# Challenging the EU's Illegal Restrictions on Israeli Products in the World Trade Organization

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KOHELET POLICY FORUM
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# Executive Summary

## LEGAL OVERVIEW

- The European Commission is expected to take new measures in the coming months to impose special labelling requirements on Israeli products from areas where it regards Israel as lacking a legitimate claim to sovereignty. The Commission is also in the process of imposing what amounts to complete exclusion on agricultural products from these areas. Since 2013, the EU has been steadily imposing sanctions of rapidly escalating severity, despite vigorous Israeli diplomatic efforts. If the planned measures are not challenged, more will quickly follow.
- Israel has a powerful, but thus far entirely unused tool against the EU sanctions. The EU's proposed measures restrict Israeli trade in violation of international trade law found in numerous multilateral treaties, including articles 2.1 and 2.2 of the World Trade Organization Agreement on Technical Barriers to Trade; Articles IX, X and XIII of the General Agreement on Trade and Tariffs and Article 2.3 and 5.6 of the Agreement on the Applications Sanitary and Phytosanitary Measures, among others.
- The WTO has a dispute resolution process that provides Israel with a relatively attractive forum to challenge the European restrictions. The process does not involve recourse to a permanent international court likely to be influenced by hostile attitudes towards Israel.
- The question of trade violations is entirely separate from the underlying merits of the conflict. Thus even if Israel were to concede for purposes of the dispute that the EU is correct about the illegitimacy of Israel's presence in the territories and parts of Jerusalem, this would not provide a basis for the restrictive trade practices.
- Any justifications the EU could adduce for its policies are undermined by their admittedly discriminatory application. The EU does not have a general set of rules for dealing with occupied territories, settlements or territorial administrations whose legality is not recognized by the EU. Rather, the EU has special restrictions aimed at Israel. This violates the fundamental rules of the GATT/WTO system, under which even otherwise valid trade restrictions are void if not applied uniformly to WTO members. Thus Israel's successful assertion of its rights in no way involves having the WTO accept its position on the status of the territories.
- EU arguments that these territories are not part of Israel are irrelevant in this context. The scope of the WTO agreements explicitly extend beyond a country's sovereign territory, and include territories under its "international responsibility." The drafting history and subsequent application of the GATT make clear that this involves territories under military occupation.

## NEXT STEPS

- Israel must begin the process of preparing to assert its international trade rights in the WTO's dispute resolution system, a quasi-judicial forum with authority to overturn measures that violate these rules.
- This would then be followed by formal consultations with EU trade officials, a required "out-of-court" step before invoking the WTO dispute resolution process.
- The process should be monitored at the ministerial level or by a special interministerial committee. It is important to note that even the beginning of formal consultations does not commit Israel to bringing a dispute to a panel, and even then the matter can be narrowed or settled at any time. The substantial majority of WTO disputes never result in a ruling, but are settled diplomatically. However, bringing a dispute provides for diplomatic leverage that would otherwise be absent.
- It is extremely likely that the EU would respond to Israeli moves towards the WTO with a vocal and forceful reaffirmation of its position. This is commonplace in WTO disputes. Israel must be prepared to not be intimidated by such protests. The likely consequence of a failed WTO approach will be no worse than a failed diplomatic one, and the chances of success are much higher.
- If other steps fail, Israel should vigorously pursue a challenge to the measures through the WTO's dispute resolution system. The WTO has the power to rule the EU measures illegal. Moreover, it can authorize various forms of retaliation and self-help by Israel.

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# I-Introduction

In the next few months—possibly as early as October 2015—the European Commission plans to adopt a measure calling for special labelling for Israeli goods related to "settlements," as well as other restrictions and outright exclusions on some such products.[1] The idea of an EU-wide measure calling for special labelling of Israeli "settlement" goods is several years old,[2] yet now it appears to be closer than ever to implementation.

Statements of European officials show that these actions are another step in a systematically implemented series of increasingly serious trade restrictions against Israel. Proposed future steps include restrictions on all Israeli banks because of their operations in disputed territories.[3] In other words, the EU is self-consciously attempting to pioneer a new model for trade with Israel and relationship to the areas under Israeli jurisdiction that fundamentally differs from its relationship with other countries.

Israel, however, is in a strong position to halt or at least significantly delay the process of escalating EU restrictions. The proposed EU measures are unlawful trade barriers against Israeli products. They violate European duties under multilateral and bilateral trade agreements. In particular, Israel has strong legal grounds to claim that the proposed measures violate articles 2.1 and 2.2 of the WTO Agreement on Technical Barriers to Trade, as well as the Articles IX, X and XIII of the General Agreement on Trade and Tariffs, Article 2.3 and 5.6 of the Agreement on the Application of Sanitary and Phytosanitary Measures, among others. These violations mean that Israel can challenge the EU measures in the WTO dispute resolution process, a relatively apolitical forum that will focus on the unlawful discriminatory nature of European trade restrictions, rather than the broader public law questions.

European foreign ministers lobbying for the labelling measure have justified the anti-Israel measure on the grounds of consumer protection.[4] Others have claimed that the labelling measure is necessary under the territorial clauses of the EU-Israel Association Agreement.[5] These arguments, as well as others relating to the underlying status of the territories, are of little help to the EU in the trade law context.

***The proposed EU measures are unlawful trade barriers against Israeli products. They violate European duties under multilateral and bilateral trade agreements.***

*The EU's treatment of Israeli goods from "settlements" contrasts with its treatment of other countries in similar situations.*

In particular, the EU's treatment of Israeli goods from "settlements" contrasts with its treatment of other countries in similar situations, as EU reports have themselves admitted.[6] This violates the core GATT and WTO norm of non-discrimination. Indeed, even if the consumer protection rationale the EU advances for labelling were valid, its discriminatory application would make it illegal. As it happens, the European justification for the discriminatory trade restriction as a required measure of consumer protection is transparently insincere. This means that in addition to being illegal on the grounds of discrimination, the proposed European measure is also illegal under article 2.2 of the WTO Agreement on Technical Barriers to Trade and other WTO treaty provisions that forbid regulatory measures that unduly burden trade.[7] The insincerity of the European claim of consumer protection is attested to by a ruling by the Supreme Court of the United Kingdom rejecting the claim that labelling of Israeli "settlement" products is a necessary means of consumer protection,[8] as well as the European Commission's own dealings with other countries such as Morocco.[9]

*The WTO dispute resolution mechanism presents Israel with its best chance to assert its legitimate trade rights.*

To date, Israeli responses to the proposed European guidelines have been restricted to diplomatic pleading. However, the intransigence of European officials on the principle of anti-Israel labelling, coupled with their interim adoption of several other unlawful sanctions against Israeli products, make it clear that Israel has to consider stronger measures to defend itself against unlawful European trade sanctions. The WTO dispute resolution mechanism offers a forum with favorable law, and non-unsympathetic decision-makers. It presents Israel with its best chance to assert its legitimate trade rights.

Even short of initiating a formal dispute, there would be value for Israel to simply begin seriously asserting the illegality of the EU measures under WTO rules, and threatening to take further action. Thus objections may delay and potentially prevent further EU actions. It does not appear that the Commission appreciates the seriousness of the trade law objections to its actions[10] (in part, because Israel, unlike other countries subject to EU sanctions, has not openly raised WTO objections).

We note that initiating a WTO dispute is not seen as a diplomatically hostile act; disputes most often arise between close allies and trading partners, like the U.S. and Canada. Likewise, while WTO disputes allow a victim of unlawful trade sanctions to adopt limited retaliatory responses, they do not permit larger trade wars or provide any legal opening for the EU to engage in its own retaliatory actions in response. In other words, while a WTO challenge can successfully defend Israeli rights, it does not tend toward greater political or trade tensions with the EU.

