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AL-HAQ

BRIEF IN SUPPORT OF UNILATERAL ACTION BY A EUROPEAN UNION MEMBER STATE TO PROHIBIT THE IMPORTATION OF ISRAELI SETTLEMENT GOODS

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I. SUMMARY

A Member State can restrict trade from illegal Israeli settlements based on its enforcement role within the European Union's (EU) legal structure. While the EU is responsible for EU-wide trade policy and maintenance of the EU customs union, enforcement of that policy is a matter for Member States. The EU has issued several guidance documents stating its position that 1) Israeli settlements in the Occupied Palestinian Territories (OPT) are illegal; 2) goods produced in those settlements are not legally produced in Israel; 3) therefore, the trade agreements between the EU and Israel do not apply to goods produced in settlements. European Court of Justice (ECJ) case law requires that when Member States do enforce EU policy, they do so in a proportional and minimally-restrictive way. The ECJ has also held that Israeli settlement goods are not protected by the EU-Israel Association Agreement because those goods are not technically produced in Israel. Thus, a Member State is not obligated by that agreement to accept settlement goods. Accordingly, a Member State can impose a restriction on the import of Israeli settlement goods.

Member States may also justify a ban on settlement goods because of their obligations under international law. The Charter of the United Nations (UN) requires Member States to abide by and enforce UN Security Council Resolutions. The Security Council has repeatedly held that Israeli settlements violate international law. Moreover, the International Court of Justice (ICJ) has held that Member States are obligated not to recognize, imply recognition, or take any other action that would assist in the maintenance of an unlawful situation. Therefore, Member States are likely justified in banning Israeli settlement goods in accordance with both EU and international law.

II. LAW AND ARGUMENT

This brief focuses only on EU treaties, legislation, and regulations. Except where it is necessary for the arguments herein, considerations of international law have been set aside. The legal arguments for EU States to ban the import of Israeli settlement goods according to international law have already been expertly dealt with elsewhere.[1]

Trade relations between the EU and Israel date back to a bilateral agreement between the European Economic Community and Israel in 1975.[2] This was followed by the Euro-Mediterranean Agreement of 2000 (EU-Israel Association Agreement), which enlarged the scope of trade to include a wider array of "agricultural" and "industrial" products.[3] The 2000 Association Agreement was amended on two occasions in 2005: first, by an Association Council Decision modifying Protocol 4 of the Agreement to clarify the meaning of "obtaining from" a particular State;[4] and second, by a Technical Arrangement requiring Israel to accompany its "made in Israel" declaration with the postal code of the area from which the product originated.[5] That amendment also requires Israel to supply the EU with a list of postal codes of settlements in the OPT.[6] The

[1] *See* James Crawford, *Third Party Obligations with Respect to Israeli Settlements in the Occupied Palestinian Territories* (unpublished), 2012, available at: https://www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf*; see also* Michael Flynn, *Opinion re EU-Israel Agreement and Settlement Produce* (unpublished) (on file at Al-Haq), 2012.

[2] Council Regulation 1274/75, 1975 O.J. (L 136) 1, available at: https://publications.europa.eu/en/publication-detail/-/publication/2dac5a3a-45ae-4d84-9e49-6311989c57fe.

[3] Euro-Mediterranean Agreement, 2000 O.J. (L 147) 3, available at: http://eeas.europa.eu/archives/delegations/israel/documents/eu_israel/asso_agree_en.pdf (hereafter EU-ISR Agreement).

[4] Decision No 2/2005 of the EU-Israel Association Council, 2006 O.J. (L 20) 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22006D0019&from=EN.

[5] Ministry of Finance, Israel Tax Authority, *Regulations Technical issues in the implementation of Protocol 4 of the Association Agreement for the Purpose of indicating the location conferring originating status in preference documents in exportation from Israel to the EU*, available at: https://taxes.gov.il/English/customs/Export/Pages/Agrement%20inexportation%20israel%20eu.aspx.

[6] *Id.*

EU-Israel Association Agreement was amended a second time in 2009 to expand agricultural exports to the EU from Israel.[7]

A. EU Formation Treaties and their Relevant Provisions

Article 215 of the Treaty on the Formation of the European Union (TFEU) allows the EU to adopt "restrictive measures" against "third countries,…natural or legal persons and groups of non-State entities."[8] Invoking these measures requires a "qualified majority on a joint proposal from the High Representative of the Union for Foreign Affairs and Security Policy and the Commission…."[9] Furthermore, such action must be "adopted in accordance with Chapter 2 of Title V of the Treaty on European Union."[10] Chapter 2 of Title V of the Treaty on European Union (TEU) states that "[t]he common foreign and security policy…shall be defined and implemented by the European Council and the Council, acting unanimously, except where the Treaties provide otherwise."[11] Once those policies are set, "Member States shall ensure their national policies conform to the Union positions."[12] As discussed below, the EU has taken the position that Israeli settlements in the OPT are illegal under international law. Because of this position, the EU could collectively ban goods imported from those settlements under Article 215 of the TFEU and Chapter 2 of Title 5 of the TEU. The EU, however, has thus far failed to move toward such a policy.

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[7] Council Decision of 20 October 2009, 2009 O.J. (L 313) 81, available at: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:313:0081:0082:EN:PDF.

