The *Front Polisario* Verdict and the Gap Between the EU's Trade Treatment of Western Sahara and Its Treatment of the Occupied Palestinian Territories

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Morocco's control over Western Sahara and Israel's control of the West Bank bear similar features in terms of public international law. Yet, when it comes to the application of its Common Commercial Policy, the EU has been treating the two cases differently. With respect to Israel, the EU determined that the 1995 EU-Israel Association Agreement is not applicable to the West Bank and Gaza Strip, thereby denying Israel any trade benefits with respect to the Territories, whereas for many years it insisted that its 1996 Association Agreement with Morocco is applicable to occupied Western Sahara, thereby enabling Morocco and Moroccan corporations to enjoy trade benefits with respect to Western Sahara. The willingness of the EU to pursue its CCP vis-à-vis Morocco and Western Sahara (de facto application with no de jure recognition) in a manner inconsistent with, if not contradictory to its practice towards Israel and the West Bank and Gaza Strip (no application and no recognition), raised much criticism. In December 2016 the European Court of Justice adopted a verdict that rejects the applicability of the EU-Morocco Association Agreement to Western Sahara (The Front Polisario Verdict). This article aims to (1) analyse the gap between the EU's trade policy and practice in these two cases and the legal and other implications thereof, and (2) address the question whether the verdict in Front Polisario eliminates this gap. Within this context, the article analyses the interface between the CCP and international law. In tackling these themes, the article will contribute, more broadly, to scholarship dealing with the interface between public international law (including issues of statehood, occupation and self-determination) and international trade, with specific reference to the applicability of international trade agreements to disputed and occupied territories.

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1 INTRODUCTION

Morocco's control over Western Sahara and Israel's control of the West Bank bear similar features in terms of public international law, in general, and the laws of belligerent occupation and the principle of self-determination, in particular. Yet despite these comparable attributes, when it comes to the application of its Common Commercial Policy (**CCP**) the EU has been treating the two cases differently. With respect to Israel, the EU determined that the 1995 EU-Israel Association Agreement is not applicable to the West Bank and Gaza Strip (the '**Occupied Palestinian Territories**', or the '**OPT**'),[1] thereby denying Israel any trade benefits with respect to the Territories,[2] whereas for many years it insisted that its 1996 Association Agreement with Morocco is applicable to occupied Western Sahara, thereby enabling Morocco and Moroccan corporations to enjoy trade benefits with respect to Western Sahara.[3]

The willingness of the EU to pursue its CCP *vis-à-vis* Morocco and Western Sahara (de facto application with no de jure recognition) in a manner inconsistent with, if not contradictory to its practice towards Israel and the OPT (no application and no recognition), raised much criticism.[4] It has been argued that this practice is not in line with the EU's commitment to strict observance of international law and that it erodes the credibility and legitimacy of the EU as a Normative Power. Moreover, some scholars contend that from the perspective of international trade

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1 As well as to the occupied Golan Heights. The Gaza Strip is no longer relevant to this article, since the unilateral withdrawal by Israel from the Gaza Strip (2005).

2 Avi Bell & Eugene Kontorovich, *Challenging the EU's Illegal Restrictions on Israeli Products in the World Trade Organization*, Policy Paper No. 18, Kohelet (Oct. 2015); Patrick Müller & Peter Slominski, *The Role of Law in EU Foreign Policy-Making: Legal Integrity, Legal Spillover, and the EU Policy of Differentiation Towards Israel*, 55(4) J. Common Mkt. Stud. 871 (2017); Guy Harpaz & Eyal Rubinson, *The Interface Between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita*, 35(4) Eur. L. Rev. 551 (2010); Guy Harpaz, *The Dispute Over the Treatment of Products Exported to the European Union from the Golan Heights, East Jerusalem, the West Bank and the Gaza Strip – The Limits of Power and the Limits of the Law*, 38(6) J. World Trade 1049 (2004); Guy Harpaz, *The EU's New Approach to the Two-State Solution in the Israeli–Palestinian Conflict: A Paradigm Shift or PR Exercise?*, 30(3) Leiden J. Int'l L. 603 (2017). *See also* M. Hirsch, *Rules of Origin as Foreign Policy Instruments?*, 26 Fordham Int'l L. J. 572 (2003); C. Hauswaldt, *Problems Under the EC–Israel Association Agreement: The Export of Goods Produced in the West Bank and the Gaza Strip Under the EC–Israel Association Agreement*, 14 Eur. J. Int'l L. 591 (2004). For analysis of the Association Agreement and EU–Israeli commercial relations, *see* Guy Harpaz & Gadi Heimann, *Sixty Years of EU–Israeli Trade Relations: The Expectations-Delivery Gap*, 50(3) J. World Trade 447 (2016).

3 For critical analysis, *see* Martin Dawidowicz, *Trading Fish or Human Rights in Western Sahara? Self-Determination, Non-Recognition and the EC–Morocco Fisheries Agreement*, in *Statehood, Self-Determination and Minorities: Reconciling Tradition and Modernity in International Law* (Dr Frenc ed., Cambridge University Press 2014); Enzo Cannizzaro, *The Law of Treaties Beyond the Vienna Convention* 425, 430ff. (OUP 2011); Harpaz (2010), *supra* n. 2; M. Balboni & G. Laschi, *The European Union Approach Towards Western Sahara* (Lang 2017).

4 Eugene Kontorovich, *Economic Dealings with Occupied Territories*, 53 Colum. J. Transnational L. 584 (2015); Harpaz & Rubinson, *supra* n. 2; Harpaz (2017), *supra* n. 2; Bell & Kontorovich, *supra* n. 2.

law, such inconsistency might have placed the EU in breach of its WTO obligations, in general, and of the Most Favoured Nation (**MFN**) obligation, in particular.[5]

In December 2016 the European Court of Justice adopted a verdict that denies the applicability of the EU–Morocco Association Agreement to Western Sahara (The ***Front Polisario*** Verdict).[6]

This article is aimed at (1) analysing the gap between EU's trade policy and practice in these two cases and the legal and other implications thereof, and (2) addressing the question whether the verdict in *Front Polisario* eliminates this gap. Within this context, the article will analyse the interface between the CCP and international law.

In tackling these themes, the article will contribute, more broadly, to scholarship dealing with the interface between public international law (including issues of statehood, occupation and self-determination) and international trade, with specific reference to the applicability of international trade agreements to disputed and occupied territories.

