

ECJ Holds that West Bank Products are Outside Scope of the EU-Israel Association Agreement

By [Itzchak Kornfeld](#)

Introduction



On February 25, 2010, in its ruling in *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, the European Court of Justice (‘‘ECJ’’) ruled on the trade implications of one of the hot-potato issues of international law: the status of the territories occupied by Israel.

During the 1990s, the EC concluded two Euro-Mediterranean Association Agreements, one with Israel in 1995^[1] and another with the Palestinian Liberation Organization (PLO) in 1997.^[2] Each of these agreements defines its product scope through rules of origin. Because origin fraud is an endemic hazard in preferential trade agreements, each EU Association Agreement requires that importers claiming preferential treatment submit a EUR.1 certification of origin standard form issued by the exporting country’s customs authorities. The importing and exporting authorities coordinate to resolve any factual questions regarding origin issues and can take disputes to a bilateral Customs Cooperation Committee (‘‘CCC’’) of

customs experts and officials. In addition, each EU Association Agreement has a formal means of settling disputes in its Association Council.

The question in this case is *which* of these two agreements governed a German company’s imports of home carbonated beverage systems and syrups manufactured in the West Bank—the EC-Israel Agreement, the EC-PLO Agreement, or neither. In November 2009, the EU Advocate-General (AG) opined that, as a matter of international law, the borders of the State of Israel are defined by the 1947 Plan for the Partition of Palestine, and any territories outside the 1947 borders do not form part of the territory of the State of Israel for purposes of the Agreement. Consequently, products originating in the West Bank, Gaza, and the Golan Heights would be excluded from the EC-Israel Agreement.

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The ECJ demurred from the AG's opinion, finding merely that the EC-Israel Agreement must be interpreted in light of the EC-PLO Agreement, and therefore only the Palestinian authorities can issue origin certificates for goods originating in the West Bank. As a result, the status of goods from East Jerusalem, the Golan Heights, and Gaza remains open; an exporter of West Bank-origin goods can benefit from EU tariff preferences if it can obtain a EUR.1 certificate from the Palestinian customs authorities.

I. Background

A German water filtration company, Brita GmbH,^[3] imported into the EU products manufactured by an Israeli company, Soda Club Ltd., in its plant in the Mishor Adumim industrial area of the West Bank.^[4] Pursuant to the EC-Israel Agreement between the European Communities and its Member States and the State of Israel (the "EC - Israel Agreement"), Brita filed sixty-two customs declarations between February and June 2002, declaring that these goods originated in the State of Israel.^[5] The declarations were based on invoices from Soda-Club and EUR.1 certificates of origin issued by Israeli customs authorities^[6] stating that the products at issue originated in Israel.^[7] The Port of Hamburg customs office (*Hauptzollamt Hamburg-Hafen*, or "HHH") provisionally accepted the EUR.1 declarations but then challenged them.

The Israeli customs challenged the HHH, stating that "our verification has proven that the goods in question originate in an area that is under Israeli Customs responsibility. As such, they are originating products pursuant to the [EC-Israel] Association Agreement and are entitled to preferential treatment under that agreement."^[8] The HHH inquired whether the goods in question were manufactured in Israeli-occupied areas of the West Bank, the Gaza Strip, East Jerusalem, or the Golan Heights. According to the ECJ, the Israeli authorities did not respond.^[9] As a result, HHH denied Brita's request for duty-free treatment and assessed duties of €19,155.46 on these entries.^[10]

The HHH denied a customs protest filed by Brita, and Brita consequently brought an action for annulment in the Hamburg Finance Court. This court decided that the outcome depended on the interpretation of the relevant trade agreements, and it referred four separate questions to the ECJ for a preliminary ruling. The Court reframed them into two issues: first, whether Israel can issue a certificate of origin (EUR.1) for goods manufactured in whole or in part on the West Bank; and second, if the origin of the goods is known "here the West Bank" whether EU Member State's customs authority is required to submit the dispute to the CCC for determination of the goods' origin.

Advocate-General Yves Bot's opinion of October 2009 examined the EC-Israel Agreement, the EC-PLO Agreement, and the 1997 Israeli-Palestinian Interim Agreement, and suggested, among other things, that the territories of the West Bank and Gaza are not part of the territory of the State of Israel. Thus, Israel cannot issue valid EUR.1 certificates for goods originating in the West Bank.

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II. The Court's Opinion

The ECJ reached the same outcome as the Advocate-General, but on different grounds. It avoided any ruling interpreting the phrase "territory of the State of Israel" in the EC-Israel Agreement. Instead, it relied on the existence of two separate EC agreements with mutually exclusive territorial scope—the EC-Israel Agreement and the EC-PLO Agreement. The Court relied on an earlier ECJ ruling in *Anastasiou*,^[11] wherein it held that only the named authorities of the named state-party can issue EUR.1 certificates. Thus, the Court reasoned, the EC-Israel Agreement could not authorize Israeli authorities to issue certificates contrary to the EC-PLO Agreement. Relying on the EC-PLO Agreement to define areas *not* within the "territory of the State of Israel," the ECJ treated the territorial question as having been decided the moment the EC concluded its Association Agreement with the PLO.