[8] *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community* art. 215(1)-(2), 13 December 2007, 2007 O.J. (C 306) 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2007:306:FULL&from=EN (hereafter TFEU).

[9] *Id*. art. 215(1).

[10] *Id.* art. 215(1)-(2).

[11] *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union* art. 24(1), 26 October 2012, 2012 O.J. (C 326) 1, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT (hereafter TEU).

[12] *Id.* arts. 29 and 26(3) ("[t]he common foreign…policy shall be put into effect by the High Representative and by the Member States, using national and Union resources.").

Even so, the TFEU contains a method by which Member States can maintain some control over their domestic markets. Trade between Member States is governed by Articles 34 and 35 of the TFEU: Article 34 prohibits quantitative restrictions on imports and goods in transit from other Member States; Article 35 prohibits the same restrictions on exports and goods in transit from that Member State to other Member States. Per Article 36 of the TFEU, Member States may derogate from Articles 34 and 35 if "justified on the grounds of public morality, public policy or public security."[13] To invoke the protections of Article 36 of the TFEU there must be an absence of harmonization legislation on the issue in question.[14] There is no formal harmonization process within the EU; harmonization of European Commission directives, notices, or legislation is often decided by the ECJ.[15] For example, the EU implemented food labeling requirements in December 2016, which have at least partially harmonized labeling regulations.[16]

Under Article 36, a Member State must show that its enforcement objective could not be achieved by either a less extensive measure or a restriction having a lesser effect on intra-EU trade.[17] Under Article 36, a Member State must demonstrate that its import

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[13] TFEU (n 8) art. 36.

[14] European Commission Enterprise and Industry Directorate General, *Free Movement of Goods: Guide to the Application of Treaty Provisions Governing the Free Movement of Goods*, at 26 (July 7, 2010), available at: https://publications.europa.eu/en/publication-detail/-/publication/a5396a42-cbc8-4cd9-8b12-b769140091cd/language-en.

[15] *See* Jule Mulder, *New Challenges for European Comparative Law: The Judicial Reception of EU Non-Discrimination Law and a Turn to a Multilayered Culturally-informed Comparative Law Method for a Better Understanding of the EU Harmonization*, 18 German Law Journal No.3 (2017) 721, at 729-30, available at: https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/5928253b15d5db322a3ed700/1495803196611/12_Vol_18_No_03_Mulder.pdf ("Primary treaty norms" do not require national implementation for harmonization; whereas, European Commission Directives must be implemented into national law. Minimum requirements established by a Directive may also be implemented via an interpretation by the ECJ.).

[16] *See* European Commission, *Food Information to Consumers – Legislation*, available at: https://ec.europa.eu/food/safety/labelling_nutrition/labelling_legislation_en.

[17] *See* Case 104/75, *De Peijper*, 1976 E.C.R. 613 at ¶¶ 16-17, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61975CJ0104&from=EN ("it emerges from Article 36 that national rules or practices which do restrict imports…are only compatible with the Treaty to the extent to which they are necessary for the effective protection [in question]. National rules or practices do not fall within the exception specified in Article 36 if [their objective] can [be] as effectively protected by measures which do not restrict intra-Community trade so much.") (hereafter *De Peijper*); *see also* Case C-367/89,

restriction is proportional to its enforcement objective.[18] In *Ahokainen and Lippik*, the ECJ identified three "sub-tests" to determine whether a national regulation is proportionate to its enforcement objective.[19] First, the restriction must be suitable: the restriction must actually help cure the Member State's perceived ill.[20] Second, the Member State's chosen restriction must be necessary to achieve its enforcement objective.[21] However, a Member State is not required to opt for a less restrictive method if doing so would "have a detrimental effect on other legitimate interests (for instance, on fundamental rights)…."[22] Third, the import restriction must be "commensurate" with the level of disruption to the EU market.[23] Once a Member State demonstrates that there is a convincing justification for its restriction based on at least one of the above sub-tests, the burden of proof then shifts to the party challenging the penalty to show that such a

Richardt, 1991 E.C.R. I-4621 at ¶ 21, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61989CJ0367&from=EN ("a Member State may invoke Article 36 in order to justify a measure restricting transit only if no other measure, less restrictive from the point of view of the free movement of goods, permits the same objective to be attained.") (hereafter *Richardt*).

[18] *See*, *e.g.*, *De Peijper* (n 17); *see also* Case 434/04, *Ahokainen and Leppik*, 2006 E.C.R. I-09171 at ¶ 21, available at: http://curia.europa.eu/juris/showPdf.jsf?text=&docid=56636&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=526135 ("[t]he Member State concerned must demonstrate that the measure at issue is appropriate to the aim pursued and that it does not go beyond what is necessary to achieve that aim.") (internal citations omitted) (hereafter *Ahokainen and Leppik*); *see also* Case C-41/02, *Comm'n v. Netherlands*, 2004 E.C.R. I-11375 at ¶¶ 46-47 ("it is for the national authorities which invoke [Article 36 of the TFEU] to show in each case…that their rules are necessary to give effective protections to the interests referred to in that provision….").

[19] *Ahokainen and Leppik* (n 18) at ¶ 23 (This case involved a Finnish regulation legislation requiring alcohol importers to obtain a license before importing any spirit. There, the enforcement objective was to ensure that the public's health was protected by requiring a license to import spirits. After identifying the relevant "sub-tests," the ECJ remanded the case back to the Finnish court for a determination of whether any of those tests were met.).