The article is structured along the following lines: following an introductory Section, Section 2 analyses the comparable features of Morocco's occupation of Western Sahara and Israel's occupation of the West Bank, Section 3 examines the differential commercial treatment by the EU of these two comparable cases, Section 4 considers the legal and other implications of this different treatment, Section 5 and Section 6 analyse, respectively, the *Front Polisario* verdict and the manner in which it mitigates this differential EU commercial treatment, Section 7 explores four remaining manifestations of such differentiated, discriminatory treatment, and Section 8 rounds out the analysis by concluding that when the EU relies on the CCP in order to advance CFSP objectives and international law principles, it should pursue such reliance equally in comparable cases otherwise the legal and moral foundations of the EU's policies, under both the CCP and the CFSP, will be undermined. Further research is required to examine the reasons for the more stringent treatment by the EU of Israel, and to address the question whether in the contexts of other disputed states/territories, trade instruments are being applied by the EU (and other entities) in an inconsistent manner.[7]

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5 Kontorovich, *supra* n. 4; Bell & Kontorovich, *supra* n. 2.

6 C-104/16 P *Council v. Front Polisario*, Judgment of the Court (Grand Chamber) of 21 Dec. 2016. For initial scholarship, *see* Alvaro de Elera, *The Frente Polisario Judgments: An Assessment in the Light of the Court of Justice's Case Law on Territorial Disputes*, in *The EU as a Global Actor: Bridging Legal Theory and Practice* 266–290 (J. Czuczai & F. Naert eds, Leiden: Brill-Nijhoff 2017).

7 For initial reading, *see* N. Caspersen, *From Kosovo to Karabakh: International Responses to de facto States*, 56(1) Südosteuropa 58 (2008); J. Ker-Lindsay, *Engagement Without Recognition: The Limits of Diplomatic Interaction with Contested States*, 91(2) Int'l Aff. 267 (2015); Dimitris Bouris & George Kyris,

2 OCCUPIED PALESTINIAN TERRITORIES AND WESTERN SAHARA – COMPARABLE FEATURES

Morocco's control over Western Sahara and Israel's control of the West Bank bear similar features. Both Israel and Morocco are accused by the international community of long-standing occupation (the West Bank and Western Sahara respectively) and of a wide-scale settlement policy in breach of the right of self-determination (of the Palestinians and of the Sahrawi population, respectively). Hence both Israel and Morocco are the objects of critical European Parliament and UN Security Council resolutions, urging them to withdraw from territories occupied by them.[8]

These similar features are also manifested in the jurisprudence of the International Court of Justice (the **ICJ**), which adjudicated both cases. In 1975, and upon a request by the United Nations General Assembly (**UNGA**),[9] the ICJ delivered an Advisory Opinion with respect to Western Sahara.[10] According to ICJ, Morocco does not enjoy territorial sovereignty over Western Sahara and its legal ties with Western Sahara do not affect the UNGA's decisions regarding the decolonization of Western Sahara and the principle of self-determination through the free and genuine expression of the will of the people of Western Sahara [11] Thus, the local Sahrawi population was entitled to self-determination through the referendum planned at that time by Spain. Similarly, in 2004 and upon a request for an Advisory Opinion by the UNGA, the ICJ stated in unequivocal terms that the Palestinian people have the right to self-determination, a right which Israel has violated through the construction of a Wall in the West Bank.[12]

The similarities between the two cases are also manifested in the bilateral trade relations between the EU and the two countries. The EU concluded Association Agreements with both Israel and Morocco under the same aegis (the CCP and the Barcelona Process) and in the same time span (1995 and 1996, respectively).

In 1995, the EC and its Member States and the State of Israel concluded the Euro-Mediterranean Agreement, establishing an association between them (the '**EU–Israel Association Agreement**').[13] The territorial applicability of the 1995 Association Agreement was stipulated in Article 83 ('**Article 83**'):

Europeanisation, Sovereignty and Contested States: The EU in Northern Cyprus and Palestine, 19/4 Brit. J. Pol. & Int'l Rel. 775 (2017).

8 For analysis and comparison, *see* Harpaz & Rubinson, *supra* n. 2.

9 Resolution 3292 (XXIX) on the Question of the Spanish Sahara, adopted on 13 Dec. 1974.

10 Western Sahara, Advisory Opinion, ICJ Reports 1975, 12–16 (Oct. 1975).

11 *Ibid*., at 12, para. 162.

12 *See* ICJ, Advisory Opinion 9 July 2004, Int'l Ct Justice; (2004) 43 I.L.M. 1009.

13 European Communities and their Member States, of the one part, of the other part (OJ 2012 L 241, at 2), approved on behalf in the EC and the European Coal the Steel Community by decision 2000/204/EC of 24 Jan. 2000. For analysis, *see* Arie Reich, *The European Neighbourhood Policy and Israel: Achievements and Disappointments*, 49(4) J. World Trade 619 (2015); Guy Harpaz, *A Proposed Model*

> This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal And Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, to the *territory of the State of Israel*. [italics added: G.H.]

In 1996, the EC and its Member States and the Kingdom of Morocco concluded the Euro-Mediterranean Agreement establishing an association between them (the '**EU–Morocco Association Agreement**'),[14] which provides for economic cooperation and the reciprocal movement of goods (including agricultural and fishery products). The territorial applicability of the 1996 Association Agreement was stipulated in Article 94 ('**Article 94**'):

> This Agreement shall apply, on the one hand, to the territories in which the Treaties establishing the European Community and the European Coal and Steel Community are applied and under the conditions laid down in those Treaties and, on the other hand, *to the territory of the Kingdom of Morocco* [Italics added: G.H.]

Thus, in both cases, the territorial applicability of the bilateral Association Agreement was left equivocal, referring 'to the territory of the State of Israel' and 'to the territory of the Kingdom of Morocco', respectively.

To complete the picture, there is one relevant legal difference between the two cases which should be taken into consideration: With respect to Israel, the EU concluded a distinct Association Agreement with the Palestinian Liberation Organization, covering, with no reservations, the 'West Bank and Gaza Strip', thereby reinforcing the line that divides Israel and the OPT. In the case of Morocco, the EU did not conclude such an agreement with *Front Polisario* with respect to Western Sahara. This article will return to the significance of this difference below.

Despite these numerous comparable attributes, the EU has been treating the two cases differently, a theme to be analysed in the following section.

3 COMPARABLE CASES, DIFFERENTIAL TREATMENT

As indicated above, in 1995 the EU concluded with Israel an Association Agreement, which pursued a constructive ambiguity approach towards the question whether it applies to the Territories. Yet, when it came to construe the term 'territory of Israel' and apply it, *in concreto*, the EU adopted an

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for Enhanced European Union–Israeli Relations: Prevailing Legal Arrangements and Prospective Juridical Challenges, 40(6) J. World Trade 1115 (2006).

[14] European Communities and their Member States, of the one part, of the other part (OJ 2012 L 241, at 2), approved on behalf in the EC and the European Coal the Steel Community by decision 2000/204/EC of 24 Jan. 2000.

approach which ignores Israel's de facto control of the disputed territory and focuses instead on the de jure legality, sovereignty and recognition (the *legal-sovereign approach*). Under that approach, the entity identified under international law as the appropriate sovereign of that territory would also be the entity of origin of the goods produced therein. The underlying assumption of the legal-sovereign approach is that trade agreements are not trade-purist and hence they should be subjected to the *lex generalis* rules of public international law. The election of this approach, which was confirmed, albeit implicitly, by the European Court of Justice in the *Brita* verdict in which the Court held that the EU–Israel Association Agreement does not apply to the OPT (2010),[15] led the EU to deny Israel any trade benefits pertaining to its control of the West Bank and Gaza Strip.