*Initiating a WTO dispute is not seen as a diplomatically hostile act.*

# II-Background: European Measures Against Israeli Trade

***The EU and EU states are already engaging in a wide range of measures against Israeli trade that are not imposed on other countries in the world.***

To understand the place of the proposed labelling requirements within broader unlawful European sanctions against Israeli trade, it is necessary to review other recent European measures against Israeli commercial entities.

Even without the proposed European measure to impose special labelling on Israeli "settlement" products, the EU and EU states are already engaging in a wide range of measures against Israeli trade that are not imposed on other countries in the world. These measures include special advisories recommending refraining from trade with Israelis, using rules of sanitary inspections to forbid importing certain Israeli products, imposing higher customs duties on certain Israeli products on the basis of a unilaterally imposed treaty interpretation adverse to Israel, and a self-imposed European Commission boycott on certain Israeli "activities."

The proposed "settlement" labelling measure echoes non-binding steps already taken within the EU that, when combined with European state advisories, clearly threaten European businesses and consumers improperly with the taint of possibly criminal wrongful action.

Moreover, it is clear when examining the record that the labelling measure is one of an escalating series of economic and diplomatic sanctions being unilaterally imposed on Israel by the EU without legal authority.

***The labelling measure is one of an escalating series of economic and diplomatic sanctions being unilaterally imposed on Israel by the EU without legal authority.***

## a. Ban on Certain European Commission Cooperation with Israeli entities

On June 30, 2013, the European Commission adopted (and officially published on July 19, 2013) a notice with Guidelines forbidding the allocation of European Union grants, prizes and financial instruments to any Israeli "entity" that has an address in the West Bank, Golan Heights, formerly Jordanian-occupied parts of Jerusalem ("east Jerusalem") or Gaza Strip. (Bizarrely, the Guidelines include the Gaza Strip even though there are no Israeli "entities" operating there.) The Guidelines also prohibit giving such grants, prizes and financial instruments to any activity carried out by an Israeli "entity" in those areas unless the activity is "aim[ed] at benefiting protected persons under the terms of international humanitarian law who live in these territories" or "aim[ed] at … promoting the Middle East peace process in line with EU policy."[11]

Importantly, while the Guidelines are described as being aimed at "settlements," they go well beyond any potential definition of settlement activity as it may be understood in international law.

The standard international law claim against Israeli "settlement activity" is that it violates article 49(6) of the Fourth Geneva Convention, which forbids "occupying power[s]" to "deport or transfer parts of [their] own civilian population into the territory [they] occup[y]."[12] But the Guidelines don't target "transfers." They are sweeping—they forbid European Commission funding for any Israeli "activity" in the described territories unless for a political purpose approved by the EU, irrespective of whether the Israeli activity is connected with population transfers.

The Guidelines are therefore a good indication at the direction the labelling measure will take. The labelling measure is likely to reach all Jewish Israeli activities of any kind in areas the West Bank, Golan Heights, formerly Jordanian-occupied parts of Jerusalem ("east Jerusalem") or Gaza Strip.

***While the Guidelines are described as being aimed at "settlements," they go well beyond any potential definition of settlement activity.***

## b. EU Denial of Customs Treatment Due to Israeli Products for Products from "Occupied" Territory

Israel and the EU have an Association Agreement with free trade provisions reducing or eliminating customs for various goods traded between Israel and the EU.[13] The agreement was reached in 1995, and entered into force in 2000. While the agreement references certain areas of disputed sovereignty in the EU, it does not make special reference to any areas under Israeli administration as either being part of Israel or not part of Israel for purposes of the agreement.

Nothing in the Association Agreement grants the EU the right to reinterpret the territorial scope of the agreement unilaterally. Nonetheless, the EU has unilaterally imposed higher customs duties on Israeli products from territories under Israeli administration that the EU has decided are not "territory of Israel" since February 2005.[14] These territories include formerly Jordanian-occupied parts of Jerusalem, the West Bank and Golan Heights (and, when it was relevant, the Gaza Strip).

***Nothing in the Association Agreement grants the EU the right to reinterpret the territorial scope of the agreement unilaterally. Nonetheless, the EU has unilaterally imposed higher customs duties on Israeli products.***

In imposing the discriminatory treatment against products from Israeli-administered territory that the EU considers not to be Israeli territory, EU states rely upon a "technical arrangement" with Israel according to which Israeli goods exported to the EU have their zip codes noted in the certificate of origination.[15] EU officials use the zip codes to deny preferential customs treatment to goods from formerly Jordanian-occupied parts of Jerusalem, the West Bank and the Golan Heights. While Israel agreed to forward the information, it never agreed to the EU utilizing the information to discriminate against Israeli products from disfavored areas.[16] The EU has been misusing the information provided by the technical agreement for several years. The technical arrangement on zip codes is now openly being used by European states to discriminate against Israeli products in matters other than customs. For instance, a British labelling advisory (discussed below) that recommends discriminatory labelling against certain Israeli products notes that "the proof of preferential origin will contain details of the place of production and accompanying zip code (i.e. postcode) of the produce concerned. This zip code will enable a distinction to be drawn between products from the internationally recognized state of Israel and products from Israeli settlements in the West Bank."[17]

***The discriminatory customs treatment against Israeli "settlement" products is not duplicated by the European Union elsewhere in the world. The EU accepts Moroccan products from occupied Western Sahara as Moroccan.***

In 2009, the German manufacturer Brita brought a case before the European Court of Justice claiming the benefit of the customs provisions in the EU-Israel Association Agreement for goods originating in Israel. In this case, the goods had been produced in Area C of the West Bank and Israel had issued a certificate of origination for the products indicating they had originated in Israel. German custom authorities refused to accept the certificate, and the European Court of Justice upheld Germany's decision on the grounds that the West Bank is not part of Israel. The European Court of Justice reasoned that any other interpretation would clash with the EU's customs and trade agreement with the PLO (a bilateral agreement between the EU and the PLO reached in 1997).[18] The state of Israel was not a party to the case. Prior to the Court's decision, the Court's Advocate General issued an opinion that Germany had a right to disregard Israel's certificate of origination because Israel had not responded to German requests for information, while acknowledging that Israel and the EU have never reached any agreement on the territorial scope of the agreement.[19]

While the European Court of Justice decision purports to be an interpretation of the Israel-EU Association Agreement, it cannot legally bind Israel, which was not a party to the case. Nonetheless, the decision sounds a cautionary note about the likely ability of Israel to receive fair treatment before the European Court of Justice.

In any event, the discriminatory customs treatment against Israeli "settlement" products is not duplicated by the European Union elsewhere in the world, even with respect to territories like Western Sahara, which the EU acknowledges is belligerently occupied by Morocco and outside Morocco's internationally recognized boundaries. While Morocco has actively settled its citizens in occupied Western Sahara, and Moroccan businesses openly carry on commercial activity in the occupied territory, the EU accepts Moroccan products from occupied Western Sahara as Moroccan for purposes of customs and trade agreements.[20]

## c. EU State Labelling Requirements

Several EU countries have already adopted special labelling requirements for Israeli "settlement" products. There are currently regulations in Britain,[21] Belgium,[22] and Denmark[23] with special labelling recommendations for Israeli products, but not products of any other state's "settlements." The labelling rules imply that all Israeli activity of any kind within the West Bank, Golan Heights, formerly Jordanian-occupied parts of Jerusalem ("east Jerusalem") or Gaza Strip, is considered "settlement" activity, irrespective of its relationship to population transfers or even Israeli residence in the disputed areas.

