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## Understanding the Dispute over the Treatment of Products Exported to the European Union from the Occupied Territories in the Context of the Transatlantic Trade and Investment Partnership

**Abstract:** While the European Union (EU) does not recognize any legal Israeli sovereignty over the territories occupied by Israel in 1967, it does not grant preferential access to the EU market for goods produced in the Israeli settlements in this area, contrary to the preferential treatment for goods produced in Israel. This situation is different, however, as regards the United States (U.S.) trade policy, which does not make any distinction between goods produced in Israel and in the Occupied Territories, since it grants the preferential access to both. Furthermore, the currently suspended negotiations of the super-regional trade agreement called the Transatlantic Trade and Investment Partnership (TTIP), spurred the enacting of a law that set the principal negotiating objectives of the U.S. regarding commercial partnerships, which included some provisions to discourage politically motivated economic actions against the State of Israel. As TTIP embraced the free trade agreement between the EU and the U.S., the EU differentiation policy could become problematic for the two partners, which despite the failure of the negotiations, revealed much about economic diplomacy. Consequently, this article attempts to show the different approaches adopted by the two trading powers, in order to deal with the dispute over the treatment of products exported to the EU from the Occupied Territories.

**Keywords:** *European Union; Israel; Occupied Palestinian Territories; the United States; trade negotiations, TTIP*

### Significance of the topic and state of the art

The ongoing process of pervasive globalization along with the growing importance of regionalization has resulted in the dynamic development of massive super-regional trade agreements such as TTIP (Transatlantic Trade and Investment Partnership). As the TTIP

agreement concerned the largest trading blocks in the world, the decisions made by its signatories, namely the European Union (EU) and the United States (U.S.), could become crucial, not only for the transatlantic market but in fact, for all of the economies around the world. Although we do not know the final shape of the proposed TTIP, according to the European Commission, it was a free trade agreement that aimed “to create growth and jobs on both sides of the Atlantic by removing trade barriers” (European Commission, 2015). Despite the expected benefits, TTIP raised many controversies, not only on both sides of the Atlantic but also around the world, and since the end of 2016 the TTIP negotiations are suspended, following the change of Administration in Washington; however, many believe that the talks *de facto* failed, and any possible agreement is currently not realistic.<sup>1</sup> Nevertheless, these negotiations could reveal much about the economic diplomacy. Indeed, among many problems which appeared in this matter, the question of the Israeli-Palestinian conflict in which the EU’s and the U.S.’ opinions slightly differ remains somewhat overlooked. Unsurprisingly, this situation resulted in different approaches adopted by the two trading blocks to deal with the problem - both on the political and economic levels. While the EU does not recognize any Israeli legal sovereignty over the territories occupied by Israel since 1967, it does not grant preferential access to the EU market for goods produced in the Israeli settlements in this area, contrary to the preferential treatment for goods produced in Israel. This situation is different, however, as regards the U.S. trade policy, which does not make any distinction between products manufactured in Israel and the Occupied Palestinian Territories (OPT) or precisely – in the Settlements; thus, it grants the preferential access to both. Furthermore, the negotiations of the TTIP agreement spurred the enacting of a law that set the principal negotiating objectives of the U.S. regarding commercial partnerships, which included some provisions to discourage politically motivated economic actions against the State of Israel. As TTIP embraced the free trade agreement (FTA) negotiations between the EU and the U.S., the EU differentiation and labeling policies could become somewhat problematic for the two partners.

