settlement products seems to suffer some severe weaknesses in uniform position and legitimacy among the Member States and lack of consistency in the EU policy. The *Psagot* judgment's approach is not necessarily acceptable to other countries, particularly the US.

Given that certainty and stability are essential elements in international trade and treaty relations, these judgments that could legalize a unilateral change of long-standing EU treaty practice might cause uncertainty that cannot be properly answered by smaller trading partners, such as Israel.

The CJEU was criticized for having missed an opportunity to call upon the EU to reassess its inconsistent trade policy towards DTs. Overall, the discriminative EU approach towards trade with Israel's DTs did not change after *Brita*, it was, possibly, reinforced by the Court's decision that served as a legal basis for further EU's measures.[18]

At first glance, the Dispute was not particularly significant for Israel's industrial base in the DTs as it is a small fraction of Israel's overall exports to the EU. However, many Palestinians who used to work for Israeli factories situated in the DTs lost their jobs when some of these factories relocated into the pre-1967 Israeli borders. The Dispute also led to measures imposed on Israeli products and projects not only by the EU but by third States that follow the EU's leadership in trade and foreign relations. To this day the Dispute constantly escalates due to the unstable political situation in the Middle East, and adversely affects Israel's ability to realize the significant potential of the EU-Israel AA and impedes the possibility of upgrading the cooperation.[19]

In this respect, a worrisome development is indicated in the Advocate General (AG)'s Opinion in *Psagot*, where AG Hogan adopted an analogy between the consumers' boycott on the Apartheid regime in South Africa to directly address consumers' rights regarding the Israeli policy in the DTs. Although there are essential flaws in this comparison, and it was not endorsed in the CJEU's *Psagot* judgment, such a political argument coming from a high-ranking officer of the court might affect public opinion in Europe and beyond.

E. Concluding Remarks - The Way Ahead

The more the EU's trade policy expands, and the more foreign relations elements are woven into disputes on trade agreements, the more the CJEU's judgments may have significant effects. Since the trade disputes under the AAs were inextricably tied to third states' essential political interests and were decided in their absence and without their consent, such judgments by the CJEU, the court of one of the parties to the AAs, raise concerns from the perspective of third states and the international rule of law. Additionally, concern might be raised that the legitimacy of the CJEU might erode due to the political and legal complexities surrounding the EU's trade policy with DTs and the criticism of the CJEU's judgments.

The adjudication of these cases by the CJEU may be lawful under internal EU law which legally does not bind third states. However, given the substantive effects of the judgments

[18] For example, in 2013 the Commission published Guidelines limiting the eligibility of Israeli entities in the DTs for EU funded financial instruments, that specifically referred to *Brita*. The application of the 2013 Guidelines in the context of an agreement allowing Israel's participation in the EU's Framework for Research and Innovation almost sabotaged Israel's participation in that important scientific program.

[19] For instance, although Israel is among the EU's main trading partners in the Mediterranean area, the EU has not concluded the next generation agreement - a Deep and Comprehensive Free Trade Area - DCFTA, similar to the DCFTA that was already concluded with several European countries and is being negotiated with Morocco and Tunisia.

on third parties' essential rights it may be recalled that under PIL a court of one of the parties is not competent to determine the rights of the other state, party to the agreement, without its consent. In the ongoing Dispute with the EU, Israel refrained from initiating an international claim and evidently could not have prevented the judgments by the CJEU. However, not employing the IDSM under the AA does not automatically establish consent for jurisdiction for the CJEU. The potential competing jurisdiction between the CJEU and the IDSMs agreed by the parties and the effects and effectiveness, or lack of, of the CJEU's rulings, indicate that the appropriateness of the CJEU's assertion of jurisdiction remains questionable. If other domestic courts were to follow the jurisdictional attitude of the CJEU, it might create a slippery slope, potentially bringing a broad range of highly sensitive third-party political disputes before domestic courts, disputes that are more appropriate for diplomatic negotiations or for IDSMs established by the parties at the international level.

Alternatively, the CJEU could opt to set proper limitations to the admissibility and to the standards of its judicial scrutiny by stressing treaty obligations such as the IDSM.
It could opt to give more weight to relevant norms of international trade law under which the definition of the 'territory' of the AAs, could include occupied or administered territories without recognizing Israel's sovereignty in the DTs. Such an interpretative approach may contribute to avoid a unilateral change of long-standing EU treaty practice, promote certainty and stability of trade and treaty relations, and could help to avoid the political and economic effects of the judgments on third states' essential interests without their consent.

Be that as it may, the foreseeable legal effects of the CJEU's judgments will have in/direct significant implications for Israel since the EU remains its biggest trading partner and they both share common values. As is evidenced, the EU's policy regarding trade with Israeli DTs changed over time and in practice the differentiation policy of the EU applies.[20] It may change again in the future encouraged by, for example, Israel's recent normalization agreements with some Muslim states (The United Arab Emirates, Bahrein, Morocco, Sudan) and a future political agreement between Israel and the Palestinian Authority.[21] In contrast, the CJEU's judgments lack such flexibility and thus the potential adverse effects of these rulings might be difficult to overcome.

By shifting the decision power partly to consumers, the *Psagot* judgment might trigger another front with Israel, held by civil society, added to that held by decision-makers.[22] The Israeli government is advised to closely follow and scrutinize all relevant legal developments and to accelerate its efforts towards the EU foreign policy, not only to promote the upgrade of cooperation through diplomatic channels,[23] but also to win public opinion.[24]

The long-awaited upgrading of the EU-Israel AA to enhance the cooperation between the parties, and updating the IDSM under the agreement, could be a step in the right direction.

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[20] Since 2004 Israel adapted to the EU's differentiation policy on several occasions. See for instance: Erasmus+, Horizon Europe 2021-2027, and the recent Israeli government's initiative to join the EU's Creative Europe program.

[21] The Commission's 'Renewed partnership with the Southern Neighbourhood - A new Agenda for the Mediterranean' of February 2021, does not yet indicate a change of paradigm.

[22] See for example: European Citizens' initiative to the Commission regarding trade with DTs 8-9-21 'Ensuring Common Commercial Policy conformity with EU Treaties and compliance with international law'

[23] A breakthrough may result from the invitation by High Representative/Vice-President Josep Borrell to Alternate Prime Minister and Foreign Minister of Israel Yair Lapid to Brussels on 12-07-2021 to participate at a lunch discussion with the EU Foreign Ministers in the margins of the Foreign Affairs Council.

[24] Nellie Munin, Ofer Sitbon 'Between Normative Power and Soft Power: the Psagot case' (2021) Australian and New Zealand Journal of European Studies, Vol 13(1) 18.