Importantly, while the labelling requirements are only "recommendations," they insinuate that any failure to comply with the "recommendations" might be punished by authorities as consumer fraud.

The British advisory on labelling is representative. The British Department for Environment, Food and Rural Affairs issued what it called "technical advice" for "labelling of produce grown in the Occupied Palestinian Territories" in 2009.

The department advises that "food and drink goods that have been produced and packed" in what the department calls the "Occupied Palestinian Territories" can have only two possible origins: "Palestinian producers" or "an Israeli settlement." Thus, the "technical advice" essentially defines all non-Palestinian producers as "Israeli settlement[s]," demonstrating that its proposed "settlement" labelling refers to all non-Palestinian products from the West Bank, Golan Heights, formerly Jordanian-occupied parts of Jerusalem ("east Jerusalem") or Gaza Strip, irrespective of whether the products have anything to do with population transfers.

The department suggests special labelling, such as labelling all West Bank produce either "'Produce of the West Bank (Israeli settlement produce)' or 'Produce of the West Bank (Palestinian produce).'" The department presents this as a response to alleged "consumer demand for information about the origin of food that has been produced in the [Occupied Palestinian Territories],"[24] while suggesting that failure to follow the recommendations on labelling would constitute criminal fraud: "the Government considers that traders would be misleading consumers, and would therefore almost be certainly committing an offence, if they were to declare produce from the [Occupied Palestinian Territory] (including from the West Bank) as 'Produce of Israel'."

## d. EU State Advisories on "Illegality of Trade with Israeli 'Settlements'"

To date, seventeen European Union states have issued public warnings of dire consequences and implied criminal sanctions for those who engage in any commercial activity related to Israeli "settlements."[25]

A typical formulation is that found in the British guidance on "overseas business risk" for Israel:

> There are clear risks related to economic and financial activities in the settlements, and we do not encourage or offer support to such activity. Financial transactions, investments, purchases, procurements as well as other economic activities (including in services like tourism) in Israeli settlements or benefiting Israeli settlements, entail legal and economic risks stemming from the fact that the Israeli settlements, according to international law, are built on occupied land and are not recognized as a legitimate part of Israel's territory. This may result in disputed titles to the land, water, mineral or other natural resources which might be the subject of purchase or investment.

> EU citizens and businesses should also be aware of the potential reputational implications of getting involved in economic and financial activities in settlements, as well as possible abuses of the rights of individuals. Those contemplating any economic or financial involvement in settlements should seek appropriate legal advice.[26]

It is clear that the advisories intend to encourage consumer boycotts against Israeli "settlement" products. Indeed, the British guidance states explicitly that "[w]e understand the concerns of people who do not wish to purchase goods exported from Israeli settlements in the Occupied Palestinian Territories" and explains that this understanding lies behind British labelling requirements.

The advisories of other EU countries are largely identical—in fact, verbatim in most respects.[27] There is little doubt that governments coordinated their move.

No similar warnings have been issued regarding settlements in or settlement products from other territories considered belligerently occupied by the EU, such as Western Sahara, Nagorno Karabakh, Abkhazia, North Cyprus and South Ossetia.

The advisories have also been accompanied by reported ex parte contacts and threats with commercial interests to dissuade them from commercial activities with Israel.

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In August, 2013, for example, the Dutch Foreign Ministry reportedly urged the Dutch company Royal HaskoningDHV not to participate in the building of a sewage treatment plant in East Jerusalem on the grounds that Ministry officials claim that doing so would violate international law.[28] The threats led the company to withdraw from the project. The Dutch claim that building the plant—which would treat waste water that currently pollutes West Bank lands and waters without distinction as to ethnic identity—would violate international law, but this claim has no basis in the law. Even assuming the laws of belligerent occupation restrict Israeli activities in the West Bank, there is no doubt that Israel has the right to authorize companies to engage in infrastructure projects that benefit Palestinians and Israelis together.

Likewise, in December, 2013, Vitens reportedly cancelled a contract with the Israeli water company Mekorot, after receiving warnings from the Dutch Foreign Ministry.[29] Other reported incidents include Roskilde University (DTU) of Denmark cancelling an academic research project with Ariel University at the instigation of the Danish Foreign Ministry and Deutsche Bahn withdrawing from construction work on the Tel Aviv-Jerusalem highway after the intervention of the German Transportation Ministry.[30]

## e. EU Boycott of Certain Israeli Agricultural Products from Disputed Territory

In 2014, the European Commission changed its rules regarding the import of poultry from Israel. Specifically, in an amendment to Regulation (EC) No 798/200,[31] the Commission denied the validity of phytosanitary certificates relating to "the territories under Israeli administration since June 1967, namely

the Golan Heights, the Gaza Strip, East Jerusalem and the rest of the West Bank." The amendment acknowledged that there was no hygenic reason for denying the validity of the certificates; instead it stated that the restriction was being undertaken "[f]or the sake of market transparency and in accordance with public international law."

Since 2014, European officials have used this unilateral technical measure to impose trade restrictions on imported Israeli dairy and meat products, poultry and eggs. Media reports on the subject are contradictory,[32] but seem to indicate that European officials have imposed a complete ban on the import of the products, if their origin is in the disputed territory, on the grounds that the certificates of phytosanitary inspection cannot be accepted notwithstanding the fact that the required inspections are taking place and being performed competently.

***Importantly, the campaign does not appear to have been affected at all by the existence of PLO-Israel peace negotiations.***

## f. Other Contemplated EU Sanctions Against Israel

For several years, there has been a constituency within the EU bureaucracy pushing for diplomatic and economic sanctions against the state of Israel. For instance, in a series of reports by Heads of Missions in Jerusalem and Ramallah, EU diplomats have recommended a series of diplomatic and economic steps against Israel. Some of the measures have already been implemented, such as the 2013 EU Commission "settlement guidelines"[33] forbidding disbursing EU funds to Israeli activities in disputed areas. The 2014 Heads of Mission report suggests separate labeling of "settlement products," together with EU-wide warnings against economic and financial activities in "settlements."[34] Other proposed measures within the reports include barring financial transactions that "support" settlements, warning EU citizens not to buy property in formerly Jordanian-occupied parts of Jerusalem, warning EU tour companies to avoid benefiting "settlement business" in formerly Jordanian-occupied parts of Jerusalem, funding legal protection for Palestinians engaging in illegal construction, and changing European immigration regulations to punish "known violent settlers."

Importantly, the campaign does not appear to have been affected at all by the existence of PLO-Israel peace negotiations. Many of the anti-Israel steps already taken were done so during periods of negotiations. For instance, at the height of the most recent round of PLO-Israel negotiations sponsored by the United States, and overseen by Secretary of State John Kerry, Britain issued its technical advisory intended to reduce some kinds of economic activity with Israel.[35]

# III-Illegality of European Measures Against Israeli "Settlements"

International law does not grant the EU or EU states carte blanche in imposing economic sanctions on Israel. International trade law, in particular, forbids the kind of labelling measure proposed within the EU, as well as many other of the recent steps taken or planned against Israeli trade. The European measures violate international trade law in several ways, most especially by **discriminating** against Israeli products, and also by imposing **unnecessary burdens** on the trade of Israeli products.

*International law does not grant the EU or EU states carte blanche in imposing economic sanctions on Israel. The European measures violate international trade law in several ways.*

## a. Discrimination

Trade agreements to which Israel and the EU (or the EU states together) are a party, including the EU-Israel Association Agreement and various WTO/GATT agreements, guarantee non-discrimination in trade. That means that rules or practices must be applied generally, to all countries, rather than in trade relations with particular countries. The treatment afforded Israel is obviously unique and discriminatory, as well as more trade-restrictive than necessary.