As it is crucial to describe what this article aims to discuss, it is equally important to emphasize what this study intends to leave aside. Thus, it is not the intention of this article to dwell on the questions about the lobbying in US or EU foreign policy-making towards the Israeli-Palestinian conflict (see e.g., Mearsheimer & Walt, 2007; Newhouse, 2009; Voltolini, 2013). It is neither intended to perform guesswork about the possible implications of the failure of TTIP for the relations between the EU, U.S., or Israel. Apart from the analysis of whether the agreement may be concluded despite the fact that the negotiations are currently in the void, and the general scepticism towards TTIP in Europe, this article focuses

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<sup>1</sup> On 28.08.2016 the German Economy Minister Sigmar Gabriel, when asked about TTIP, stated that “the negotiations with the United States have *de facto* failed, even though nobody is really admitting it”. See for example <https://www.telegraph.co.uk/business/2016/08/28/eus-ttip-trade-deal-with-the-us-has-collapsed-says-germany/>.

on contributing to the better understanding of politics of trade negotiations (e.g., Hirsch, 2013; Morin et al., 2015; Rosen, 2003; Zartman, 1971). Specifically, it attempts to analyze this problem in the context of the dispute over the treatment of Israeli products exported to the EU from the Settlements in the OPT (e.g., Aprovev et al., 2012; Gordon & Pardo, 2015b; Harpaz, 2017; Hirsch, 2002; Lovatt, 2016; Lovatt & Toaldo, 2015; Persson, 2018), with a case study of recent developments in this matter which were brought about by the TTIP negotiations. By adding the U.S. to the analysis of the EU–Israel dispute, this possibly sets up a new, transatlantic dimension of the problem.

## **Hypothesis and methodology**

In the light of the literature on the research problem, the hypothesis proposed in this article argues that the TTIP negotiations exemplify the use of trade agreement as a tool of foreign policy in the context of the Israeli-Palestinian conflict. In order to verify this assumption, the article also attempts to capture the tremendous complexity of the problem, while the issues taken into account range from the Rules of Origin (RoO) instrumentalization, through the role of the lobbies in the U.S. and the EU foreign policy formulation, to the BDS movement activity and its opponents' actions to stop this initiative. Additionally, the often confused notions of the EU's "differentiation" with the dispute over the question of the RoO between the EU and Israel blur the picture of this situation, and hence, the article will address both of these issues. This article is a political study of negotiations in a particular context, and it makes use of desk research and document analysis whereas, to get to the information which would otherwise be inaccessible, it is complemented with interviews with relevant actors.

## **The politics of trade relations between Israel, the U.S., and the EU**

There are specific interests which have driven the establishment of the FTAs between Israel, the U.S., and the EU, yet, these factors are not solely for economic reasons. In the case of the alliance with the U.S., it dates back to the Six-Day War in 1967. An increasing influence of the Soviets in the Middle East, a greater military capacity of Israel, and a stronger backing for the pro-Israeli lobby in the U.S. were crucial for this partnership. Indeed, not long after, but still in the context of the Cold War rivalry, an FTA was signed between the two allies. It is noteworthy that the U.S. Congress has been combating the foreign attempts to boycott Israel for decades. It started by codifying strict legal penalties for those abiding by the Arab League Boycott. The cooperation with the U.S. Trade Representative forced potential free trade partners to end their hostile actions towards Israel. Supported by the Executive Branch, it successfully pushed both Bahrain (2005) and Oman (2006) to end their boycotts [of Israel] as a condition of free trade with the U.S., and for Saudi Arabia to grant Israel with the MFN (Most Favored Nation) clause during its WTO accession (AIPAC Memo, 2015, p. 1).

While the EU is the most important trading partner, relations between Israel and Europe may seem at first sight as principally focused on economic cooperation - yet, it is also profoundly marked by geopolitics. The EEC (European Economic Community) firstly granted preferential access for products originating from the PTOs in 1986 (Eeckalaert, 2013, p. 39). Nevertheless, soon enough a firmer European stance on the question of the Israeli settlements probably resulted from a disappointment with the results of the peace negotiations in the 1990s. Indeed, from the beginning of the Madrid and Oslo negotiations, Israeli colonization did not stop, but rather even accelerated (Blanc et al., 2007, p. 47). In February 1997 the EC and the PLO signed an interim association agreement on trade and cooperation for the benefit of the Palestinian Authority (PA) of the West Bank and the Gaza Strip. In May 1998, the European Commission concluded that, according to the United Nations Security Council resolutions, no Israeli settlement in the West Bank, the Gaza Strip, East Jerusalem, or the Golan Heights could be considered part of the territory of the State of Israel (Gordon & Pardo, 2015b, p. 79, 81; see also European Commission, 1998). Recently, some European countries (e.g., the Netherlands, the UK, Norway, and Denmark) took some “economic steps” to pressurize Israel for political reasons, through divestments from Israeli financial institutions which were involved in the Settlements projects, or threatening economic sanctions, as in the case of Denmark. Furthermore, in 2014 the EU differentiation strategy, in some cases, could serve as a reason for the imposition of EU bans on certain Israeli goods. The EU issued guidelines on proper labeling of products from the Settlements; otherwise, it threatened to impose a ban on all Israeli meat, poultry, and dairy products.<sup>2</sup>

