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Europe's highest court rejects preferential EU treatment for products made in Israeli-occupied Palestinian territory

By Christopher Lund

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On February 25, 2010 the European Court of Justice (ECJ) handed down a judgment in Brita GmbH v. Hauptzollamt Hamburg-Hafen. The facts of the case are nothing spectacular, but it is the politically-charged nature of the case and the economic consequences of the ruling that make this case significant.

One of the issues that the ECJ was asked to determine was whether goods produced by an Israeli manufacturer in the West Bank qualify for preferential treatment under the 1995 EC-Israel Agreement. The Agreement basically states that goods produced in the "territory of Israel" shall enjoy preferential treatment, in the form of reduced tariffs, when exporting to EU member states. The ECJ has now ruled that Israeli products from the West Bank (or any other administrative territory of Israel) do not so qualify.

The ruling comes as no surprise to anyone in the EU who has been following the growing vocal disapproval over Israeli labeling practices. For example, on November 11, 2009 the UK government made an official recommendation to make it a criminal offense to label any products from Israeli settlements as having been produced in Israel.

Part of the reason for EU displeasure over Israel's characterization of West Bank goods is that the EU is the largest aid giver to the Palestinian Authority (PA). For the last several years the EU has given an average of over $600 million per year in aid to the Palestinians. In the view of many EU members, whenever Israel uses lands, such as the West Bank, and profits from them, Israel is diverting funds from the Palestinian economy. As a result, the PA requires more external aid. While Israel is getting richer on Palestinian soil, the EU must bear the cost by giving more aid to the Palestinians.

So when Brita, a German company that imports drink makers from an Israeli supplier, applied for preferential treatment under the EC-Israel Agreement, German customs officials wanted to make sure that the goods originated in Israel and not just in Israeli-occupied territory. German customs then sent an inquiry to Israel and received a response that the goods were manufactured in an area under Israel's responsibility. Germany then sent a more specific request, asking where the goods were manufactured; however, Israel did not respond.

This is not the first time that Israel has been accused of skirting EU rules under the EC-Israel Agreement. For many years, Israel had been known to import Brazilian orange juice, re-label it as being made in Israel, and then ship it to the EU duty free. Subtler has been the Israeli

practice of labeling products from its settlements as coming from Israel. For example, Yarden Wine, made in Golan Heights, describes its product as "produce of Israel."

Due to this and other questionable practices, in February 2005 the EU began requiring that all goods from Israel "be marked with their place of origin and postcode." The goal of these labeling requirements was not only to prevent Israel from importing goods from other nations and relabeling them as "made in Israel;" but also to prevent Israel from doing the same thing to goods manufactured in the West Bank, East Jerusalem, Golan Heights, and other Israeli settlements.

In Israel's defense, the language of the EC-Israel Agreement is not straightforward. Critics have characterized Israel's labeling practices of settlement goods as "a clear violation" or "blatant violation" of the EC-Israel Agreement. However, nowhere in the agreement do the parties define the "territory of the State of Israel." Article 83 of the Agreement simply states: "This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community … and, on the other hand, to the territory of the State of Israel."

Israel's interpretation was that the areas under Israeli control since 1967, such as parts of the West Bank, are the territory of the state of Israel insofar as Israel has administered these lands, set up Israeli businesses, housing settlements, maintained military control, and (to a great extent) continues to control the economic and physical movement of people in the area.

So why did Israel not use this case as an opportunity to officially and openly make the argument that Israeli settlements are part of "the territory of Israel?" Or why did Israel not respond to Germany's second request for more information about the origin of Brita's products? Perhaps Israeli officials saw that the game was up after Germany's dissatisfaction with its first response of, "[o]ur verification has proven that the goods in question originate in an area that is under Israeli Customs responsibility."

Israel realized that Germany did not accept its expansive view of Israeli territory, that most EU members have called Israel's maintaining of settlements illegal, and that if it responded to Germany's second request, Brita's goods would definitely not be given preferential treatment. Yet, if Israel ignored the request, there is an off chance that preferential treatment would still be granted without incurring a clear ruling pointing to occupation.

Still, the importance of the recent ECJ ruling is to finally define "the territory of Israel" as it pertains to the EC-Israel Agreement. In doing so the ECJ has rejected Israel's interpretation of what constitutes Israeli territory: "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 that agreement."

Defining the extent of Israeli territory was only the answer to the first question.

Brita put before the court a second argument, namely that even if Israeli goods from the West Bank do not qualify under the EC-Israel Agreement, the goods should still qualify for EU preferential treatment under the EC-PLO Association Agreement. In other words, since both Israel and PA have Association Agreements with the EU, then it doesn't matter if goods are

produced by Israelis or Palestinians in the West Bank – the goods should still qualify for preferential treatment.

In answering the second issue, the ECJ referred to the Vienna Convention, an international agreement on customary international law concerning treaties between states. Article 34 of the Convention provides: "A treaty does not create either obligations or rights for a third State without its consent."

In accordance with Article 34, the ECJ determined that Israel cannot use the EU-PLO Agreement to gain the right to export goods from the West Bank to the EU duty-free; because that would be tantamount to obligating the PA to confer rights over Palestinian territory to Israel. "Such an interpretation, the effect of which would be to create an obligation for a third party without its consent, would thus be contrary to the principle of general international law …"

The ECJ further determined that an importing EU state cannot grant preferential treatment to all goods from the West Bank by ignoring the manufacturer's nationality.

"To allow elective determination" would be "tantamount to denying" that the exporting State must "provide valid proof of origin."

In ruling the way it did, the ECJ was sensitive to volatile Palestinian-Israeli relations. The last thing the Mediterranean area needed was for an international power to legitimize Israel's occupation of Palestinian lands. Critics already point to Israeli occupation of the West Bank and other settlements as the biggest barrier to peace in the area. Adding an EU stamp of legitimacy on "made in Israel" goods from the West Bank would have caused greater resentment among Palestinians and more fuel to an already unstable situation.

The effect of the ECJ's ruling has large political and monetary ramifications for Israel. For example, just before the ruling, Palestinian leader Mahmoud Abbas was in Brussels and urged Europeans "not to invest" in Israeli settlements and to "boycott products" from them. Now with the ECJ's ruling, the Palestinian's arguments will carry much more weight. Israel has yet to comment on the decision; however, it sent a clear message to Palestinians this past week by announcing the construction of 1,600 Israeli housing units in East Jerusalem.

Also consider that the EU is Israel's second largest exporting partner. In 2008, Israeli companies exported about $16.2 billion in goods to the EU. One source indicates, "An estimated one-third of these goods were either fully or partially made in the occupied territories." The ECJ ruling means a price increase for one-third of Israeli products in the EU, making them less competitive. This may force Israel to rethink the extent to which it relies on settlement operations as part of its national economic strategy.

Christopher Lund, who also edited the ECJ decision on THE DAILY STAR law page, is a second-year law student at the University of Utah College of Law. He has a BA in Political Science and a BA in Russian Language from the University of Alaska Anchorage.