In contrast, with respect to EU–Morocco Association Agreement, the EU adopted a *trade-practical approach* to the term 'territory of Morocco', enshrined in the Association Agreement. This approach ignores issues of occupation, breaches of international law and the issue of de jure entitlement of the disputed area under public international law and focuses instead on its de facto control, seeking the entity which effectively controls that area and which is hence internationally responsible for it. The underlining assumption of that approach, which is arguably recognized by the GATT/WTO regime (in both 'law in the books' and 'law in action'),[16] is that trade agreements are designed to promote free trade more than to solve political and international legal disputes. By adopting the trade-practical approach, the EU allowed Morocco trade benefits under the Agreement with respect to occupied Western Sahara.

According to the same trade-practical approach, the EU and Morocco concluded in 2010 an Agreement in the form of an Exchange of Letters between the EU and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products (the '**Liberalization Agreement**').[17] The latter was designed to implement the progressive liberalization of trade in products provided for in the Association Agreement, by way of the amendment of some of the stipulations of the Association Agreement as well as of some of the accompanying protocols. The Liberalization Agreement, which did not refer to issues of territorial applicability, in general, nor to Article 94, in particular, and which was applied, de facto, to

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15 C-386/08 *Brita GmbH v. Hauptzollamt Hamburg-Hafen*. For analysis, *see* Harpaz & Rubinson, *supra* n. 2; Paul James Cardwell, *Adjudicating on the Origin of Products from Israel and the West Ban.k: Brita GmbH v. Hauptzollamt Hamburg-Hafen (C-398/06)*, 17(1) Eur. Pub. L. 37 (2011); Nllie Munin, *EU Measures Toward Israeli Activities in the Occupied Territories and the BDS: A Diplomatic Achievement or a Pyrrhic Victory?*, 7(3) J. Multidisciplinary Res. 55 (2015).

16 For analysis, *see* Bell & Kontorovich, *supra* n. 2, at 11–13; Hirsch, *supra* n. 2.

17 OJ 2012 L 241, at 2.

Western Sahara, was enshrined in EU law in the Council Decision 2012/497/EU – the '**contested Decision**').[18]

Yet another international agreement between the EU and Morocco which demonstrates the different treatment by the EU towards Morocco, as compared with its treatment towards Israel, is the 2006 EU–Morocco Fisheries Agreement,[19] under which EU vessels were granted access to fish resources, applicable to 'to the territory of Morocco and to the waters under Moroccan jurisdiction'.[20]

Thus the EU has actively concluded a trade agreement for the purpose of applying it to territories occupied by Morocco. Contrary to the EU position adopted in relation to Israel and the West Bank, by providing benefits to EU vessels fishing in the territorial waters of Western Sahara under an agreement concluded with Morocco, the EU allowed Morocco to commercially benefit from its occupation of Western Sahara.

Thus, despite the fact that the Council and Commission were aware of (1) Morocco's sovereign claims over Western Sahara prior to the conclusion of the Association Agreement, the Liberalization Agreement and the Fisheries Agreement, and of (2), Morocco's de facto application of these agreements to Western Sahara, the EU neglected to insist on the inclusion of a provision which would exclude Western Sahara from the territorial applicability of these agreements. Instead, the EU cooperated with full awareness of this de facto application by Morocco, at times even facilitating and promoting it.[21]

4 LEGAL AND OTHER IMPLICATIONS OF THE DIFFERENT TREATMENT

The willingness of the EU political organs (Commission and Council) to pursue an approach *vis-à-vis* Morocco (application with no recognition) which is inconsistent with, if not contradictory to their practice towards Israel (no application and no recognition) raised much criticism.

It has been argued that this practice undermines the legal and moral foundation of the EU's its policy, and that the EU would find it very difficult to obtain

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[18] Council Decision 2012/497/EU on the agreement between the EU and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part.

[19] Morocco–EU Fisheries Partnership Agreement, adopted by Regulation 764/2006 on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco [2006] OJ L141.

[20] Regulation 764/2006 Arts 2(a), 11.

[21] For support, *see Front Polisario, supra* n. 6, at para. 118.

the international legitimacy required for the purpose of serving as a Normative Power if it construes and applies its CCP in a way which may be regarded as inconsistent, instrumental and politically motivated.[22]

With respect to its trade agreements with Morocco, the EU was willing to utilize legal means that would adversely affect the Sahrawi people and sacrifice the EU's noble principles for the sake of advancing its trading sector and satisfying the interests of important EU Member States who, out of political and economic interests, maintain close political and economic relations with Morocco.

Moreover, from the perspective of Israel, numerous Israeli politicians who consistently dismiss any attempt by the EU to criticize Israel or to intervene in the Israeli–Palestinian conflict relied on that inconsistent treatment and argued that it is no more than one manifestation of the broader theme, namely the EU's anti-Israeli, double standards approach towards Israel. As argued elsewhere, a narrative that is prevalent in Israeli discourse is that the EU policies towards Israel are reflections of European double standards and immorality.[23] The more stringent approach adopted towards Israel as compared with the approach adopted with respect to Morocco reinforces this anti-EU narrative.

The EU invests substantial human and financial resources in trying to assist in the resolution of the Middle East conflict. It will be difficult, however, for it to achieve that goal given the legitimacy deficit from which it suffers. Its lack of military capabilities, coupled with that legitimacy deficit, may prevent it from playing a meaningful role in the process of democratization and peaceful resolution of the Middle East conflict. This more stringent approach towards Israel might only worsen this state of affairs.

Moreover, and as indicated above, some scholars assert that even if the EU's commercial position with respect to Israel and the OPT is, *in abstracto*, in full compliance with international law, including international trade law, being justified on the grounds of public international law or on the grounds of consumer protection with respect to the labelling requirements, nevertheless the discriminatory implementation of that position, *in concreto*, amounts to violation by the EU of its MFN obligations under the WTO Agreement. This argument is based on the following logic: If the EU is willing to grant Morocco a trade benefit (namely applicability of trade agreements to an area under Morocco's occupation), while denying Israel the same benefit with respect to the OPT, then this difference

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[22] Harpaz & Rubinson, *supra* n. 2.

[23] Guy Harpaz & Asaf Shamis, *Normative Power Europe and the State of Israel: An Illegitimate Eutopia?,* 48(3) J. Common Mkt. Stud. 479 (2010); Guy Harpaz, *Mind The Gap: Narrowing the Legitimacy Gap in EU–Israeli Relations*, 13(1) Eur. Foreign Aff. Rev. 117 (2008).

amounts to a violation of the letter and spirit of the MFN principle. But is this argument well founded under WTO law?