Besides, the EU playing its role as a mediator in the Middle East conflict has its motivations, such as combating instability in the region as well as Islamic fundamentalism and international terrorism. Such a coherence of interests in this area constituted a more solid transatlantic partnership, while for the last two decades the U.S. and the EU strictly cooperated on the question of Israeli-Palestinian conflict. This led to a total disappearance of the differences on the two sides of the Atlantic over this problem (Pardo, 2011, p. 22).<sup>3</sup>

## **The question of the Rules of Origin**

In a Free Trade Area, goods can circulate without being subject to duties while entering another market, referred to as preferential treatment. However, such treatment is only granted to specific products which comply with the RoO. The general principle is that the State carrying out the “last substantial process” or “sufficient working or processing” is the

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<sup>2</sup> See for example <http://www.jpost.com/Israel-News/Politics-And-Diplomacy/EU-threatens-Israel-with-total-ban-of-poultry-unless-it-marks-products-from-settlements-374177>.

<sup>3</sup> This study focused on the period before the change of the administration in Washington that followed the TTIP negotiations' suspension. Please note, however, that currently, with Donald Trump in the White House, the differences between the Transatlantic partners increased in this regard.

originating State (Hirsch, 2002, p. 575). Trade agreements need RoO because they serve to prevent third parties from exploiting them by transferring goods through a beneficiary country (Elliot, 2016, p. 1). In short, RoO define how much processing must take place locally before goods and materials are considered to be the product of the exporting country and rewarded with preferential market access (Naumann, 2011, p. 1).

The connection between foreign policy and RoO is stronger when a trading party is required to determine the origin of products manufactured in territorially disputed areas (Hirsch, 2013, p. 320). Such territorial disputes are not uncommon, (e.g., Cyprus, Taiwan, and the Western Sahara) and the states which must face this situation on the ground of trade, may, according to Moshe Hirsch, pursue one of the two approaches. First, the *practical-trade approach* “considers the issue of origin from a commercial perspective and resolves the relevant questions in accordance with rules of international trade law that emphasize the factors of de facto control, jurisdiction, and ensuing responsibility”. Whereas the second, *political-sovereignty approach* “considers the issue of origin from an international political perspective, underlines the involved questions of sovereignty and recognition, and addresses the question of origin as flowing from an early determination regarding the questions of sovereignty or recognition” (Hirsch, 2002, p. 577). In the setting of the RoO dispute between the EU and Israel over the preferential treatment of products manufactured in the Israeli Settlements in the OPTs, it is certain that the technical customs rules are also in use as instruments of foreign policy (see e.g. Gordon & Pardo, 2015b; Hirsch, 2002; Hirsch, 2013; Rosen, 2003). By applying in this context the two alternative approaches proposed by Hirsch, it becomes visible that the U.S. adopted the first approach (support for this approach may be found in the GATT rules - Article XXVI (5) (a)), whereas the second has been chosen by the EU (Hirsch, 2013). Indeed, along with the introduction of an FTA between the EU and Israel, and proliferation of Israeli settlements in the OPTs, some serious questions about the legal status of Israeli products produced in the Settlements have been raised. Hence, the RoO became an instrument of political conditionality and foreign policy issue, rather than a sole trade criterion needed to determine the national source of a product. As Neve Gordon and Sharon Pardo claim in their study, “the application of the RoO has had no tangible impact on this industry [export industry in the Territories], on the Israeli economy as a whole, or even the settlement project in particular” (2015b, p. 75). Nevertheless, in their view, this has had “an incremental impact, since the rules have influenced some EU member states to begin addressing the labeling issue. They have further served as the basis for the publication of new EU guidelines” (Gordon & Pardo, 2015b, p. 75).