[20] *Id.* at ¶ 24 ("[t]he question to be determined in applying the suitability test is whether the measure has any benefits at all for the legitimate interests on which the Member State relies").

[21] *Id.* at ¶ 25 ("could the Member State, by directing a similar amount of its resources into an alternative measure, achieve the same result at a lower cost to intra-Community trade?").

[22] *Id.*

[23] *Id.* at ¶ 26 ("the greater degree of detriment to the principle of free movement of goods, the greater must be the importance of satisfying the public interest on which the Member State relies").

restriction is not appropriate.[24] If the challenging party cannot meet that burden, the Member State's restriction should stand.[25]

The final hurdle a Member State must clear when implementing a unilateral trade restriction is that such a restriction is non-discriminatory.[26] It is unclear from existing EU legislation and case law whether this means that the Member State must not discriminate against particular goods from a third State or whether it must not discriminate against a particular State.[27] In either case, the restriction cannot be either arbitrary or implemented solely to further protectionist trade policies.[28] A Member State's restriction is not arbitrary when it is "justified and proportionate."[29] It is not necessary for the restriction to eliminate all forms of discrimination because "some degree of differential treatment or disparate impact on imported products may be accepted if it is proportionate to the objective differences between domestic and imported products."[30] For instance, if domestic goods are not produced in violation of international law and

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[24] *See, e.g.,* Case C-55/99, *Comm'n v. France*, 2000 E.C.R. I-11499 at ¶ 30, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=45453&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=156237 ("in proceedings for failure to fulfill an obligation, it is for the Commission to prove the allegation that the obligation has not been fulfilled and to place before the Court the information needed to enable it to determine whether the obligation has not been fulfilled.").

[25] *Id.* at ¶ 39 ("since the Commission has not put before the Court evidence from which it could conclude that the [Member State's restrictions are] disproportionate, the complaint in this respect must be rejected.").

[26] Case 34/79, *Henn and Darby*, 1979 E.C.R. 3795 at ¶ 21, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61979CJ0034&from=EN ("[Article 36 of the TFEU] is designed to prevent restrictions on trade based on the grounds mentioned in [Article 36] from being diverted from their proper purpose and used in such a way as either to create discrimination in respect to goods originating in other Member States or indirectly to protect certain national products.") (hereafter *Henn and Darby*); *see also Ahokainen and Leppik* (n 18) at ¶ 28 ("[i]n addition to the assessment of proportionality…a measure enacted by a Member State [cannot] 'constitute a means of arbitrary discrimination.'") (quoting TFEU (n 8) art. 36).

[27] *See e.g.*, Case 7/78, *Thompson*, 1978 E.C.R. 2247, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61978CJ0007&from=EN (the UK *could* restrict the import of certain coins by individuals); *but see* Case C-70/94, *Werner*, 1995 E.C.R. I-3189, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61994CJ0070&from=EN (Germany *could not* restrict the import of certain machine components only because their destination country was Libya.).

[28] *Henn and Darby* (n 26).

[29] *Ahokainen and Leppik* (n 18) at ¶ 30.

[30] *Id.*

imported goods are, such discrimination would likely be acceptable—especially when that distinction forms the restriction's *raison d'être*.

B. EU Notices Regarding Trade with Israel

1. *EU Notices to Importers 1997-2012*

Since the conclusion of the EU-Israel Association Agreement, the ambiguity of "originate from Israel," coupled with the expansion of Israeli industrial and residential settlements in the OPT, has led to concerns over the particular place of origin for some goods. The EU first expressed doubt over the origination of orange juice imported from Israel in 1997.[31] In a Notice to Importers, the EU warned that "certain substantial errors in the application of the [EU-ISR trade agreements]" and a "lack of effective administrative cooperation" raised questions regarding the "validity of all preferential certificates issued by Israel for all products…."[32] EU operators were informed that they "must take the necessary precautions from now on" to ensure that imports from Israel meet the preferential certificate validity criteria;[33] that is, that those imports are produced within Israel's internationally-recognized boundaries.

A second Notice to Importers was issued in November 2001, informing Member States that Israel had withdrawn the invalid EUR.1 certificates for the orange juice questioned in the 1997 notice.[34] The EU also noted, however, that the investigation into that orange juice's proof or origin labels had led the EU to "confirm[] that Israel issues

[31] 1997 O.J. (C 338) 13, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:1997:338:FULL&from=EN ("there are grounds for doubts about the validity of EUR.1 movement certificates submitted to the Community in recent years for importations of orange juice coming from Israel.").

[32] 1997 O.J. (C 338) 13.