The MFN obligation requires Parties to grant equal treatment to the products, service or investor of another party, no less favourable than that which is granted by them to a product, service or investor of a third Party. The MFN obligation is used in various areas of international law, mainly international trade law, where it is considered as 'one of the pillars of the world trading system'.[24]

The principle is enshrined in Article I of the GATT which requires that any trade concessions granted by a WTO Member (to a WTO Member or to any other trade entity) must be granted by it, immediately and unconditionally, to all other WTO Members:

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the *like product* originating in or destined for the territories of all other contracting parties. [emphasis added – G.H.]

The MFN principle is also enshrined in Article II of the General Agreement on Trade in Services (**GATS**) and in Article 2.1 of the Technical Barriers to Trade Agreement (**TBT**). The latter requires WTO Members to 'ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin and to like products originating in any other country'[25] [emphasis added – G.H.] The MFN requirement also appears in numerous bilateral investment treaties.

It should be underscored that the requirement of equality under WTO law, manifested under both the MFN clause and the National Treatment clause, is an overarching principle under the WTO legal order. Moreover, this requirement should be examined in the light of the *Chapeau* of Article XX of the GATT (General Exceptions), which allows WTO Members to derogate from their WTO obligations on numerous specified grounds (e.g. public morality, public health), provided that such derogation is made according to an equality benchmark: 'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination

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[24] WTO European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries, para. 101.

[25] TBT Annex 1, para. 1.

between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures'.

Thus, in numerous cases brought before the WTO Dispute Settlement Body, where the panels and the Appellate Body were willing to accept, in principle, the invocation by the respondent Member of various exceptions provided by Article XX, the implementation of these derogations was found to be in violation of WTO law, as they were not implemented in strict compliance with the MFN clause.[26] *Brazil – Measures Affecting Imports of Retreaded Tyres*[27] and *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*[28] are only two salient cases in point.

Nonetheless, it is submitted that the scholarship that equates the EU differentiated commercial treatment with the breach of the MFN principle is flawed. First, WTO agreements are most probably not applicable to the West Bank (just as they are not applicable to Western Sahara).[29] Israel in fact did not notify the GATT's Secretariat of any such applicability, following its occupation of the West Bank (June 1967), and since then it has refrained from reporting to the WTO its trade practices in the OPT (e.g. under the auspices of the WTO Trade Policy Review Mechanism). More specifically, I am not aware of any legal document in the context of the GATT/WTO in which Israel claims that a product produced by an Israeli corporation in the OPT is of Israeli origin (the same may be argued, *mutatis mutandis*, with respect to Morocco and Western Sahara). Thus, if indeed, the WTO is inapplicable to the OPT, there can be no violation of the MFN principle with respect to products produced in the OPT and exported by Israel to the EU.

Moreover, and assuming, *in arguendo*, that the GATT/WTO agreements do apply to the OPT, a differentiated commercial treatment, in itself, is insufficient in establishing an MFN violation. The MFN requirement (like the National Treatment requirement) does not address abstract differential trade treatment. Instead it prohibits, in a much more concrete manner, a Member of the WTO from granting trade treatment to a product of country A, which is more favourable than the treatment accorded by it to the *like product* exported to it by Member B (which is a Contracting Party to the WTO). Thus in order to establish an MFN violation in our case, it must be proven that there is an export to the EU of comparable products ('like products') from Western Sahara and the OPT, and that

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[26] For analysis, *see* Tomer Broude, *Selective Subsidiarity and Dialectic Deference in the World Trade Organization*, 79(2) L. & Contemp. Probs. 53 (2016).

[27] WT/DS332/AB/R, 3 Dec. 2007.

[28] WT/DS400/AB/R and WT/DS401/AB/R, 22 May 2014.

[29] For the territorial applicability of the GATT/WTO, *see*, in particular, Art. XXIV of the GATT.

the former like product is being treated by the EU more favourably than the latter like product. Thus with no exportation to the EU of like products of both Israeli and Moroccan origin, there can be no violation of the MFN requirement.

Moreover, the MFN principle is not an absolute one. Rather it is subject to exceptions, one of which is the Customs Union/Free Trade exception. Under this exception, which is enshrined in Article XXIV of the GATT, if a Contracting Party of the WTO grants a trade privilege to another country under a valid agreement that creates a Customs Union or a Free Trade Area between the two countries, then such a privilege is exempted from the MFN clause and hence it need not be granted by that Contracting Party to all other WTO Contracting Parties. Thus, if the EU granted Western Sahara products a trade privilege (i.e. recognition as a product of Moroccan origin), then such a privilege was granted under an international treaty between the EU and Morocco, which created a free trade area between them. Thus, in this legal context, the grant of this privilege is not subjected to the MFN requirement.

Thus it is our tentative conclusion that the differential commercial treatment on the part of the EU is problematic in policy and legitimacy terms but it is not illegal in terms of WTO law.

Did the 2016 *Front Polisario* verdict bring to an end the inconsistent approach of the EU and nullify the negative implications analysed in this section?

5 THE *FRONT POLISARIO* VERDICT

Recently the Court of Justice of the EU was asked to adjudicate the legality of Association and Liberalization Agreements with Morocco, together with the contested Decision, as they pertain to Western Sahara. The proceedings were first brought by *Front Polisario* before the EU's General Court, asking for the annulment of the contested Decision. *Front Polisario* argued that the Liberalization Agreement applies to Western Sahara, that the EU acknowledged that applicability through allowing such de facto applicability, and that that applicability vitiates the contested Decision with illegality.[30] The proceedings provided the EU judiciary with an opportunity to examine whether Western Sahara falls under the territorial scope of the trade agreements and in this context to examine the application of international and EU law to this matter.

[30] T-512/12 *Front Polisario v. Council*, Judgment of the General Court (Eighth Chamber) of 10 Dec. 2015, para. 140. For analysis of the verdict of the General Court, *see* S. Hummelbrunner and A.-C. Prickartz, *It's Not the Fish that Stinks! EU Trade Relations with Morocco Under the Scrutiny of the GC of the European Union*, 32 Utrecht J. Int'l & Eur. L. 19 (2016).

The General Court concluded that the Association Agreement and the Liberalization Agreement with Morocco applied to Western Sahara. The Court further established that an international trade agreement between the EU and a non-Member State which may be applied to a disputed territory is not, *per se*, contrary to EU law or international law. Thus, no absolute prohibition existed against the conclusion of an agreement with Morocco which would be applicable to the 'disputed territory' of Western Sahara. The EU institutions enjoy wide discretion as to whether it is appropriate to conclude such an agreement with such extra-territorial application.[31] Yet, where the Council intends to approve an agreement applicable to a disputed territory, such as Western Sahara, and which seeks to facilitate the export to the EU of products originating in that territory, it is under a legal duty to examine, *ex ante* and in a careful and impartial manner, all the relevant facts of the individual case, and in particular to ensure that the production of those products was not carried out in a manner detrimental to the population of that territory nor that it entailed infringements of fundamental rights of the persons concerned.[32] In the specific case, the Council did infringe the duty to inspect the facts in hand in order to ensure that there was no evidence of exploitation of the natural resources of the territory of Western Sahara under Moroccan control, which might likely be to the detriment of the inhabitants of Western Sahara or infringe their fundamental rights.