### **RoO, differentiation dispute, and TTIP**

The crux of the problem in the context of the TTIP agreement was the preferential treatment of the products manufactured in the OPTs within the frameworks of the Israel-EU and Israel-U.S. FTAs. Although both the U.S. and the EU acknowledged that labeling of

products from the OPTs should show their actual origin, i.e., the West Bank, the Gaza Strip, or Israel proper, in November 2015 the EU required additional information if a manufacturer was located in the Israeli settlements. If this would be the case, the FTA with the EU does not grant a preferential treatment to such a product, contrary to the provisions of the U.S. approach, while “under U.S. law, eligible articles imported into the United States from Israel, the West Bank, or the Gaza Strip are covered under the 1985 U.S.-Israel Free Trade Agreement (IFTA). (...) If a good is produced in the West Bank or Gaza, it remains a product of such no matter who produced it, and no matter from where it is shipped, provided no further work effecting a substantial transformation is done outside of the West Bank or Gaza” (Zanotti, 2015, p. 4, 5).

In the case of the labeling requirements under the EU-Israel FTA, the EU constantly maintained that this change is purely technical, and it does not support any boycotts or sanctions against Israel, but it rather aims to apply the already existing legislation, which should, effectively, give consumers the possibility to make an informed choice (Zanotti, 2015, p. 6). On November 9, 2015, 36 US Senators sent a letter to EU foreign policy chief Federica Mogherini pressing her to not implement the policy of different labeling for goods from Israeli settlements because it “appears intended to discourage Europeans from purchasing these products and promote a de-facto boycott of Israel” (Zanotti, 2015, p. 8). In turn, the Council of the European Union (2016) recognized that:

The EU and its Member States are committed to ensure continued, full and effective implementation of existing EU legislation and bilateral arrangements applicable to settlements products. The EU expresses its commitment to ensure that - in line with international law - all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967. This does not constitute a boycott of Israel which the EU strongly opposes. (p. 4)

Enacted on 29.06.2015, Bipartisan Congressional Trade Priorities and Accountability Act of 2015 (Section 102(b)(20)), and signed into law on 24.02.2016 the Trade Facilitation and Trade Enforcement Act (H.R. 644; from here and forth: “the Act”), granting President Barack Obama<sup>4</sup> fast-track authority over trade negotiations such as TTIP, established the principal U.S. trade negotiating objectives for TTIP. The fast-track authority (or Trade Promotion Authority) is the process that “Congress made available to the President to enable legislation to approve and implement certain international trade agreements” (Fergusson, 2015, p. 1).

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<sup>4</sup> Please note that President Obama issued a signing statement rejecting conflation: “certain provisions of this Act, by conflating Israel and “Israeli-controlled territories” are contrary to longstanding bipartisan United States policy”. For a full-text of the statement see <https://obamawhitehouse.archives.gov/the-press-office/2016/02/25/signing-statement-hr-644>. Also, almost one month before this event, the State Department Spokesman John Kirby said at a press briefing on 19th January 2016 that they “do not view labeling the origin of products as being from the settlements a boycott of Israel. We also do not believe that labeling the origin of products is equivalent to a boycott”. See for example <https://www.ynetnews.com/articles/0,7340,L-4755295,00.html>.