[33] *Id.*

[34] 2001 O.J. C (328) 6, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001XC1123(02)&qid=1527493813804&from=EN (replacing 1997 O.J. (C 338) 13).

proofs of origin for products coming from places brought under Israeli administration since 1967, which, according to the Community, are not entitled to benefit from preferential treatment under the [relevant trade agreements]."[35] EU operators were again warned that they must take "all the necessary precautions" to ensure that products "originating from Israeli settlements in the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights" were not afforded preferential treatment under the EU-Israel trade agreements.[36]

In January 2005, the EU issued a third Notice to Importers informing them that the EU and Israel had reached an agreement, per Protocol 4 of the EU-ISR Association Agreement, requiring all Israeli import movement certificates and invoice declarations to "bear…the name of the city, village or industrial zone where production conferring originating status has taken place."[37] The notice reminded EU operators that "products coming from places brought under Israeli Administration since 1967 are not entitled" to the benefits of the EU-Israel Association Agreement.[38] Operators were further instructed that a proof of origin indicating production in a "city, village or industrial zone which [has been] brought under Israeli Administration since 1967" would be refused preferential status under the EU-Israel Association Agreement.[39]

Finally, in a 2012 Notice to Importers, the EU reiterated its position from the previous three notices while also informing EU operators that a list of "non-eligible locations and their postal codes" (i.e., settlements) was available and would be kept up-

[35] 2001 O.J. C (328) 6.

[36] *Id.*

[37] 2005 O.J. (C 20) 2, available at: http://trade.ec.europa.eu/doclib/docs/2006/march/tradoc_127720.pdf (replacing 2001 O.J. C (328) 6).

[38] *Id.*

[39] *Id.*

to-date on the internet.[40] EU operators were asked to "consult the list regularly…and before lodging a customs declaration for releasing goods for free circulation."[41]

2. *EU Interpretative Notice 2015*

In addition to the above four Notices to Importers, the EU also issued an Interpretative Notice regarding how goods imported from Israel are to be labeled.[42] That notice clarifies that for products originating in Israeli settlements located in the OPT, the labels "originating from Israel," "place of provenance West Bank," or "made in the Golan Heights"[43] are not appropriate.[44] It is also unacceptable for the label "made in Israel" to apply to any good that is produced in a non-settlement area of the OPT.[45] Goods produced in Israeli settlements located in Palestine must be labeled so as to clearly indicate they originated in a settlement there, e.g., "product from the West Bank (Israeli settlement)."[46]

The Interpretative Notice notably includes the statement that the "Notice does not create any new legislative rules."[47] Rather, it clarified labeling guidelines under the EU-Israel Association Agreement and the EU labeling guidelines, which require that food

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[40] 2012 O.J. (C 232) 5, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52012XC0803(02)&from=EN (replacing 2005 O.J. (C 20) 2).

[41] *Id.*

[42] European Commission, *Interpretative Notice* C(2015) 7834 final, available at: https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf (hereafter Interpretative Notice).

[43] Interpretative Notice (n 42) at ¶ 4, fn. 6-8 ("originating from," "place of provenance," and "made in" are examples of the various phrases used to communicate where a good is produced).

[44] *Id.* at ¶¶ 4, 10; *see also* 2015 O.J. (C 375) 4, at 5, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52015XC1112(01)&from=en (taking the same position as the Interpretative Notice, but on the additional grounds that such information misleads consumers).

[45] *Id.* at ¶ 9 ("customs authorities of the importing Member State may refuse to grant the preferential treatment provided for under the EU-Israel Association Agreement where the goods concerned originate in the West Bank.").

[46] 2015 O.J. (C 375) 4 (n 42), at 5.

[47] *Id.* at ¶ 3.

is labeled in a manner that "does not deceive the consumer" as to the "true country of origin or place of provenance of that product."[48] Because that Member States were reminded that they are responsible for the enforcement of any of the EU's Community-wide legislation or treaty.[49] That enforcement must be carried out via "penalties…[that] are effective, proportionate and dissuasive."[50]

C. International Court Decisions Regarding EU-Morocco Trade Agreements

Over the last eighteen months, the European Union Court of Justice (ECJ) rendered two opinions regarding Morocco's occupation of Western Sahara territory. These decisions establish that international law necessarily excludes the OPT from the scope of any EU-Israel trade agreement unless the people of Palestine explicitly consent to the inclusion of their territory. The ECJ's February 2018 ruling is particularly relevant to Israel's occupation of Palestine as there the Court held that the occupied Western Sahara territory could not be included in any definition of territory under Morocco's jurisdiction.

1. *ECJ December 2016 Decision*

The first of the Morocco-Western Sahara decisions was delivered in December 2016, in response to an appeal to the General Court's ruling that the EU-Morocco Association and Liberalisation Agreements applied to the occupied territory of Western Sahara.[51] There, the Court held that the people of Western Sahara were a third party to the EU-Morocco

[48] 2011 O.J. (L 304) 18, at 20, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32011R1169&from=en.

[49] Interpretative Notice (n 42) at ¶ 3 ("[w]hile this Notice reflects the Commission's understanding of the relevant Union legislation, enforcement of the relevant rules remains the primary responsibility of Member States."); *See also* TFEU (n 8) art. 3a(3) ("The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.").

[50] *Id.* at ¶ 3.

[51] Case C-104/16 P, *Council v. Front Polisario*, Digital Reports (21 December 2016), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0104&from=EN.

Association Agreement who "may be affected by the implementation" of that agreement.[52] Because they may be affected, the people of Western Sahara must give their consent for their territory to be brought within the scope of the Association Agreement.[53] Implementation of that agreement absent the consent of the affected peoples is "incompatible with the principles of self-determination"—principles the EU is required to comply with .[54] Furthermore, that implementation conflicts with the "binding principle of general international law" that EU treaty obligations "must be performed in good faith."[55] The Court therefore reversed the General Court's decision and held that the EU-Morocco agreements did not apply to the occupied Western Sahara territory because doing so would violate international law.