### 1. How the Measure Discriminates

There are about 200 territorial sovereignty disputes worldwide, in many cases of which the EU does not accept sovereignty claims of the states which administer the territory in question. Among these territories are Western Sahara (controlled by Morocco), Kashmir (controlled in different parts by India, Pakistan and China), and many others. In many of these areas, the controlling state allows or actively encourages its citizens to live in the territory, in practices that are far more intrusive than those identified by Europe as "settlements" when Israel is involved. Despite the ubiquity of territorial disagreements and settlement practices, the EU has never *unilaterally* adopted a regulation requiring geographic labelling contrary to the exporting country's certificate of origination.

Outside the case of Israel, in several cases, European policymakers have taken pains to emphasize that consumer labels in Europe do not represent European views of territorial sovereignty. Outstanding examples include Taiwan, whose products are sold in Europe under the label "Taiwan," rather than "China," and the Western Sahara, whose products are labelled "Morocco," rather than "Western Sahara (Moroccan settlement)." Yet the EU does not recognize Taiwanese sovereignty[36] or Moroccan sovereignty over Western Sahara.[37] Indeed, the EU has taken no reported steps to prevent the marketing of products as "Made in Palestine" notwithstanding the EU's failure to recognize a state of Palestine.[38]

EU officials have consistently maintained that, despite Morocco's occupation of Western Sahara and denial of the Sahrawi people's internationally-recognized right to self-determination, nothing in international law requires labelling goods produced by Morocco in Western Sahara as "Made in Western Sahara," or excluding such goods from preferential customs treatment.

For instance, in response to questions in the European Parliament, the European Commission clarified in 2013 that "Neither the Association Agreement, or the Agriculture Agreement foresees any specific rules regarding requirements as to the labelling of products. Products originating in Morocco and imported into the Union can thus not be differentiated on a territorial basis. In general, under current EU legislation origin labelling is voluntary unless its omission would mislead consumers."[39] The Commission has in recent months reaffirmed this position before the European Court of Justice, in response to litigation brought by Sahrawi representatives.[40]

The legal problem posed by the European plan to discriminate against Israeli products has not gone unnoticed. The US, for example, recently adopted the Trade Promotion Authority legislation[41] stating that among the "principal negotiating objectives of the United States regarding commercial partnerships are …. [t]o discourage politically motivated actions to boycott, divest from, or sanction Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on the State of Israel" where "to boycott, divest from, or sanction Israel" is defined as including "actions by states, non-member states of the United Nations, international organizations, or affiliated agencies of international organizations that are politically motivated and are intended to penalize or otherwise limit commercial relations specifically with Israel or persons doing business in Israel or in Israeli-controlled territories." Follow-on legislation, awaiting final approval in Congress, specifically mentions the illegality under WTO treaties (specifically, GATT) of discrimination against Israeli products, including from "territories under Israeli jurisdiction."

Even vocal supporters of a harsh European policy against Israel have been forced to admit that the discriminatory behavior is legally deficient.[42] If the EU and EU states want to justify their harsh measures against Israeli "settlement" products as a matter of international trade law, they must adopt similarly harsh measures against not only the Moroccan products from Western Sahara, but also regarding products from occupied parts of Kashmir, Azerbaijan, Georgia and other WTO members.

There is only one other case where the EU has imposed trade restrictions regarding a territorial dispute. The EU, together with the US, imposed a series of sanctions on Russia related to Russia's purported annexation of Crimea; the EU views Crimea as sovereign territory of Ukraine, unlawfully occupied by Russia. The EU sanctions include "personal sanctions" (asset freezes and visa bans imposed on people and entities extra-judicially determined to be guilty of wrongful behavior in the annexation of Crimea), and a variety of trade sanctions, such as certain import prohibitions and bans on EU investment.[43]

Unfortunately for the EU, adverse treatment of Russia is not sufficient to legally justify its discrimination against Israeli products. The best that can be said for the EU is that it may be discriminating against two states, rather than just one. Russia has argued[44] that the trade-related sanctions violate the rules of WTO agreements, including GATT.[45] The EU's only plausible defense for its anti-Russia sanctions is one that cannot legally justify the EU's measures against Israel. Specifically, the EU is expected to raise the claim that it can utilize the exception in article XXI of GATT and article XIVbis of GATS, that allows the imposition of trade restrictions that are otherwise forbidden by the agreements where necessary for particular security reasons. It is far from certain that such a defense can justify EU trade sanctions against Russia, given the narrowness of the circumstances covered by the security exception. In any event, the security exception would not apply to European labelling measures against Israel because i) technical barriers to trade, like labelling, do not have any security exception; ii) the EU does not claim that its anti-Israel measures are motivated by security but rather by consumer protection; and iii) the EU is not claiming that it is motivated by security but rather by the mere neutral application of existing EU rules.

### 2. WTO Trade Agreement Provisions

Labelling requirements are a type of technical barrier to trade. Article 2.1 of the WTO Agreement on Technical Barriers to Trade is therefore particularly apposite to the proposed labelling measure. It requires that states "ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

***While the Technical Barriers to Trade Agreement lists several circumstances that may justify trade barriers. Discrimination is always forbidden.***

This is only one of several provisions in WTO treaties that forbid discriminatory treatment in trade. Articles 5.1 and 5.2 of the WTO Agreement on Technical Barriers to Trade also forbid discrimination in assessing conformity with technical regulations. Likewise, Article IX.1 of 1994 GATT Agreement (the General Agreement on Tariffs and Trade) specifies that "[e]ach contracting party shall accord to the products of the territories of other contracting parties treatment with regard to marking requirements no less favourable than the treatment accorded to like products of any third country.". Article III.4 of the 1994 GATT Agreement requires "treatment no less favourable" for all imported products "in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use." Other non-discrimination provisions of the 1994 GATT Agreement are found in articles I, X and XIII. Article X(3), for instance, forbids discriminatory enforcement ("Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings ..."). Article 2 of the WTO Agreement on Rules of Origin similarly forbids discrimination in applying rules regarding the origin of products.

Indeed, it is widely acknowledged that non-discrimination is one of the most basic principles of international trade law.

Importantly, in some cases, discrimination in trade renders measures invalid under international trade law, even where the discrimination is defended on the grounds of consumer protection and similar arguments. While the Technical Barriers to Trade Agreement lists several circumstances that may justify trade barriers, these justifications do not apply to discrimination. Discrimination is always forbidden.

The best illustration of this principle may be found in a recent WTO ruling on US meat labeling requirements (United States - Certain Country Of Origin Labelling Requirements).[46] The US had adopted rules requiring that meat be sold with detailed labels about their countries of origin — for example, "born in Canada, raised and slaughtered in the United States" or "born, raised and slaughtered

in the United States."[47] Consumer groups supported the labelling requirements on the grounds that they were important to avoid consumer confusion. Canada and a number of other states challenged the rules on the grounds of discrimination (as well as several other grounds). Importantly, Canada did not dispute the fact that the rules required only the provision of truthful information. Nor did it deny that some consumers might be interested in the information.

A WTO dispute settlement panel ruled in favor of Canada and the other challengers on the grounds of discrimination, as well as several other grounds. The US appealed the ruling to a WTO appellate body, which reversed several of the dispute settlement rulings, but left in place the finding that the regulation illegally discriminated. Importantly, the appellate body overruled the ruling that the regulation was an illegal consumer protection measure. The appellate body acknowledged that the regulation may, in fact, fulfill its legitimate objective to provide consumers with information on origin, but even if it did, that is not enough to justify discrimination.