Drawing on the Opinion of A-G Wathelet, and on its verdict in *Brita*,[33] the European Court of Justice overruled the verdict of the General Court, holding that literal, contextual and purposive interpretation of the trade agreements with Morocco leads to the conclusion that they do not apply to the territory of Western Sahara.

In reaching this conclusion, the ECJ heavily relied on the principle of self-determination. This customary principle, which is applicable to all non-self-governing territories, and to all peoples who have not yet achieved independence, is a legally enforceable *erga omnes* right and one of the core principles of international law.[34] In accordance with this principle, read in light of the UNGA Resolution 2625 (XXV), the territory of a colony or other non-self-Governing Territory, is accorded under the UN Charter, a 'separate and distinct' status.[35] In view of this status accorded to the territory of Western Sahara by virtue of the principle of self-determination, the Association Agreement's reference to the 'territory of the

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31 *Ibid*., para. 223.
32 *Ibid*., paras 223–247.
33 The Court relied on the *Brita* verdict in order to ascertain that the territorial clause in the EU–Morocco Association Agreement should be construed in light of all relevant rules of international law, including the principle of the relative effect of treaties (*See* in particular paras 86 and 100 of the verdict, *supra* n. 6).
34 *Council v. Front Polisario, supra* n. 6, para. 88.
35 *Ibid*., para. 90.

Kingdom of Morocco' cannot be interpreted in such a way that Western Sahara is included within the territorial scope of that Agreement.[36] Thus, to hold that the Agreements were meant to be implemented in Western Sahara would be tantamount to finding that the EU intended to implement the Agreements in a manner incompatible with the principle of self-determination. Yet, the EU repeatedly reiterated in this context the need to comply with this principle.

Similarly, the Association Agreement and the Liberalization Agreement were found not to apply to Western Sahara on the basis of the principle of relative effect of treaties. Under this principle, enshrined in Article 34 of the Vienna Convention on the Laws of Treaties, treaties do not impose any obligations, nor do they confer any rights on third parties, without their consent. In accordance with its analysis, Western Sahara's status under the UN Charter, coupled with the special position granted to the *Front Polisario* by the ICJ and the UNGA, should lead to the conclusion that the people of Western Sahara be regarded as a 'third party' within the meaning of the principle of the relative effect of treaties. This 'third party' may be affected by the implementation of the Association Agreement in the event that the Territory of Western Sahara comes within the scope of that Liberalization Agreement.[37] Irrespective of whether such implementation is likely to harm or to benefit this 'third party', that implementation must receive its consent. Yet such consent was not obtained in the present case. The ECJ was of the opinion that to hold that the Agreements were meant to be implemented in Western Sahara would be tantamount to finding that the EU intended to implement the Agreements in a manner incompatible with the principle of relative effect of treaties, yet such a finding is not warranted, given the fact that the EU repeatedly reiterated in this context the need to comply with this principle.

To conclude, the interpretation of the Association Agreement and the Liberalization Agreement in accordance with the relevant rules of international law led the ECJ to the conclusion that the Agreements do not apply to the territory of Western Sahara. Consequently, *Front Polisario* cannot be regarded as having standing to seek annulment of the contested Decision,[38] and the appeal must be allowed.[39]

This conclusion relieved the European Court of Justice of the need to address the question, addressed by the General Court, namely whether in pursuing its CCP in relation to a disputed territory in a manner that seeks to facilitate the export to the EU of products originating in that territory, the EU is under a duty to ensure that the production of those products was not carried out in a manner

[36] *Ibid*., paras 92–93.
[37] *Ibid*., paras 100–103.
[38] *Ibid*., paras 129–134.
[39] *Ibid*., para. 126.

detrimental to the population of that territory, nor that it entailed infringements of fundamental rights of the persons concerned.

6 THE *FRONT POLISARIO* VERDICT – ELIMINATING THE GAP?

In this section it will be argued that the *Front Polisario* verdict carries three distinct advantages. The first is that the verdict bases the CCP on solid grounds of international law. The second is that it aligns, in the context of Western Sahara, the EU's CCP with its Common Foreign and Security Policy (**CFSP**). The third advantage, which is the most pertinent to this article, is that the verdict advances *internal judicial coherence* between the EU's position with respect to the OPT and its position with respect to Western Sahara, thereby addressing the differentiated, discriminatory treatment of these two comparable cases.

As regards the first advantage, the verdict places the CCP on solid international law. Since the early 1990s, the EU has been striving to operate as a Normative Power through the export of its successful model of peace – democratization through trade – to other parts of the world,[40] thereby extending its sphere of economic and normative influence[41] and increasing the geographical scope of its 'peace community'.[42] These EU normative aspirations are heavily based on the ethos of international law, human rights, international institutions and multilateralism, as evident in the Lisbon Treaty and its commitment to 'strict observance' of international law.[43]

More specifically, under Article 3(5) of the Treaty on the EU (**TEU**), the EU is committed to 'uphold and promote its values in its relations with the wider world'. Within the framework of these relations, the EU undertakes to 'contribute' to 'peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter'. This commitment is reinforced by Article 21 of the TEU, which states that the Union's action on the international scene 'shall be guided by the principles which have inspired its own creation,

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40 K. Nicolaïdis & R. Howse, *'This Is My EUtopia': Narrative as Power*, 40 J. Common Mkt. Stud. 767, 768 (2002).

41 I. Manners, *Normative Power Europe: A Contradiction in Terms?* 40 J. Common Mkt. Stud. 235 (2002); R. Whitman, *From Civilian Power to Superpower? The International Identity of the European Union* (New York: St Martin Press 1998); Nicolaïdes & Howse, *ibid.*

42 L. Gardner-Feldman, *Reconciliation and Legitimacy: Foreign Relations and Enlargement of the European Union*, in *Legitimacy and the European Union: The Contested Polity* 77 (T. Banchoff & M.P. Smith eds, London: Routledge 1999).

43 *See* Arts 3 and 21 of consolidated version of the EU Treaty.

development and enlargement', namely 'democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law'. Under the same Article, the Union is bound to 'a high degree of cooperation in all fields of international relations' with a view to consolidating 'democracy, the rule of law, human rights and the principles of international law' and fostering 'sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty'.