Through this procedure, Congress seeks to, inter alia, “define trade policy priorities and to have those priorities reflected in trade agreement negotiating objectives”, and “to ensure that the executive branch adheres to these objectives by requiring periodic notification and consultation with Congress” (Fergusson, 2015, p. 8). The Act includes a provision which aims “to discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel”, and “seeks the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel”. Additionally, the legislation would seek to use the ongoing trade negotiations with the EU to combat the BDS on the state-sanctioned, and international institution-led levels. Furthermore, it would protect “American entities from foreign prosecution waged solely on the basis that operating in Israel is determined to be a violation of international law” (AIPAC Memo, 2015, p. 3). Finally, the Act notes that “boycotts of, divestment from, and sanctions against Israel by governments, governmental bodies, quasi-governmental bodies, international organizations, and other such entities are contrary to principle of nondiscrimination under the GATT 1994 (as defined in section 2(1)(B) of the Uruguay Round Agreements Act (19 U.S.C. 3501(1)(B)))”. This may prove the U.S. practical-trade approach towards the question of preferential access for the products manufactured in the Settlements.

According to a US Congress staff member who was involved in the legislation process, the Bill which introduced into the Trade Promotion Authority the provisions referring to Israel stemmed from the rise of BDS around the world, whereas the US has an interest in stopping, while Israel is one of its greatest allies and it cannot just stand by while its trading partners in Europe are waging economic warfare against its ally (Anonymous U.S. Congress Staff member, personal communication, June 2016). TTIP was, therefore, perceived as a perfect opportunity to acknowledge that a prime objective of US Congress is to ensure that “when the US is negotiating with Europe, they are discouraging the BDS movement and the boycott of Israel” (Anonymous U.S. Congress Staff member, personal communication, June 2016). Indeed, as Hugh Lovatt noted, the Congress’ increased focus on the EU’s actions revealed that “at least some in DC and Israel have recognised the potency of the legal tool that the EU has at its disposal” (Lovatt, 2016). It is, however, a difficult task to find any remarks made by the EU side, as regards the Act (except the *Report of the 12<sup>th</sup> TTIP Round of Negotiations*, where the European Commission refers to the customs enforcement, stating that “the US presented a newly adopted Trade Facilitation and Trade Enforcement Act, which contains *positive* (emphasis added by the author) elements allowing for increased cooperation and exchange of information with third countries” (2016)). Thus, the bone of contention could be the fact that, according to the authors of the legislation, the EU’s labeling guidelines are *politically motivated* (emphasis added by the author) and anti-Israel - this does not lead to a peaceful solution (Anonymous U.S. Congress Staff member, personal communication, June 2016) and stands in contradiction to the US custom regulations on imports from the region. Certain groups perceived the Act’s regulations as a threat for introducing any

future pressures on Israel while claiming that “the legislation explicitly says that the TTIP negotiators should act to discourage boycotts and other economic measures against Israel. Such measures would include sanctions targeting goods from Israeli settlements in the occupied West Bank” (Cronin, 2015).

### **The role of lobbying**

Both in the European and American context of the activities committed to either supporting or combating the BDS movement, the lobbies play a significant, yet, often underestimated role. Benedetta Voltolini shows, that some of these organizations through certain lobbying practices may play a role in EU foreign policy formulation towards the Israeli-Palestinian conflict – as in the case of the MATTIN Group, a human rights NGO based in Ramallah which has managed to establish trust-based relationships with EU officials and politicians (2013, p. 157). The recently published EU guidelines constitute an exemplary case. The Commission was hesitant to publish the document, and it was pressure from the European Parliament which triggered the publication. More specifically, a group of MEPs (who themselves were under pressure from their own electorate) and NGOs successfully pushed the Commission, demanding a clear stance on the Horizon 2020 agenda towards the Settlements, while threatening that otherwise, the EP will not approve it (Gordon & Pardo, 2015a, pp. 419–420). In their article, Gordon & Pardo argue, that what contributed to the successful visibility of the Guidelines was actually a furious reaction from Israel (2015a, p. 423). Indeed, although BDS was rejected at the national and EU levels, the Israeli leaders continue to misrepresent differentiation as a boycott of Israel (Lovatt & Toaldo, 2015, p. 9). As regards the TTIP negotiations and the recent American legislation in this context, one of the MEPs, Anne-Marie Mineur (GUE/NGL) asked the Commission in April 2015 if this topic would be discussed during the TTIP negotiations with the U.S., and if “the Commission could guarantee that the democratic right of a country to hold a boycott is non-negotiable and will thus never be restricted by the potential TTIP”, whereas “the work of the BDS Movement will not be hampered in any way, despite the wishes of potential trade partners”.<sup>5</sup> The Commission stated that it does not consider that there is any link between the US-Israel Trade and Commercial Enhancement Act bill and the TTIP negotiations. It also declared that “the EU will continue to define its policy vis-à-vis Israel in an autonomous manner”.<sup>6</sup>