It is not an obstacle that the settlement labelling action will most likely be a recommendation to member states rather than a Commission directive. Non-binding measures can be challenged in the WTO Dispute mechanism.[48] Indeed, in the US-Canada meat dispute, some of the labelling rules came only in the form of a letter from the Secretary of Agriculture "urg[ing]" sellers to adopt the desired form of labelling.[49] The dispute panel specifically addressed the question of whether the discriminatory labelling treatment was permissible when it appeared only in the Secretary of Agriculture's letter as a "suggestion[] for voluntary action." The panel ruled that the discrimination was still unlawful. While labelling recommendations may escape the category of technical barriers to trade by being merely voluntary, they are still considered regulations. Thus, said the panel, the discriminatory "suggestions" are forbidden by article X(3) of GATT.

## b. Excessive Restrictions on Trade

Aside from barring discrimination, WTO Agreements also forbid many other kinds of barriers to trade. One of the relevant rules is that states are forbidden to adopt regulations that impose excessive burdens on trade.

Most directly relevant here is article 2.2 of the WTO Agreement on Technical Barriers to Trade, which states that "technical regulations [should] not [be] prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade." This means, among other things, that "technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective." Thus, even though article 2.2 includes the "prevention of deceptive practices" among the legitimate objectives a state may pursue, it is not enough for the EU simply to say that "made in Israel" labels are deceptive. The EU must also establish that the means chosen by the EU to deal with the "deception" of consumers about the European view of the geopolitical status of the territory where the product was produced is the least trade-restrictive means available, and that the means do not create unnecessary obstacles to trade.

Relatedly, article 2.3 of the WTO Agreement on Technical Barriers to Trade forbids regulations where their "objectives can be addressed in a less trade-restrictive manner."

***There has been WTO litigation on the subject of unnecessary technical barriers such as labelling requirements, and the results are not favorable to the European position .***

There has been WTO litigation on the subject of unnecessary technical barriers such as labelling requirements, and the results are not favorable to the European position. One of the major cases is the Meat Labelling case mentioned earlier. In the Meat Labelling case, the dispute panel found that US labelling requirements for meat violated article 2.2 of the Technical Barriers to Trade Agreement because they did not convey information clearly to consumers and so could not fulfill their legitimate purpose. The appellate panel overturned this finding, but did not rule that the labelling requirements were legitimate as consumer protection regulations. Rather, the appellate panel ruled that it had insufficient information to determine the question of whether less trade-restrictive means were available and, since the regulation was invalid anyway, there was no need to make a final resolution.

The other major WTO labelling case is the US-Tuna case, in which US regulations on the labelling of tuna as "dolphin-free" were challenged.[50] In this case, the dispute panel found no discrimination, since the same rules of "dolphin-free" labelling were applied to all. However, the dispute panel rejected the labelling regulation as violative of article 2.2 of the Technical Barriers to Trade Agreement because less restrictive rules could be applied to the type of fishing techniques eligible for "dolphin-free" labelling, and still achieve the aim of protecting dolphins. The appellate body upheld the judgment against the US, on different grounds. The appellate board found that Mexican tuna sellers were significantly disadvantaged by the rules, even though the same rules applied to all, so the regulation was unlawfully discriminatory under article 2.1 of the Technical Barriers to Trade Agreement. At the same time, the appellate body ruled that the evidence of less restrictive alternatives to the labelling rules was insufficient, so it reversed the finding on article 2.2 as well.

In cases where the EU has trade agreements with states whose territorial sovereignty is disputed, other than the Israeli case, the EU has resolved questions through a variety of methods, such as by deferring to the exporting state, or reaching a new agreement with the other state regarding the territorial scope of agreements. It is not clear why the EU could not adopt such measures here.

# IV - Faulty European Defenses of Anti-Israel Measures

***The European excuses are invalid even on the assumption that Israel has no legitimate claim to territorial sovereignty.***

Several European excuses have been adduced to justify proposed and existing anti-Israel measures. None of these excuses is valid.

Importantly, the European excuses are invalid even on the assumption the Europeans are correct in characterizing the West Bank, Golan Heights and formerly Jordanian-occupied parts of Jerusalem as territories belligerently occupied by Israel to which Israel has no legitimate claim to territorial sovereignty.[51]

## a. Consumer Protection

One of the main justifications offered for European measures is an alleged consumer interest in geographic product information that matches European interpretations of territorial sovereignty. Consumers, in other words, will be materially misled if a product is labelled "made in Israel," while European officials believe that the location of the products' origin, - while within an area controlled and administered by Israel, is not within Israel's legitimate scope of territorial sovereignty.

There are two fatal flaws to this excuse.

### 1. Consumer Protection Does not Justify Discrimination

First, the excuse, even if valid, would not justify discrimination among products.

As the WTO labelling cases (the meat and tuna cases discussed above) show, a valid consumer protection interest is not enough to justify discrimination. American consumers are surely interested in knowing their tuna is "dolphin-free" and there may be European consumers who want to make sure their products are "settlement-free," but this cannot justify a rule that discriminates only against Israeli trade. Moreover, as the WTO rulings in the Meat Labelling case show, whatever the alleged consumer interest in accurate information about the products origin, - it cannot justify labelling measures that violate the anti-discrimination provisions of the WTO treaty on Technical Barriers to Trade.

It is clear that the EU does not have, and will not have, a directive or regulation directed to all areas of disputed sovereignty, or even to all areas that the EU considers to be under belligerent occupation and currently being populated by persons transferred by the occupier. The discrimination is not only a ground of invalidity in itself, but it also shows that the claim of consumer protection cannot be sincere.

*The theory of a consumer interest in importing states' opinions on territorial sovereignty was considered and rejected by the Supreme Court of the United Kingdom.*

**2. The Consumer Protection Excuse Has Already Been Rejected By Courts**

Second, the theory of a consumer interest in importing states' opinions on territorial sovereignty was considered and rejected by the Supreme Court of the United Kingdom. Importantly, the Court accepted, at least arguendo, not only the European legal theory of sovereignty (that Israel lacks any claim of sovereignty to the disputed West Bank), but also its preferred terminology (referring to the area as the "Occupied Palestinian Territory"). Nonetheless, the Court could not accept the consumer protection argument.

In Richardson and another v. Director of Public Prosecutions,[52] the UK Supreme Court dealt with the contention of several defendants on charges of criminally trespassing on a London shop which specialized in selling Ahava products originating from the Dead Sea that their trespass was not criminal, because the store was engaging in unlawful activity. Among the claims of the defendants was that the products sold in the shop were labelled "Made by Dead Sea Laboratories Ltd, Dead Sea, Israel" and this was "false or misleading labelling because the OPT [Occupied Palestinian Territory] is not recognized internationally or in the UK as part of Israel." The Court rejected this claim completely. The Court acknowledged that the British Consumer Protection from Unfair Trading Regulations 2008 and the EU Unfair Commercial Practices Directive 2005/29/EC forbid "a commercial practice which … contains false information … or if it … in any way deceives or is likely to deceive the average consumer in relation to … geographical or commercial origin of the product." However, the Court rejected the idea that consumers were deceived.

According to the Court, "there was no basis for saying that the average consumer would be misled into making a transactional decision (i.e. into buying the product) when otherwise she would not have done, simply because the source was described as being constitutionally or politically Israel when actually it was the OPT: the source was after all correctly labelled as the Dead Sea." The Court also approved the ruling of the district judge that "the number of people whose decision whether or not to buy a supposedly Israeli product would be influenced by knowledge of its true provenance would fall far below the number required for them to be considered as the 'average consumer'. If a potential purchaser is someone who is willing to buy Israeli goods at all, he or she would be in a very small category if that decision were different because the goods came from illegally occupied territory."