This same EU ethos is also relevant to its external, commercial persona. Article 207(1) TFEU attempts to consolidate that long-standing practice by stating that '[t]he Common Commercial Policy shall be conducted in the context of the principles and objectives of the Union's external action', which include, as stated above, the promotion of compliance with human rights. Indeed, in the last twenty five years the EU concluded dozens of trade agreements with more than one hundred countries that included human rights clauses, requiring the parties to these agreements to respect human rights and democratic principles.[44] These commitments, which are enshrined in the Association Agreements with the State of Israel and with the PLO,[45] govern the extraterritorial effects of the EU's international policies, including the CCP.[46]

The ECJ's decision to ground its verdict on a thorough analysis under the Vienna Convention on the Laws of Treaties and on the principle of self-determination, allows it to advance a harmonious reading of EU law pertaining to international trade law and general public international law, thereby promoting 'a systematic vision of international law as a coherent legal order'.[47] Basing the CCP on solid international law grounds may advance, in turn, the aforesaid EU's normative aspirations and may contribute to fulfilling the EU's self-declared commitment to strict compliance with international law.

More specifically, under EU law, the EU is bound to integrate the promotion of human rights into its trade and investment policies.[48] This commitment covers

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[44] L. Bartels, *The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements*, Study, Directorate-General for External Policies of the Union, Directorate B, Policy B Department, EXPO/B/DROI/2012-09 Feb. 2014, http://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/433751/EXPO-JOIN_ET(2014)433751_EN.pdf., accessed 1 June, 2018.

[45] Art. 2 of the two respective Association Agreements. For analysis, *see* Harpaz & Rubinson, *supra* n. 2.

[46] For analysis, *see* L. Bartels, *The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, 25(4) Eur. J. Int'l L. 1071 (2015).

[47] T. Tridimas & J. Gutierrez-Fons, *EU Law, International Law and Economic Sanctions Against Terrorism: The Judiciary in Distress?*, 32 Fordham Int'l L. J. 1083 (2009).

[48] *See* the EU Action Plan on HR and Democracy 2015–2019 Council of the EU, The Action Plan on Human Rights and Democracy 2015–2019, Foreign Affairs Council Conclusions 10897/15, Brussels, 20 July 2015.

the right to self-determination, including the permanent sovereignty and the right of peoples and nations to freely dispose of the natural resources within their territories in their national interest and in the interest of their well-being.[49] Thus, the exploitation by Morocco of the natural resources of Western Sahara runs counter to the principle of self-determination, because it assists the maintenance and strengthening of Morocco's occupation of that territory, thereby adversely affecting the ability of the Sahrawi people to realize their right to self-determination, in economic and other terms.[50] Thus, the ECJ's reading of the EU's international trade agreements in a manner that does not facilitate such exploitation is in line with the right to self-determination, and thereby advances a harmonious reading of the CCP and public international law.

It must be emphasized that the *Front Polisario* verdict not only places the EU trade practice with Morocco in line with international law, but it may also contribute to the implementation of the CCP with respect Western Sahara, as well as to other disputed or occupied territories in a manner consistent with the principal tenets of international law.

Indeed the recent Opinion of Advocate General Wathelet in the *Western Sahara Campaign* verdict concluded that the aforesaid 2006 Fisheries Partnership Agreement (which was applied to Western Sahara and to the waters adjacent to it) and its 2013 Protocol (setting out the fishing opportunities and financial contribution provided for in that agreement) are incompatible with the EU's commitment to international law, insofar as they are applicable to the territory of Western Sahara and to the waters adjacent thereto.[51]

In his Opinion, the Advocate General contended that the Agreements and the Protocol breached the EU's obligation that in its external action it should protect human rights and strictly respect international law. More specifically, the Advocate General based this conclusion on the principle of self-determination,[52] and on the principle of permanent sovereignty over natural resources,[53] as well as on the

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[49] Hummelbrunner & Prickartz, *supra* n. 30, at 28.

[50] Balboni & Laschi, *supra* n. 3.

[51] Case C-266/16, *Western Sahara Campaign UK, The Queen v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs*, request for a preliminary ruling from the High Court of Justice (England & Wales), Queen's Bench Division (Administrative Court), United Kingdom, Opinion delivered 10th Jan. 2018, http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d0f130d5b98149f107244770a2bcdea5bed5534f.e34KaxiLc3eQc40LaxqMbN4PaNuKe0?text=&docid=198362&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=850267.

[52] The fisheries exploitation by the EU of the waters adjacent to Western Sahara established and implemented by the contested acts does not respect the right of the people of Western Sahara to self-determination.

[53] *See* in particular, para. 293 of the Opinion: The contested acts do not put in place the necessary safeguards in order to ensure that that exploitation is carried out for the benefit of the people of that territory.

breach by the EU of its obligation not to recognize an illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination.[54] Moreover, the negotiation and conclusion with the Kingdom of Morocco of an international agreement applicable to Western Sahara and to the waters adjacent thereto constitutes in itself de jure recognition of Morocco's annexation of Western Sahara, its inland waters and the territorial sea, as well as its sovereignty over them.[55]

If that Opinion were to be adopted by the European Court of Justice, then the *Front Polisario* verdict together with the *Western Sahara Campaign* verdict may contribute to the judicial scrutiny of yet another international agreement concluded between the EU and Morocco, namely the Aviation Agreement, which, like the Fisheries Agreement, was applied to Western Sahara.[56]

Moreover, there are already initial indications that the *Front Polisario* verdict would also influence the manner in which national courts would treat exports from Western Sahara.[57]

A second, interrelated distinct advantage stemming from the verdict is that it assisted in advancing consistency between the EU's actual practice towards Western Sahara under the CCP, and its de jure position towards it under the CFSP. The EU is bound by the rule of law. A crucial implication of such a duty is that its legal rules have to be sufficiently clear and free of contradictions in order to maintain the integrity of the EU's legal order.[58] The Lisbon Treaty establishes the need to ensure that legal unity and legal consistency between all aspects of the EU's external action, and it treats this need as a distinct structural characteristic of the EU's legal order.[59] Under the CFSP the EU does not recognize the purported

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54 The EU breached its obligation not to recognize an illegal situation resulting from the breach of the right of the people of Western Sahara to self-determination and not to render aid or assistance in maintaining such a situation. The Agreement and the Protocol do not correspond to either the free pursuit of the local population's economic development or to the free disposal of its wealth and of its natural resources.

55 Para. 194 of the Opinion.

56 On 24 Oct. 2017, the European Parliament approved the EU–Morocco Euro-Mediterranean Aviation Agreement. The Agreement grants European airlines 'unrestricted freedom, landing, take-off, passenger and cargo, between the EU and Morocco'. The Agreement applies to the 'the land areas (mainland and islands), internal waters and territorial sea under its sovereignty or jurisdiction' (Art. 1.14), thereby covering Western Sahara.

57 *See* the recent legal proceedings before a South African court, ending with the seizure of a ship shipping phosphates from Western Sahara to New Zealand via South Africa, http://www.wsrw.org/a105x3971.