Both Agreements require that proof of origin be produced as a condition of preferential treatment for goods. Thus, on the basis of EUR.1 certificates issued by the Palestinian authorities, products originating in the West Bank cannot be allowed preferential treatment *under the EC-Israel Agreement* but only under the EC-PLO Agreement.

III. Analysis

The Court's opinion raises as many questions as it answers.

A. *The Territorial Scope of the EC-Israel Agreement.*

Rules of origin are seldom caught up in international territorial disputes. Their commonplace aim is to establish whether a specific preferential arrangement (e.g., duty-free import) will be employed for a particular product in international trade. Nevertheless, where a product originates in a territorially disputed area, rules of origin are utilized in the context of international trade. Consequently, rules of origin operate as a means of distinguishing whether a specific discriminatory scheme will be applied for a particular product in international trade.

Accordingly, importing states generally apply two territorial approaches when determining a product's origin: the practical-trade approach or the political-sovereignty approach.^[12] The practical-trade approach evaluates the question of origin from a purely commercial standpoint and determines the relevant questions according to the principles of international trade law.^[13] Alternatively, the political-sovereignty approach gauges issues of origin from the perspective of international politics, thus highlighting questions of sovereignty recognition. The question is whether judges must employ both approaches.

One might argue that the ECJ adopted a practical-trade approach in reference to the EC-PLO Agreement. It could be that the decision simply accepts the EC-PLO Agreement as identifying, for practical purposes, that goods originating in the West Bank fall under that arrangement. On the other hand, it may also be that the ECJ employed the political-sovereignty approach, which contradicts its international trade ruling in *Anastasiou*,

where the Court employed the practical-trade approach by emphasizing the factors of *de facto* control, jurisdiction, and ensuing responsibility. First, from a trade law analysis, the term “goods originating in Israel”^[14] is not defined anywhere in the EC-Israel Agreement. Its decision here may be seen as a default to a political response. Second, had the EC sought to limit its definition of Israel’s territoriality, it certainly could have done so by formulating a “territorial scope” reservation when the parties executed the treaty in 1995, pursuant to Article 19 of the Vienna Convention on the Law of Treaties (“Vienna Convention”), like it did two years later (1997) when it executed the EC-PLO Agreement.

B. Defining Territorial Scope and Customs Jurisdiction?

Article 29 of the Vienna Convention states that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory.”^[15] How does a court construe Article 29 when it addresses a contentious legal issue, such as, whether the “territory of the State of Israel” includes the West Bank? Some have argued that, in interpreting Article 29, a court should apply rules similar to a common law court when construing common law contracts. That is, the court should look at the parties’ intent at the time of treaty negotiation.

If one accepts the foregoing proposition, the question remains: how should the ECJ have divined the intentions of EC and Israel in 1995 when they executed the treaty. Arguably, Israel considers parts of the West Bank to be under its sovereign control.^[16] Conversely, the EU’s position is “that settlements on occupied land are illegal under international law. The European Union urges the Government of Israel to immediately end all settlement activities.”^[17] Moreover, the EC-PLO Agreement gives a clear indication of the EU’s position that goods originating in the West Bank fall under Palestinian customs authority. Given these varying possibilities, the ECJ’s decision not to undertake an examination of the term “territory of the State of Israel” pursuant to Article 29 of the Vienna Convention should have been explained.

Does the foregoing analysis affect international trade law differently from international law generally?^[18] It may not since the relationship between the two parties to the EC-Israel Trade Agreement are governed principally by the terms of the treaty in spite of any other law. Nevertheless, it is important to note that had this case been adjudicated by an arbitral tribunal (e.g., the World Trade Organization (WTO) or the International Centre for Settlement of Investment Disputes (ICSID)), the underlying reasons for the ruling may have raised a series of different questions.

This may explain why the Fourth Chamber ruled in paragraph 64 of its judgment that “[t]he European Union 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 that agreement.” Again, however, it may merely be that the 1997 EC-PLO Agreement constrained the Court in ways that the Israeli side did not envision when it concluded its agreement in 1995.

C. Lessons Learned

This case provides two windows into the future. First, since the law regarding the EUR.1 certificate is settled, the primary law of the case appears to be that the EC-Israel Agreement and the EC-PLO Agreement are coequals, and that the territories of the two countries do not overlap. That is, the Palestinian National Authority's officials have the exclusive right to issue origin certificates for products made in the West Bank, and the fate of origin certification for the remainder of the occupied territories of Israel remains unresolved. Second, the Court will defer to bodies (such as the Agreement's Cooperation Committee) only on technical issues, including the facts underlying origin issues and the application of law to those facts. This latter outcome may be a portent of things to come in cases addressing international administrative law.