It is worth emphasizing that the Court's focus on the average consumer is not merely a matter of English law, but of EU law.[53]

## b. Israel's Territorial Scope in Trade Agreements

A secondary excuse adduced by supporters of discriminatory labelling of Israeli products is that territories that are outside of de jure Israeli territorial sovereignty are necessarily outside the scope of Israel for purposes of trade agreements, and that the EU is therefore entitled to discriminate against Israeli products from such areas.

There are several problems with this excuse as well.

***No matter what Israel's territorial scope, the EU has no authority to discriminate against Israeli products contrary to the WTO agreements.***

### 1. Theories of Territorial Sovereignty Do Not Justify Discrimination

First, the proposed European measure is not aimed at restricting products from all territories not covered by trade agreements; it is aimed specifically at Israeli products, to which the EU and EU states bear legal duties. It is Israeli products that must demonstrate their provenance, and not other products in the world. As such, it is a measure that may be evaluated like all other measures against the products of specific states covered by the WTO agreements. In other words, no matter what Israel's territorial scope, the EU has no authority to discriminate against Israeli products contrary to the WTO agreements.

### 2. In International Trade Law, Territory Is Not Restricted to De Jure Sovereign Territory and Includes Areas Under Occupation

Neither the WTO agreements nor the European-Israeli Association Agreement define the "territory of Israel." There is absolutely no reason to believe that the meaning of the term is "the de jure territory of the state of Israel in accordance with the EU position on that issue." It is well-known that "territory" as used in agreements is not necessarily limited to the territory which is considered to fall under a state's territorial sovereignty.

Many treaties are limited territorially and are still interpreted by EU states as applying to territory over which a state has only de facto control while sovereignty is disputed. For instance, EU states claim that legal instruments such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights or the Convention on the Rights of the Child apply to Israeli actions in the West Bank notwithstanding EU claims that Israel lacks de jure sovereignty.[54]

Trade agreements, in particular, often distinguish between territories on grounds other than sovereignty. Sometimes territories within the definite de jure sovereignty of a state are granted superior trade status (Falkland Islands) to other territories similarly with the de jure sovereignty of a state (Ceuta and Melilla). In some cases, trade

*It is well-known that "territory" as used in agreements is not necessarily limited to the territory which is considered to fall under a state's territorial sovereignty.*

agreements clearly apply to territories of disputed sovereignty and undisputed sovereignty without distinction. For instance, as noted above, EU trade agreements with Morocco do not exclude Western Sahara. On the Israeli side of the equation, numerous trade agreements, such as Israel's free trade agreements with the U.S.[55] and Canada,[56] clearly apply to the disputed territories that came under Israeli jurisdiction in 1967.

GATT---in particular article III (which guarantees equal treatment for imported products on a variety of measures)---offers protection to "products of the territory of any contracting party." Article IX of GATT, which sets the rules for marks of origin, guarantees "no less favorable" marking requirements "to the products of territories of other contracting parties." Likewise, the Technical Barriers to Trade Agreement speaks of "products imported from the territory of any Member."

*The natural reading of this provision is not only that GATT protections extend to all territories under a state's de facto control, but also that states themselves determine to which of their own de facto territories to extend protection.*

"Territory" under the GATT is defined as including non-sovereign areas of jurisdiction, and even includes areas under military occupation. This is clear from several articles of the treaty itself, as well as its travaux preparatoires and history of interpretation. The GATT itself defines the scope of its territorial application: "Each government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility..."[57] The natural reading of this provision is not only that GATT protections extend to all territories under a state's de facto control, but also that states themselves determine to which of their own de facto territories to extend protection.

To the degree there is practice and history shedding further light on the meaning of "territory," it reinforces the conclusion that the term refers to territory under de facto control rather than de jure sovereignty.

One of the most important pieces of evidence lies in article I of the GATT Treaty, which forbids customs duties and other barriers or preferences for "product[s] originating in or destined for the territories of all other contracting parties." Article I.2 (together with a number of annexes) includes a list of territories that are excluded by special agreement from the treaty. The territories that appear in the lists of exclusion are of many different kinds, and they are not restricted to those under the de jure sovereignty of the GATT states. They also include territories such as mandates that are administered by state parties to GATT. The inclusion of such territories in a list of special exclusions makes it clear that absent such special exclusions, GATT territories encompass areas under the de facto control of a state party, even in the absence of de jure sovereignty.

***The WTO agreements are not limited to states; governments without internationally recognized sovereignty like Taiwan are able to join the WTO.***

A second piece of evidence lies in the WTO treatment of states, more generally. The WTO agreements are not limited to states; governments without internationally recognized sovereignty like Taiwan are able to join the WTO. More generally, this indicates, as one researcher observed,[58] "Political disagreement about who is the legitimate authority in a given territory is not supposed to interfere with the agenda of the trade body, which is only concerned with world trade but not with the issue of sovereignty. In other words, the WTO is attempting to create the necessary environment for smooth world trade by giving equal membership on the basis of economic preconditions, and therefore eschews to get entangled in disputes over sovereignty."[59] It is for this reason that the EU is able to carry on trade relations with Taiwan through the WTO framework even though the EU does not recognize Taiwan's sovereignty over any territory. The government of Taiwan has de facto sovereignty over the island, even though it lacks any de jure sovereignty, and this obliges all WTO parties to grant Taiwan the full benefits of international trade law, even if they do not recognize Taiwan's sovereignty.

A third piece of evidence lies in the drafting history of GATT. It was assumed by the drafting parties that the territories covered by GATT included application to occupied territories and that, absent specific language excluding such occupied territories, they would be included in the free trade protections of the occupying state. This conclusion is reinforced by the 1957 deletion of an interpretive note to article XXVI which stated that the applicability of the GATT "with the areas under military occupation has not been dealt with [and] is reserved for further study at an early date."[60] The history behind the interpretive note demonstrates that it---like the exclusions of I.2 and associated annexes---meant to exclude specific territories occupied at the end of World War II rather than the general category of occupied territories. Indeed, the discussions preceding the adoption of the interpretive note in 1947 show that the US initially sought a note stating that the treaty "shall not bind any area or part thereof under present military occupation, nor any occupying authority therein." The idea of this note was to exclude very specific military occupations (the then-"present military

occupation" of Germany by Allied forces following World War II, and also of Japan) rather than all occupied territories prospectively and in general. Indeed, this was the reason for the US suggestion of the term "present."[61] After much discussion, a joint US/UK proposal would have referred to "the areas under military occupation" ("the areas" rather than simply "areas" in order to clarify that a specific military occupation was intended). The interpretive note on occupied territories was eventually deleted in 1957 as "unnecessary," obviously because the Allied occupation of Germany had ended.[62] Indeed, the GATT Secretariat has always assumed that occupied territories could fall within the treaty.[63]

As a whole, the episode shows that the parties understood that, by default, "territories" under the "international responsibility" of a state, as used in GATT encompassed all territories under state control, whatever their sovereign state, unless specifically excluded. The GATT contracting parties understood that this applied even to areas under military occupation, and thus discussed excluding or grandfathering some pre-existing occupations. And while a specific exclusion for some occupied territories was contemplated, and included in a since-deleted interpretive note, no general exclusion for all occupied territories was ever even considered, much less adopted.

As demonstrated by Moshe Hirsch,[64] several subsequent controversies about the application of GATT to overseas Portuguese possessions on the Indian subcontinent, the Panama Canal Zone, and Antarctica again reinforced the rule that free trade protections under WTO agreements are not concerned with the legal status of territory but, rather, with their de facto control. Moreover, these precedents all make clear that the status of non-sovereign territories under GATT is judged by the governing state itself; it is not the view of third-countries about the status of territories that determines their GATT status.