58 Müller & Slominski, *supra* n. 2, at 874.

59 Art. 21(3) TEU: 'The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, shall ensure that consistency and shall cooperate to that effect'. For analysis, *see* Müller & Slominski, *supra* n. 2, at 874–875; A. Von Bogdandy, *Founding Principles*, in *Principles of European Constitutional Law* 11, 28–33 (2d ed., A. von Bogdandy & J. Bast eds, Oxford/Portland: Hart 2011).

annexation of Western Sahara by Morocco. Instead it supports the right of self-determination for the people of Western Sahara. Thus the ECJ's extensive reliance on international law assisted it to reach the conclusion that the contested Decision does not apply to Western Sahara, and this outcome would contribute to bringing to an end an EU–Morocco trade practice which has infringed the principle of self-determination and solidified Morocco's de facto annexation of Western Sahara. Consequently the treatment by the CFSP and the CCP of Western Sahara is likely to merge.[60]

The third advantage of the verdict, which is directly linked to the theme of this article, is that it advances *internal-judicial coherence* between the EU's position with respect to the OPT (the *Brita* verdict) and its position with respect to Western Sahara (*Front Polisario*). In *Brita*, the ECJ relied on international law (mainly the principle of relative effect of treaties) in order to construe the EU–Israel Association Agreement in a manner that restricts its application to Israel 'proper', to the exclusion of OPT. In *Front Polisario*, the reliance on international law, particularly the right of self-determination and the principle of relative effect, led the same Court to construe the EU–Morocco trade agreements in a manner that restricts its application to Morocco 'proper', to the exclusion of occupied Western Sahara, thereby promoting internal coherence in the jurisprudence of the ECJ.

It should be noted that at least in one respect the *Front Polisario* verdict should be perceived as even more robust than that of *Brita*. In *Brita*, the Court based its conclusion regarding the non-applicability of the EU–Israel Association Agreement to the OPT on the fact that the EU concluded with the PLO a distinct trade agreement that applied to the entire West Bank and Gaza Strip. Such an agreement could be read as a manifestation of the unwillingness of the EU to apply its Association Agreement with Israel to an area covered by another trade agreement with another trading partner. In contrast, and as noted above, no such agreement was concluded with *Front Polisario* with respect to Western Sahara. This did not prevent the ECJ from concluding that the trade agreements with Morocco do not apply to Western Sahara and that the principle of relative effect of treaties should require the obtaining of the consent of *Front Polisario* to the conclusion of a trade agreement pertaining to Western Sahara.

Nonetheless, the following section will argue that although the *Front Polisario* verdict addressed the inconsistency of the EU in relation to the two cases, the verdict did not eliminate all discrepancies between the EU's commercial treatment of the OPT and its commercial treatment of Western Sahara. It will identify four remaining manifestations of such differentiated, discriminatory treatment.

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[60] Art. 21(3) TEU: 'The Union shall ensure consistency between the different areas of its external action and between these'.

7 REMAINING DISCREPANCIES

The EU's principled position, since 1998, is that trade agreements with Israel will not apply to any occupied territories held by Israel. In order to reinforce and formalize this stance, the EU insisted (2004) on concluding with Israel a 'technical arrangement', under which Israel would specify the geographic location of production of any product in the certificate of origin issued for goods exported by Israel to the EU. It would not, however, specify whether the goods originated in the Territories or not. The solution allowed Israel to meet the EU's demands, while continuing, contrary to the EU's stance of principle, to issue preferential proof in an official certificate of origin regarding goods exported from the Territories. On the other hand, this solution allowed the EU's political organs (the Commission and the Council of Ministers) to give de facto meaning to its de jure non-recognition of the territories as part of the State of Israel, by instructing the national customs authorities of its Member States, on the basis of the geographic location specified in the Israeli certificate of origin, to provide preferential treatment only to goods exported from Israel proper (defined by the territorial borders on the eve of the Six Days' War). Such an arrangement based on the requirement of a certificate of origin and on an indication of the location of the production was never adopted in relation to Morocco. This difference continues to prevail even after the *Front Polisario* verdict, as certificates of origin with a clear indication of the specific location of production are required of Israel but not of Morocco.

In another attempt to reinforce and formalize the EU's stance towards Israel and the OPT, the Council of the EU decided in December 2012 that the EU is committed 'to ensure that … all agreements between the State of Israel and the European Union must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967, namely the Golan Heights, the West Bank including East Jerusalem, and the Gaza Strip'.[61]

Yet again, such a policy of refraining from applying its agreements in an extra-territorial manner was not adopted with respect to Morocco and Western Sahara. To the contrary, as evident in the *Front Polisario* proceedings, the official policy of the EU's executive branch towards Western Sahara was a policy of application (albeit with no recognition). The *Front Polisario* proceedings actually attest that the EU pro-actively promoted the realization by Moroccan companies of trade opportunities in Western Sahara. The *Front Polisario* verdict does not require the EU to state in any future trade agreement with Morocco the non-applicability of

[61] Council of the EU, Council Conclusion on the Middle East Process, 3209 Foreign Affairs Council Meeting, 10 Dec., 2012, para. 4, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/134140.pdf#sthash.gqXKkWAb.dpuf.

that Agreement to Western Sahara, and hence this differentiated treatment between Israel and Morocco would continue to prevail.

A third manifestation of the more stringent implementation pursued by the EU towards Israel is the publication by the EU of Guidelines that set out the conditions under which the Commission will implement key requirements for granting EU support to Israeli entities or to their activities in the Territories (July 2013).[62] According to the Guidelines, only those Israeli entities having their place of establishment within Israel's pre-1967 borders will be considered eligible for EU grants, prizes and financial instruments, and only with respect to their activities pursued west of the Green Line.[63] According to the Guidelines, in the case of grants and prizes, the activities and operations of Israeli entities carried out in the framework of EU-funded grants and prizes will be considered eligible if they do not take place in the Territories, either wholly or partially, and in the case of financial instruments, Israeli entities will be considered eligible if they do not operate in the Territories, either in the framework of EU-funded financial instruments, or otherwise.[64] In November 2013 the EU applied the Guidelines in the context of an agreement allowing Israel's participation in the EU's Framework for Research and Innovation ('**Horizon 2020**'),[65] a participation that is of paramount importance to the State of Israel.[66]

Yet again, the EU refrains from adopting any such Guidelines with respect to Moroccan entities situated in Western Sahara or to activities pursued by Moroccan entities therein. The *Front Polisario* verdict did not change that state of affairs and it is unlikely that it would induce the EU to adopt Guidelines with respect to Morocco and Western Sahara similar to those adopted with respect to Israel and the OPT.