2. *ECJ February 2018 Decision*

Expanding on its reasoning in the December 2016 decision, the Court here held that the occupied Western Sahara territory was not and could not be included in any definition of the territory of Morocco.[56] The Court reminded the parties that the EU is required to "observe international law in its entirety, including not only the rules and principles of general and customary international law, but also the provisions of international conventions that are binding on it."[57] To include the occupied Western Sahara territory within the scope of the EU-Morocco agreements would be "contrary to certain rules of general international law…namely the principle of self-determination, stated in Article 1

[52] *Id.* at ¶ 106.

[53] *Id.*

[54] *Id.* at ¶ 123.

[55] *Id.* at ¶ 124.

[56] Case C-266/16, *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs*, Digital Reports (27 February 2018), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62016CJ0266&from=EN.

[57] *Id.* at ¶ 47.

of the Charter of the United Nations, and the principle of the relative effect of treaties, of which Article 34 of the Vienna Convention is a specific expression."[58]

The Court also rejected the argument that the parties were free to give the territory of Morocco a unique definition in their agreements that would include occupied territory. Although the Court acknowledged that the parties are generally permitted to agree on such a definition, including the territory of Western Sahara in the definition of "waters falling within the sovereignty…of the Kingdom of Morocco…would be contrary to the rules of international law…."[59] Therefore, the EU must reject "any intention of the Kingdom of Morocco to include…[Western Sahara's waters] within the scope of [any trade agreement]."[60]

3. *High Court of South Africa Western Sahara Phosphate Decision*

Of additional significance, in February 2018, the High Court of South Africa ruled on the ownership of Western Sahara phosphate cargo onboard an Australian cargo ship. That phosphate had been mined in the occupied Western Sahara territories without Western Sahara's consent, but as part of a trade agreement with Morocco.[61] The South African Court held that "ownership in the phosphate ha[d] never lawfully vested in the [shipping company]"[62] and that the rightful owner of the phosphate was the Saharawi Arab Democratic Republic.[63] In the case of raw material exports originating in Israeli

[58] *Id.* at ¶ 63.

[59] *Id.* at ¶ 71.

[60] *Id.*

[61] Dominic Dudley, *Activists Claims Victory as Morocco Pulls Out of Court Case Over Controversial Phosphate Exports*, Forbes (14 July 2017, 6:17 AM), available at: https://www.forbes.com/sites/dominicdudley/2017/07/14/morocco-pulls-out-of-court-case/#1e8d2ff77ed1.

[62] Case No. 1487/2017, *Saharawi Arab Democratic Republic v. NM Shipping SA*, High Court of South Africa, 23 February 2018, ¶ 2, available at: http://wsrw.org/files/dated/2018-02-23/20180223_south_africa_ruling.pdf.

[63] *Id.* at ¶ 1.

settlements, Member States can argue that they are not required to allow the importation of those materials because they are the lawful property of the people of Palestine and, without Palestine's consent, those goods cannot be legally sold by anyone else.

D. International Court Decisions Regarding Israeli Settlements and EU-Israel Trade

1. *International Court of Justice Advisory Opinion*

In a 2004 advisory opinion, the ICJ weighed in on the specific issue of the construction of the Israeli annexation wall. There, the ICJ held that the wall is illegal, as is the wall's "associate régime."[64] The ICJ held that Israel is obligated to stop building the wall and dismantle the parts of the wall located in the OPT.[65] For any damages that were suffered by Palestinians by the construction of the wall, including the confiscation of property, the Court held that Israel is obligated to return that property to its owner or, if that is not possible, pay monetary damages to those owners.[66] As for other States' obligations regarding the "situation resulting from the construction of the wall," the Court's holding is worth quoting at length:

> Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the [OPT], including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation

[64] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion*, 2004 I.C.J. 136 (9 July) at ¶ 142 ("the Court…finds that the construction of the wall, and its associated régime, are contrary to international law."), available at: http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf (hereafter *ICJ Wall Advisory Opinion*).

[65] *Id.* at ¶ 151 ("Israel…has the obligation to cease forthwith the works of construction of the wall being built in the [OPT], including in and around East Jerusalem.").

[66] *Id.* at ¶¶ 152-53 ("Israel has the obligation to make reparation for the damage caused to all the natural or legal persons concerned. * * * Israel is under an obligation to return the land, orchards, olive groves and other immovable property seized from any natural or legal person for purposes of construction of the wall in the [OPT]. In the event that such restitution should prove to be materially impossible, Israel has an obligation to compensate the persons in question for the damage suffered.").

> created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation…to ensure compliance by Israel with international humanitarian law as embodied in that convention.[67]

2. *European Union Court of Justice* Brita *Judgment*

The ECJ's *Brita* decision provides some additional clarity on the place of exported settlement goods vis-à-vis EU trade agreements.[68] First, the Court affirmed that the rules of customary international law are binding on EU institutions and Member States, regardless of whether the documents establishing those rules bind those institutions and States.[69] Second, the Court held that products obtained in locations under Israeli occupation since 1967 do not qualify as being obtained in Israel under the EU-Israel Association Agreement.[70] The Court did not specifically address the legality of Israel's use of the OPT for settlement industry *per se*; rather, the Court reasoned that the existence of both the EU-Israel Association Agreement and the separate EU-Palestinian Authority Interim Agreement[71] logically implies that each agreement must apply to different

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[67] *ICJ Wall Adviosry Opinion* (n 64) at ¶ 159.