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Endnotes

[1] A 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, 2000 O.J. (L 147) 3, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2000:147:0003:0156:EN:PDF> [hereinafter EU-Isr. Agreement] (the agreement was concluded on November 20, 1995 and approved on April 19, 2000). See *Decision of the Council and the Commission of 19 April 2000 on the Conclusion of a 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*, 2000/384/EC, 2000 O.J. (L 147) 3, 171, available at http://ec.europa.eu/competition/international/bilateral/il2a_en.pdf.

[2] A Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community, of the one part, and the Palestine Liberation Organisation (PLO) for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, 1997 O.J. (L 187) 3, available at <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransId=696> [hereinafter EC-PLO Association Agreement].

[3] A GmbH stands for *Gesellschaft mit beschränkter Haftung*, a corporate or limited liability entity.

[4] See Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2009 E.C.J. ¶ 49 (Oct. 29) (Opinion of Adv. Gen. Yves Bot),

<http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-386/08> [hereinafter Brita v. Hauptzollamt AG Decision].

[5] *Id.* ¶ 51.

[6] In order to be entitled to preferential treatment, the exporter must, under Article 17 of Protocol 4 to the EC-Israel Agreement, submit a EUR.1 certificate. That certificate is issued by the customs authorities of the exporting State, who must take any steps necessary to verify the originating status of the product and the fulfillment of all the other requirements laid down by that protocol. *Brita v. Hauptzollamt AG Decision*, ¶ 66.

[7] *Id.* ¶ 51.

[8] Case C-386/08, *Brita GmbH v. Hauptzollamt Hamburg-Hafen*, Judgement, 2010 E.C.J. ¶ 32 (Feb. 25), <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-386/08>.

[9] *Id.* ¶ 55.

[10] *Id.* ¶ 57.

[11] Case C-432/92, *Queen v. Minister of Agriculture, Fisheries and Food ex parte S.P. Anastasiou (Pissouri) Ltd.*, 1994 E.C.R. I-3087.

[12] See, e.g., Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 *FORDHAM INT'L L.J.* 572 (2003).

[13] *Id.*

[14] See, e.g., EU-Isr. Agreement art. 9.1. (a).

[15] Vienna Convention on the Law of Treaties art. 32, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331. See also Michael J. Dennis, *AGORA: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory - Application of the Human Rights Treaties Extraterritoriality in Times of Armed Conflict and Military Occupation*, 99 *AM. J. INT'L L.* 119, 127 (2005). The article states that

Under customary international law, as reflected in Article 29 of the Vienna Convention on the Law of Treaties, “unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory. . . . [For example,] the negotiating history of the ICESCR [the International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESC)] confirms that states generally intended that the treaty would be binding on each state with respect to its own territory and those nonmetropolitan territories over which it exercised sovereignty. The negotiating record does not even suggest that states intended that the substantive obligations in the ICESCR would apply extraterritorially, either in peacetime or during situations of

armed conflict or military occupation.

[16] Â Israel Ministry of Foreign Affairs, *Israeli Settlements and International Law* (May 20, 2001), <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/Israeli+Settlements+and+International+Law.htm> (stating the Ministry of Foreign Affairsâ€™ position as follows: â€œJewish settlement in West Bank and Gaza Strip territory has [*sic*] existed from time immemorial and was [*sic*] expressly recognised as legitimate in the Mandate for Palestine adopted by the League of Nations, which provided for the establishment of a Jewish state in the Jewish people's ancient homeland . . . Repeated charges regarding the illegality of Israeli settlements must therefore be regarded as politically motivated, without foundation in international law.â€).

[17] Â Press Release, Council of the European Union, Declaration by the Presidency on behalf of the European Union on Israeli Decision Regarding Settlements, No. 17698/09 (Presse 385) (Dec. 18, 2009), *available at* http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/cfsp/112007.pdf. However, the author was unable to find evidence that the EU or any of its member states adopted the position expressed above prior to 2002.Â Â

[18] Â For an analysis of European international law and theories of why the ECJ may have handled the case in the manner that it did, *see generally*, JOOST PAUWELYN, OPTIMAL PROTECTION OF INTERNATIONAL LAW: NAVIGATING BETWEEN EUROPEAN ABSOLUTISM AND AMERICAN VOLUNTERISM (2008) (discussing the contractual theory of international law, making specific reference to Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972)).Â See also Yuval Shany, *Contract Claims vs. Treaty Claims: Mapping Conflicts between ICSID Decisions on Multisourced Investment Claims*, 99 AM. J. INTâ€™L L. 835 (2005).