A fourth, and arguably the most significant manifestation of the discriminatory approach pursued by the EU towards Israel is the Commission's *Interpretative Notice on Indication of Origin of Goods from the Territories Occupied by Israel Since June 1967*. The Notice published in 2015 clarifies the EU's position with respect to the need to label settlement products exported by Israel to the EU.[67] The labelling requirement carries a much greater potential of adversely affecting the trade in these

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62 S. I of the *Guidelines on the Eligibility of Israeli Entities and their Activities in the Territories Occupied by Israel Since June 1967 for Grants, Prizes and Financial Instruments Funded by the EU from 2014 onwards* (2013/C 205/05), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2013:205:0009:0011:EN:PDF.

63 S. 9, *ibid*.

64 S. 12, *ibid*.

65 Horizon 2020 is applied during the years 2014–2020 with a budget of close to EUR 80 billion.

66 For analysis, *see* Harpaz (2017), *supra* n. 2, at 607–608.

67 Brussels, 11 Oct. 2015 C(2015) 7834 final, appearing in https://eeas.europa.eu/sites/eeas/files/20151111_interpretative_notice_indication_of_origin_en.pdf.

settlement products, as compared with the previous requirement of submitting a certificate of origin, as the former is apparent to the European consumer. As with the other three examples provided in this section, the EU insists that no such labelling requirements, which were adopted with respect to Israel, were required for Western Sahara products (let alone with respect to any other disputed or occupied territory in the world).[68]

In light of the analysis of these four manifestations of a more stringent application of its policy towards Israel, the tentative conclusion of this article is that the *Front Polisario* verdict narrowed the gap between the EU's approach towards Western Sahara and the OPT, as it would ensure that the principled approach of the EU to these two cases would be the same: no application and no recognition. Nonetheless, the *Front Polisario* verdict did not and would not eliminate this gap altogether. Various significant inconsistencies continue to exist in relation to the actual implementation of these two policies.

Are these inconsistencies in breach of the MFN principle? Does the EU violate its obligations towards Israel under the WTO Agreement?

When a WTO Member pursues an identical policy *vis-à-vis* two countries but the implementation of that policy is more stringent with the like products of one country as compared with respect to those of the other, then no MFN treatment is in fact being accorded. The *Front Polisario* verdict is likely to align the EU principled policy to the Israeli-OPT and Moroccan–Western Sahara cases. Yet, it will not change the fact that as indicated in this section, the actual implementation of that policy will continue to be more stringent with Israel and the OPT. Drawing on the language of the WTO Appellate body, such different implementation may be considered to be illegal de facto discrimination.

This analysis has led Professor Avi Bell and Professor Eugene Kontorovich to postulate that the EU violates the MFN principle:

> Any justifications the EU could adduce for its policies are undermined by their admittedly discriminatory application. The EU does not have a general set of rules for dealing with occupied territories, settlements or territorial administrations whose legality is not recognized by the EU. Rather, the EU has special restrictions aimed at Israel. This violates the fundamental rules of the GATT/WTO system, under which even otherwise valid trade restrictions are void if not applied uniformly to WTO members … the discriminatory customs treatment against Israeli "settlement" products is not duplicated by the European Union elsewhere in the world, even with respect to territories like Western Sahara … There are about 200 territorial sovereignty disputes

[68] *See* e.g. the Commission's clarification: 'Neither the Association Agreement, or the Agriculture Agreement foresees any specific rules regarding requirements as to the labelling of products. Products originating in Morocco and imported into the Union can thus not be differentiated on a territorial basis. In general, under current EU legislation origin labelling is voluntary unless its omission would mislead consumers', *see* Parliamentary Questions (11 June 2013) Answer given by MrCioloş on behalf of the Commission, http:// www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-003971&language=EN.

> worldwide, in many cases of which the EU does not accept sovereignty claims of the states which administer the territory in question … Despite the ubiquity of territorial disagreements and settlement practices, the EU has never unilaterally adopted a regulation requiring geographic labelling contrary to the exporting country's certificate of origination.[69]

Yet again, and drawing on the analysis conducted *supra*, it is postulated that these remaining inconsistencies, and their resultant de facto discriminatory treatment, do not give rise to a violation of the MFN principle. Thus the support expressed by Israel's Minister of Justice, Ayelet Shaked, and by Minister of Interior Security, Gilad Erdan, for initiating legal proceedings against the EU before the WTO is ill-founded in terms of WTO law.[70] Moreover, it is very unlikely that the State of Israel, which is so reluctant to initiate legal proceedings before international tribunals, including the WTO Dispute Settlement Body, will choose to do so in a case with such high political and commercial stakes.

8 SUMMARY AND CONCLUSIONS

For two decades, the EU has pursued its CCP *vis-à-vis* Morocco and Western Sahara (de facto application with no de jure recognition) in a manner inconsistent with, if not contradictory to its practice towards Israel and the OPT (no application and no recognition). The article dealt with this state of affairs and with the attempt to alleviate it.

As argued elsewhere, *Brita* reflects a solid albeit imperfect interpretation of the EU–Israel Association Agreement and its territorial clause under international law.[71] The same can be said about the *Front Polisario* verdict with respect to the EU–Morocco Association Agreement and its territorial clause. In addition, the latter verdict is consistent with the former, thereby advancing internal judicial coherence within the EU legal order and potentiality mitigating the inconsistent manner in which the political institutions of the EU treat the two cases.

Yet, as this article demonstrates, the actual manner in which the EU treats Israel and the OPT remains more specific, elaborate and stringent, as compared with its treatment of Morocco and Western Sahara. The remaining differences between the manner in which the EU implements its trade policy towards Israel and the OPT as compared with the actual implementation of its trade policy towards Morocco–Western Sahara have negative implications in legitimacy terms. They undermine the moral foundations upon which the EU's policies purport to be based. Yet, it is highly questionable whether they place the EU in violation of its obligations under WTO law, particularly the MFN clause. It must

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[69] Bell & Kontorovich, *supra* n. 2, at III, 5 and 9.
[70] For their support, *see* https://www.haaretz.co.il/news/politics/.premium-1.2779956.
[71] Harpaz & Rubinson, *supra* n. 2.

be emphasized that this article does not question the non-applicability of trade agreements to occupied territories when such application would prejudice the interests of the occupied population. Nor does it imply that the EU should refrain from exerting pressure, through its CCP and other instruments, on the State of Israel with regard to its policies towards the OPT. Quite the contrary. It is contended that the CCP should be used in order to advance general objectives of international law, including the principle of self-determination. In fact, the EU's commercial policy with respect to the OPT gained strong support from UN Security Council Resolution 2334 (December 2016), which stipulated that Israel's settlement activity constitutes a 'flagrant violation' of international law and has 'no legal validity', and calls 'upon all States … to distinguish, in their relevant dealings, between the territory of the State of Israel and the territories occupied since 1967'. All that the article argues is that when the EU relies on the CCP in order to advance CFSP objectives and international law principles, it should pursue such reliance equally in comparably cases. Otherwise the legal and moral foundations of the EU's policies, under both the CCP and the CFSP, will be undermined.