[68] Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 E.C.R. I-01289, available at: http://curia.europa.eu/juris/document/document.jsf?text=&docid=72406&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=152024 (hereafter *Brita*).

[69] *See, e.g., id.* at ¶ 42 ("even though the Vienna Convention does not bind either the [EU] or all its Member States, a series of provisions in that convention reflect the rules of customary international law which, as such, are binding upon the [EU] institutions and form part of the [EU] legal order."); *see also id.* at ¶ 40 ("the fact that that Vienna Convention does not apply to international agreements concluded between States and other subjects of international law is not to affect the application to them of any of the rules set forth in that convention to which they would be subject under international law independently of that convention.").

[70] *Brita* (n 68) at ¶ 64 ("the customs authorities of the importing Member State may refuse to grant preferential treatment provided for under the [EU]-Israel Association Agreement where the goods concerned originate in the West Bank.").

[71] Euro-Mediterranean Interim Association Agreement, 1997 O.J. (L 187) 3, available at: http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117751.pdf.

territories. Thus, the "territory of Israel" in the EU-Israel Association Agreement necessarily does not include "the West Bank and Gaza Strip" in the EU-Palestinian Authority Interim Association Agreement.[72]

III. ARGUMENT FOR BANNING SETTLEMENT GOODS UNDER THE "PUBLIC POLICY" EXCEPTIONS TO THE TFEU AND THE EU-ISRAEL ASSOCIATION AGREEMENT.

The EU's 2015 Interpretative Notice likely harmonizes standards for how Israeli settlement products are to be labeled for import into the EU common market.[73] ECJ case law prevents invoking Article 36 of the TFEU when harmonized standards exist.[74] However, harmonization legislation in one area addressed in a treaty does not render inoperable other operative clauses of that treaty.[75] Importantly, even if the 2015 Interpretative Notice achieves harmonization on settlement goods, that harmonization is likely only partial. That is, there may be harmonization regarding how a settlement product is labeled, but not whether importing goods from that location amounts to a violation of a Member States' public policy.

Consequently, the harmonization legislation regarding the place of origin of Israeli goods does not preclude the invocation of Article 27 of the EU-Israel Association

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[72] *Brita* (n 68) at ¶ 47 ("[e]ach of [the EU-Israel Association Agreement and the EU-PA Interim Association Agreement] has its own territorial scope. Under Article 83 thereof, the [EU]-Israel Association Agreement applies to the 'territory of the State of Israel.' Under Article 73 thereof, the [EU-PA Interim] Association Agreement applies to the 'territories of the West Bank and the Gaza Strip.'").

[73] The fuzzy harmonization process in the EU makes it difficult to know whether the 2015 Interpretative Notice harmonizes the rules of origin for settlement goods. Taking the more legally conservative approach, the rest of this section proceeds from the assumption that harmonization has been achieved.

[74] *See* Case C-639/11, *Comm'n v. Poland*, Digital Reports (20 March 2014) at ¶ 79, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62011CC0639&rid=1#c-ECR_62011CC0639_EN_01-E0070 ("It is…settled case-law that, when there are no harmonising rules capable of [achieving the Member States' objective], the Member States are free to decide on the degree of protection they wish to [achieve their objective] and on the way in which that degree of protection may be achieved, although the discretion left to the Member States must be exercised within the limits imposed by the Treaty.").

[75] Again, assuming the 2015 Interpretative Notice achieves harmonization, that harmonization is only partial: there may be harmonization regarding where a product comes from, but not what whether an import from that location amounts to a violation of a Member States' public policy, *see* Interpretative Notice (n 42).

Agreement. That provision gives the parties to that agreement the identical protections of Article 36 of the TFEU: "Nothing in this Agreement shall preclude prohibitions or restrictions on imports, exports or goods in transit justified on the grounds of public morality, public policy or public security…."[76] Thus, the option is still open for a Member State to implement a national provision to prohibit the import of goods from Israeli settlements in the OPT based on public policy or public security grounds, even in light of harmonized place of origin standards.

Accordingly, a Member State could argue that trade with Israeli settlements in the OPT violates public policy because accepting imports from those settlements would cause the Member State to violate international law. The UN Security Council has consistently declared for the last 50 years that Israeli settlements in the OPT violate international law.[77] UN States have "agreed to accept and to carry out the decisions of the Security Council…."[78] UN States are required to carry out those decisions "through their action in the appropriate international agencies of which they are members,"[79] such as the EU. Finally, and most importantly, "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under

[76] EU-ISR Agreement (n 3) art. 27.