The same is true of Israel's particular agreements with the EU. There is only one reference to territories with disputed sovereignty in the Association Agreement: Ceuta and Melilla, two cities in Morocco over which Spain claims sovereignty. These two cities are explicitly excluded from the territorial scope of the EU. According to the interpretative canon of expressio unius est exclusio alteris (the express mention of one thing excludes all others), this means that all other territories of disputed sovereignty (Gibraltar, the Falkland Islands, West Bank, etc.) are not excluded from the territorial scope of the agreement.

The WTO agreements do not grant the EU authority to define unilaterally the scope of Israeli territory. Past practice seems to suggest that states have the authority to define their own territorial scope, and that this scope often does not coincide with the scope of territorial sovereignty de jure.

There is no formal agreement between Israel and the EU adopting the EU position that the territory of Israel according to the Association Agreement is only those areas which are under the de jure sovereignty of Israel under the legal interpretation of the EU.

***Free trade protections under WTO agreements are not concerned with the legal status of territory but, rather, with their de facto control. The status of non-sovereign territories under GATT is judged by the governing state itself.***

## c. Independent Legal Duty

A third, and final, excuse proposed for European discrimination against Israeli products is that international law requires the EU and its member states to deny equal treatment to Israeli products from disputed territories, because Israeli "settlements" or the Israeli "occupation" are unlawful.

Unfortunately for the EU, even if the critical legal view of settlements and occupation were correct — i.e., if one accepted that Israel's status in the disputed territories is that of a de jure belligerent occupant, and Israeli settlements are illegal in toto — this would not justify discrimination against Israeli products.

First, there is no general GATT exception that permits engaging in trade discrimination due to perceived illegality of the other party's conduct. The GATT exception that is relevant to such claims is the security exception, and it only permits discrimination in a narrow band of cases. In general, opinions about a trade partners' actions being illegal under public international law cannot justify trade sanctions otherwise forbidden by the WTO agreements, unless the sanctions are based on a Chapter VII UN Security Council resolution authorizing such sanctions. No such sanctions have ever been authorized against Israel or Israeli-controlled territory.

***A third, and final, excuse proposed for European discrimination against Israeli products is that international law requires the EU and its member states to deny equal treatment to Israeli products from disputed territories, because Israeli "settlements" or the Israeli "occupation" are unlawful.***

There is a related GATT Article XX exception for reasons of "public morals," but this cannot successfully be invoked by the EU at this late stage. As a WTO Panel report said in its Seal Skins ruling (2013), evidence that a measure has other purposes, such as consumer protection, would preclude a public morals defense. In other words, public morals must be an explicit and exclusive reason for an action to succeed as a defence. But, the EU has already elaborately justified its anti-Israel measures as required for consumer protection and to give the EU a bigger diplomatic role in the peace process, punishing Israel for its alleged intransigence.[65] This prevents the EU from credibly raising a morals defense. Moreover, even public morals measures must be applied non-discriminatorily. Thus in the Seals Skins case, the Appellate Panel accepted that a regulation restricting seal skin imports from the EU was a measure to protect "public morals." However, the measure had certain exceptions for seals killed through native Inuit hunting practices, designed to protect the culture and heritage of indigenous people. Despite the "noble" humanitarian motive, the exception gave an advantage to Greenland, and the measure was held illegal on the grounds of discrimination. No deep analysis would be required to find the anti-Israel measures unlawfully discriminatory, since they discriminate on their face.

Second, the theory that international law requires discriminating against "settlement" or occupied territory trade is groundless. The legality of private companies conducting business in Israeli controlled territory considered belligerently occupied was recently strongly reaffirmed by a 2013 ruling of the Court of Appeal of Versailles in France in the Alstom case. The Court held that a company doing business or establishing infrastructure in east Jerusalem in no way violates international law (the case concerned a firm that worked on the Jerusalem light rail system).[66] An occupying state is bound by certain restrictions, but private entities are not, even when they are in contractual arrangements with occupation authorities.

Similarly, in a 2002 legal opinion, the U.N. Security Council's Legal Advisor concluded that foreign companies taking Moroccan contracts to do business in Western Sahara do not violate international law, even when such plans are opposed by the "protected persons" (the population of the territory that is not citizens of the occupying state), so long as it does not "disregard" the interests of those protected persons. The economic opportunity such contracts create for protected persons are sufficient "regard" for those interests.[67]

As a recent study shows, there is no support to be found in international practice for a rule requiring discrimination against private businesses simply because they operate in occupied territories with the approval of the occupation authorities.[68] Certainly, there has been no attempt by the EU to apply such a requirement to all occupied territories, belying the claim that there is an international legal duty to do so.

***The theory that international law requires discriminating against "settlement" or occupied territory trade is groundless.***

# ENDNOTES

1 **Adrian Croft et-al, Reuters** (16 April 2015). Ministers urge EU to go ahead with labeling Jewish settlement goods. Available at: http://www.reuters.com/article/2015/04/16/us-israel-palestinians-eu-settlements-idUSKBN0N72KV20150416.

2 **Times of Israel** (9 Jun 2015), EU said soon to finalize guidelines for labeling settlement goods. Available at: http://www.timesofisrael.com/eu-said-soon-to-finalize-guidelines-for-labeling-settlement-goods/.

3 **E.g., EUbusiness** (23 July 2013). Ashton pushes EU to label Israeli settler goods:report. Available at: http://www.eubusiness.com/news-eu/israel-settlement.q0b/; Haaretz (23 July 2013). Catherine Ashton: Israeli settlement products to be labeled in EU by end of 2013. Available at: http://www.haaretz.com/news/diplomacy-defense/.premium-1.537315. And most recently, proposals articulated in "EU Differentiation and Israeli Settlements" report by the European Council on Foreign Relations (ECFR), Hugh Lovatt and Mattia Toaldo (July 2015). Available at: http://www.ecfr.eu/publications/summary/eu_differentiation_and_israeli_settlements3076

4 **A letter from Sebastian Kurz et-al to Federica Mogherini** (13 April 2015). Available at: http://www.haaretz.co.il/st/inter/Hheb/images/simun.pdf.

5 **European Parliament, Debates on application of the EU-Israel Association Agreement, Strasbourg,** 4 September 2003. Available at: http://europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20030904+ITEM-006+DOC+XML+V0//EN&language=CS#top. Representative of the Commission Nielsen stated that "I can confirm then that in applying the EU-Israel Association Agreement, the EU relies on international law for the territorial definition of the State of Israel, thus excluding the territories under Israeli administration since 1967 in the West Bank, Gaza Strip, East Jerusalem and the Golan Heights. Therefore, products originating in these areas are not entitled to benefit from preferential treatment under the EU-Israel Association Agreement."

6 http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534995/EXPO_STU(2015)534995_EN.pdf pg. 51.

7 While often characterizing the restrictions as purely technical and ministerial, senior EU officials also often champion them as tools to promote renewed negotiations between Israel and the Palestinians. Such expressly political purposes for what are framed as trade measures are precisely what the WTO system prohibits.

8 https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0198_PressSummary.pdf p.2.

9 See **Parliamentary Questions**, Answer Given by Mr. Çioloş on behalf of the Commission, Parliamentary Question No. E- 003971/2013, June 11, 2013, 2014 O.J. (C 20 E) 1, 137.

10 For example, the leading documents providing legal justifications for European sanctions treat trade objections in the most cursory manner, and appear to be simply unaware of both GATT's territorial provision in Art. XXVI(5)(a) or the operation of the principle of non-discrimination. See http://www.europarl.europa.eu/RegData/etudes/STUD/2015/534995/EXPO_STU(2015)534995_EN.pdf, pg 23 n.56.