In turn, the politicians who were instrumental in introducing the Bill into law were Congressmen Juan Vargas and Peter Roskam and Senators Ben Cardin and Bob Corker

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<sup>5</sup> For the MEP’s question see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2015-006236+0+DOC+XML+V0//EN&language=en>.

<sup>6</sup> For the Commission’s answer see <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2015-006236&language=EN>.



- all of them committed supporters of Israel for years.<sup>7</sup> Their initiative was supported by a lobbying group that advocates pro-Israel policies to the U.S. Congress, AIPAC (American Israel Public Affairs Committee) and was praised by Israel (Anonymous U.S. Congress Staff member, personal communication, June 2016). According to the authors of the Bill, the BDS movement strategy is “economic warfare (which is in its opinion the most damaging sector) dressed as a social justice movement” (Anonymous U.S. Congress Staff member, personal communication, June 2016). Furthermore, from the point of view of the Israel Allies Foundation, the recent EU labeling requirements are “a predicate for the expansion of boycott efforts” (Israel Allies Foundation, n.d.), somewhat similar to the opinions often expressed by some Israeli politicians.

## Conclusion

The hypothesis proposed in this article could be proved only in part. Nevertheless, the research results bring more understanding about the circumstances of politicization of trade agreements negotiations. Considering the developments in the legislation on the two sides of the Atlantic, the analyzed legal provisions are to a lesser extent related to the sole, national interests of one or another country or entity - nor the international relations itself. Likewise, they are not a result of any potential contention between the transatlantic partners over the legal status of the Israeli settlements in the OPTs, even if there is a difference in the granting of preferences under the FTAs. It seems that they appear instead as the outcomes of a certain “lobby war” over the BDS movement which is motivated by domestic actors and their particular interests – and to a lesser degree by a broader agenda of foreign policy objectives – both in the U.S. and the EU. The first of the two opposing groups (in the U.S.) assumed that the issue of labeling is politically motivated in Europe, and therefore it wanted to counteract such a dangerous development which may be partially connected with the BDS impact on the EU and its MS governments. The second group (in the EU) wanted to safeguard the flexibility of the EU’s external action as regards Israel because the new legislation referred to the “politically motivated actions” and therefore could endanger the EU stand on the preferential treatment of the products manufactured in the Settlements. In turn, such a conclusion may go in line with research findings of the significant role of lobbying in the foreign policy formulation in the U.S. and the EU (e.g., Mearsheimer & Walt, 2007; Newhouse, 2009; Voltolini, 2013). One should bear in mind, finally, that this question would depend on the force of two significant factors in this scope:

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<sup>7</sup> For the engagement in support of Israel see for example [http://www.thepoliticalguide.com/Profiles/Senate/Maryland/Benjamin\\_Cardin/Views/Israel/](http://www.thepoliticalguide.com/Profiles/Senate/Maryland/Benjamin_Cardin/Views/Israel/); <http://www.timesofisrael.com/for-gop-rising-star-israel-us-are-in-it-together/>; <https://roskam.house.gov/Roskam-Vargas-Portman-Cardin-BDS/>; [http://www.israelallies.org/usa/members/juan\\_vargas/](http://www.israelallies.org/usa/members/juan_vargas/); [http://www.israelallies.org/usa/members/peter\\_roskam/](http://www.israelallies.org/usa/members/peter_roskam/).

1) the actual power and ability to exert the influence of two opposing groups of lobbies in the U.S. and the EU; and 2) the choice between political and trade-oriented approaches to the question of the RoO in TTIP.

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