[77] *See* S.C. Res. 2334 ¶ 2 (23 December 2016), available at: http://www.un.org/webcast/pdfs/SRES2334-2016.pdf (demanding "Israel immediately and completely cease all settlement activities in the [OPT], and that it fully respect all of its legal obligations in this regard"); *see also* S.C. Res. 1515 at ¶ 2 (19 November 2003), http://unscr.com/en/resolutions/doc/1515 (calling on "the parties to fulfil their obligations under the Roadmap"); *see also* S.C. Res. 465 at ¶ 5 (1 March 1980), available at: https://unispal.un.org/DPA/DPR/unispal.nsf/0/5AA254A1C8F8B1CB852560E50075D7D5 (determining that "all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian or other Arab territories occupied since 1967, including Jerusalem, or any part thereof, have no legal validity and that Israel's practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Fourth Geneva Convention"); *see also* S.C. Res. 242 at ¶ 1(ii) (9 November 1967), available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20S%20RES%20242.pdf (calling on Israel to "[terminate all] claims or states of belligerency").

[78] United Nations, *Charter of the United Nations* art. 25, 24 October 1945, available at: http://www.refworld.org/docid/3ae6b3930.html (hereafter UN Charter).

[79] *Id.* art. 48(2).

any other international agreement, their obligations under the present Charter shall prevail."[80]

The above UN Charter provisions and responsibilities have been reinforced in ECJ case law. In *Yassin Abdullah Kadi*,[81] the ECJ held that "[f]rom the standpoint of international law, the obligations of the Member States of the United Nations under the Charter of the United Nations *clearly prevail over every other obligation of domestic law or of international treaty law*…."[82] The ECJ also held that, "pursuant both to the rules of general international law and to the specific provisions of the [TEU], Member States may, *and indeed must*, leave unapplied any provision of [EU] law…that raises any impediment to the proper performance of their obligations under the Charter of the United Nations."[83] Member States could implement "national measures contrary to the common commercial policy…if they were necessary to ensure that the Member State concerned performed its obligations under…a resolution of the Security Council."[84] Finally, the ECJ has also determined that even when some responsibilities as a UN member have been transferred from that State to the EU, Member States are still responsible for ensuring that the EU is in compliance with the UN Charter.[85]

All EU Member States are also members of the United Nations.[86] Thus, Member States are bound to respect and enforce the decisions of both the ECJ and the UN Security

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[80] *Id.* art. 103.

[81] Case T315-01, *Yassin Abdullah Kadi*, 2005 E.C.R. II-03649, available at: https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62001TJ0315&rid=7) (hereafter *Kadi*).

[82] *Kadi* (n 68). at ¶ 181 (emphasis added).

[83] *Id.* at ¶ 190 (emphasis added).

[84] *Id.* at ¶ 191. The "common commercial policy" mentioned here is found in Article 113(1) of the TEU: "The common commercial policy shall be based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies," available at: https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf.

[85] *Id.* at ¶ 198 ("in so far as the powers necessary for the performance of the Member States' obligations under the Charter of the United Nations have been transferred to the Community, the Member States have undertaken, pursuant to public international law, to ensure that the Community itself should exercise those powers to that end.").

[86] *Member States*, United Nations, available at: http://www.un.org/en/member-states/.

Council. In addition to the UN's resolutions above, the EU has also taken a clear position that Israeli settlements in the OPT violate international law.[87] A Member State is obligated to ensure that neither it nor the EU takes action that would imply the legality of the Israeli settlements in the OPT. If the EU fails to act as a unit, Member States are not relieved of their responsibility to enforce the relevant UN Security Council resolutions—nor can the EU prevent a Member State from doing so.[88]

Therefore, a Member State could argue that it must ban trade from illegal Israeli settlements in order to comply with its obligations under international law; and that violating international law is against public policy. Because Israel is in violation of international law, Member States are likely justified in banning *all* imports from Israel. However, per the proportionality guidelines discussed above, and in accordance with the EU-Israel Association Agreement, Israeli exports produced singularly within Israel's pre-1967 borders *may be* entitled to preferential treatment and free movement inside the EU common market provided that they do not originate from the unlawful settlements; that arrangement has not been altered by any of the EU's Notices to Importers or its 2015 Interpretative Notice.

However, Member States can still act to ban goods produced in illegal settlements. This action acutely addresses specific international law violations (settlements located in the OPT) while leaving unpunished any imports from within the internationally-recognized Israeli borders (i.e., pre-1967).[89] To satisfy the EU's enforcement proportionality requirement, a Member State should enact two pieces of legislation simultaneously: 1) a regulation requiring goods produced in Israeli settlements to be labeled as such; and 2) a prohibition on those goods. This would ensure that the Member

[87] Interpretative Notice (n 42) at ¶ 1 ("[t]he [EU] has made it clear that it will not recognize any changes to [Israel's] pre-1967 borders, other than those agreed to by the parties to the Middle East Peace Process…."; *see also, Brita* (n 68) at ¶ 58 ("The [EU] takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under [the EU-Israel Association Agreement].").

[88] *Kadi* (n 81) at ¶ 204 ("the Community may not infringe the obligations imposed on its Member States by the Charter of the United Nations or impede their performance").

[89] The relevant ECJ case law deals with the application of Article 36 of the TFEU; however, because Article 27 of the EU-ISR Agreement is identical to Article 36, the same reasoning likely applies.

State avoids charges that it is arbitrarily banning goods it only suspects are produced in settlements, or that it is failing to abide by its obligations under the EU-Israel Association Agreement.[90] Rather, the Member State would be acting *in accordance* with its obligations under international law.