11 **European Commission** (July 2013). Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards. Official Journal of the European Union (2013/C 205/05). Available at: http://eeas.europa.eu/delegations/israel/documents/related-links/20130719_guidelines_on_eligibility_of_israeli_entities_en.pdf. For further analysis of the Guidelines, see Avi Bell and Eugene Kontorovich, EU's Israel Grant Guidelines: A Legal and Policy Analysis, http://kohelet.org.il/uploads/file/EUs%20Israel%20Grants%20Guidelines%20A%20Legal%20and%20Policy%20Analysis%20-%20Kohelet%20Policy%20Forum%20-%20Final%281%29.pdf.

12 Israel, for its part, denies the de jure application of article 49(6) to the disputed territories, and it denies that its activities vis a vis settlements constitute "transfers."

13 **Euro-Mediterranean Agreement** Establishing an Association Between the European Communities and their Member States, of the one part, and the State of Israel, of the other part (21 June 2000) Official Journal of the European Communities, (L 147/3) Available at: http://eeas.europa.eu/delegations/israel/documents/eu_israel/asso_agree_en.pdf.

14 **Notice To Importers - Imports from Israel into the Community,** (25 January 2005), Official Journal of the European Union (2005/C 20/02). Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52005XC0125(01)&from=EN.

15 **EU-Israel Technical Arrangement.** Available at: http://ec.europa.eu/taxation_customs/customs/customs_duties/rules_origin/preferential/israel_ta_en.htm.

16 The current list is available here: http://ec.europa.eu/taxation_customs/customs/technical-arrangement_postal-codes.pdf

17 **Department for Environmental, Food and Rural Affairs** (UK) (hereafter DEFRA), "Technical Advice: Labeling of Produce Grown in the Occupied Palestinian Territories," December 10, 2009, available on the DEFRA website, http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf.

18 **Brita GmbH v Hauptzollamt Hamburg-Hafen,** (Case C-386/08), http://curia.europa.eu/juris/liste.jsf?language=en&num=C-386/08#.

19 **Opinion of Advocate General,** delivered on 29 October 2009. Available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72631&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=986349. It is worth noting that a recent decision by the European Council (Council Decision 2013/94/EU of 26 March 2012 on the conclusion of the **Regional Convention on pan-Euro-Mediterranean preferential rules of origin,** http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:rx0014) undermines the rationale underlying the Brita ruling. The new Council decision on Pan-Euro-Mediterranean preferential rules of origin includes the West Bank and Gaza as areas covered within within a single cumulation zone together with the territories of Israel and several other states. This means that a product from the West Bank and from places the EU recognizes as Israel, even if intermixed, should receive exactly the same customs treatment. Under these circumstances, it would be bizarre to refuse to extend preferential customs treatment to Israeli products from the West Bank when all other Israeli products and all other West Bank products receive the preferential customs treatment, and Israel (like every other country) is entitled to treat West Bank products as domestically produced.

20 **Official Answer to the European Parliament on behalf of the Commission by Karel De Gucht, European Commissioner for Trade.** 7 June 2013. Available at: http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-003951&language=EN see also http://blogs.ft.com/beyond-brics/2013/12/12/western-sahara-eu-morocco-deal-in-uncertain-territory/.

21 **UK Department for Environment, Food and Rural Affairs,** 'Technical Advice: labelling of produce grown in the Occupied Palestinian Territories' (2009) Available at: http://webarchive.nationalarchives.gov.uk/20130402151656/http:/archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf.

22 **Belgian Federal Public Service for the Economy, SMEs, Self-employed and Energy,** 'Avis aux détaillants concernant l'étiquetage d'origine des produits en provenance des territoires occupés par Israël' (2014). Available at: http://economie.fgov.be/en/binaries/Notice%20to%20retailers%20concerning%20origin%20labelling%20of%20products%20from%20Israeli-occupied%20territories_tcm327-253289.pdf.

23 **Danish Ministry of Food, Agriculture and Fisheries, 'Labelling of foods from Israel and the Occupied Palestinian Territories'** (2012); see also Mærkning af fødevarer fra Israel og besatte palæstinensiske områder (21 April 2015) Available at: http://www.foedevarestyrelsen.dk/Leksikon/Sider/M%C3%A6rkning-af-f%C3%B8devarer-fra-Israel-og-besatte-pal%C3%A6stinensiske-omr%C3%A5der.aspx.

24 **Department for Environmental, Food and Rural Affairs** (UK) (hereafter DEFRA), "Technical Advice: Labeling of Produce Grown in the Occupied Palestinian Territories," December 10, 2009, available on the DEFRA website, http://archive.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf.

25 See **Barak Ravid,** 12 more EU countries warn against trade with Israeli settlements (3 July 2014). Available at: http://www.haaretz.com/news/diplomacy-defense/.premium-1.603030.

26 **UK Foreign & Commonwealth Office: Overseas Business Risk – Israel** (1 June 2014). Available at: https://www.gov.uk/government/publications/overseas-business-risk-israel/overseas-business-risk-israel

27 **E.g., Advice on Investment in Israeli Settlements in Occupied Palestinian Territory, Ireland Department of Foreign Affairs and Trade**, available at https://www.dfa.ie/our-role-policies/international-priorities/middle-east-and-north-africa/opt-ivestment-advice/; **Governo de Portugal**, Draft common messages aimed at raising awareness among EU citizens and businesses regarding involvement in financial and economic activities in the settlements, Available at: http://www.portugal.gov.pt/media/1465187/20140630%20mne%20ue%20colonatos%20isrealitas%20ing.pdf; **Posibles implicaciones para los ciudadanos y empres as de la Unión Europea de las actividades económicas y financieras en los asentamientos,** Available at: http://www.exteriores.gob.es/Portal/es/PoliticaExteriorCooperacion/OrienteProximoMagreb/Documents/MENSAJES_SOBRE_INVERSIONES_ASENTAMIENTOS_ESP.pdf; **Ministero degli Affari Esteri e della Cooperazione Internazionale,** Common messages aimed at raising awareness among EU citizens and businesses regarding involvement in financial and economic activities in the settlements, Available at: http://www.esteri.it/mae/en/sala_stampa/archivionotizie/approfondimenti/2014/06/20140627_insediamenticittadiniimpreseue.html; **LANG; Ministry for Foreign Affairs of Finland,** Common messages aimed at raising awareness among EU citizens and businesses regarding involvement in financial and economic activities in the settlements, Available at: http://www.formin.finland.fi/public/default.aspx?contentid=309088&contentlan=2&culture=en-US.

28 **Barak Ravid, Dutch government urges local firm to cancel East Jerusalem project, Haaretz** (26 August 2013). Available at: http://www.haaretz.com/news/diplomacy-defense/.premium-1.543535.

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62 See **Interpretative Note** at https://docs.wto.org/gattdocs/q/GG/L999/189.PDF.

63 This is made clear by various **GATT documents** inquiring of various contracting parties whether they wished to assume GATT obligations for particular territories under their military occupation, in situations where there intent had not been made clear. This clearly shows that it was understood that GATT parties could extend the treaty to territories under their military occupation if they choose. See Annex C in http://sul-derivatives.stanford.edu/derivative?CSNID=90670063&mediaType=application/pdf; http://sul-derivatives.stanford.edu/derivative?CSNID=90310007&mediaType=application/pdf. France applied the GATT to occupied areas of Germany, despite the objection of the Federal Republic. http://sul-derivatives.stanford.edu/derivative?CSNID=90670065&mediaType=application/pdf.

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## KOHELET POLICY FORUM

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