Israel may claim that a Member State is not permitted to unilaterally ban goods produced in settlements because that ban is a dispute about the origin of the goods and any such dispute is required to be submitted to either the Customs Cooperation Committee[91] or the Association Council.[92] However, the ECJ in *Brita* determined that goods produced anywhere in the OPT, including Israeli settlements, are governed by the EU-PA Interim Association Agreement, not the EU-Israel Association Agreement.[93] Therefore, disputes regarding the import of settlement goods are not required to be heard by either the EU-Israel Association Agreement's Customs Cooperation Committee or the Association Council because those goods do not within the purview of either of those bodies.

IV. CONCLUSION

The unlawfulness of the Israeli settlements not only precludes settlement goods from receiving preferential tax and customs treatment, their illegal nature also precludes them from being sold in the EU's common market *at all*. On both fronts, neither the EU nor the UN have been effective. None of the EU's Notices to Importers or Interpretative Notice

[90] *See Richardt* (n 17) at ¶ 20 ("Measures adopted on the basis of Article 36 can therefore be justified only if they are such as to serve the interest which that article protects and if they do not restrict intra-Community trade more than is absolutely necessary.").

[91] EU-ISR Agreement (n 3), Protocol 4 art. 33 ("[w]here disputes arise in relation to the verification procedures of Article 32 [determining where a product originates] which cannot be settled by [the parties' customs authorities] or where they raise a question as to the interpretation of this Protocol, they shall be submitted to the Customs Cooperation Committee.").

[92] *Id.* art. 75(1) ("[e]ach of the Parties may refer to the Association Council any dispute relating to the application or interpretation of this Agreement.").

[93] *Brita* (n 68) at ¶ 53 ("Article 83 of the [EU]-Israel Association Agreement must be interpreted as meaning that products originating in the West Bank do not fall within the territorial scope of that agreement….").

has prevented Israeli settlement goods from either receiving preferential customs treatment afforded Israeli goods or enjoying free movement throughout the EU market.[94] None of the UN Security Council's Resolutions have prevented the spread of settlements or the growth of those settlements' economies. Israeli settlement goods are still being exported all over the world with the majority of those goods being sent to Europe.[95] Further action is required by Member States to uphold their responsibilities under international law.

The TFEU and the TEU provide mechanisms by which the EU can collectively ban goods from Israeli settlements inside the OPT. However, a lack of action by the EU as a whole does not prevent Member States from acting on their own to ensure they are in compliance with international law. Member States are bound by the UN Charter to abide by and enforce UN Security Council resolutions. The Security Council has repeatedly held that Israeli settlements violate international law. Furthermore, the ICJ has held that States are obligated not to take any action that either recognizes or implies recognition of an illegal situation. The EU-Israel Association Agreement contains language that mirrors that of the TFEU with regard to restricting the free movement of goods within the customs union. ECJ case law requires that Member States that enact such restrictions must do so in a proportionate and minimally-restrictive way.

So while Member States cannot restrict the import of all goods produced in Israel, they may restrict the import of settlement goods because 1) the settlements are not within the recognized borders of Israel; 2) the settlements are illegal and Member States are obligated under international law not to recognize and end the illegal situation;[96] and

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[94] *See, e.g.,* UN Secretary General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, UN Doc. A/HRC/34/39 (16 March 2017) at ¶ 35 ("[in 2015, Israel] estimated that the annual value of industrial products produced in settlements and exported to Europe is $300 million").

[95] *Id.* ("[the EU] is Israel's main trading partner…. Agricultural production remains the main source of income for settlements in the Jordan Valley, with 66 per cent of their produce being exported.").

[96] UN Member States are further obligate to do what is in their power to ensure Israel complies with international law and ends its occupation of Palestine, *see ICJ Wall Advisory Opinion* (n 64) at ¶ 159 ("all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War

3) banning only settlement goods is proportionate because that action is necessary to prevent recognizing an illegal situation and the action addresses only the situation in direct violation of international law. The best strategy for a Member State seeking to ban Israeli settlement goods seems to be to simultaneously enact both a requirement that settlement goods are labeled "made in the West Bank (Israeli settlement)" and a prohibition on the import of goods so labeled. Member States should then prepare to defend its position on both the EU and international law justifications discussed above.

Member States should consider that arguing the legality of banning goods from Israeli settlements is likely the easiest part of such a strategy; enforcement will be difficult. Member States will require a logistical framework that vigilantly verifies the origin of all imported products carrying a "made in Israel" label. Customs officials will need to monitor not only products imported directly to that State, but also products that are moved to its State after having been imported elsewhere in the EU. This task will be even more difficult given the lack of enforcement regarding settlement labeling requirements across the EU, with the lone exception of France.[97] Thus, the legal foundation for banning settlement goods is solid; however, the enforcement of such a ban will require immense political and enforcement dedication.

of 12 August 1949 are under an obligation…to ensure compliance by Israel with international humanitarian law as embodied in that Convention").

[97] *See* Charlotte England, *France Becomes First European Country to Label Items from Israeli Settlements*, The Independent (29 November 2016, 12:48 AM), available at: https://www.independent.co.uk/news/world/europe/france-becomes-first-european-country-to-label-items-from-israeli-settlements-a7444031.html.