

LEBANESE AMERICAN UNIVERSITY

THE EUROPEAN COURT OF JUSTICE & THE
PALESTINIAN-ISRAELI CONFLICT

By

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Thesis submitted in partial fulfillment of the requirements for the Degree of Master of Arts in
International Affairs

School of Arts and Sciences

June 2011



LEBANESE AMERICAN UNIVERSITY

School of Arts and Sciences - Beirut Campus

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Program: M.A. in International Affairs.

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Acknowledgment

I would like to thank my advisor, Dr. Sami Baroudi, for his great support during my college years and for his guidance throughout my thesis work. I would also like to thank Dr. Salamey and Dr. Skulte-Ouaiss for being on my thesis committee. I have had the privilege of studying under the three of you, and for this I express my sincere gratitude to the Lebanese American University for giving me such an opportunity. Finally, I would like to thank my friends and family for their long support.

To my family, Mustapha, Hind and Shireen

Abstract

This thesis focuses on the role of the European Court of justice (ECJ) in the Palestinian-Israeli conflict. It thoroughly examines the ECJ's ruling on the legality, or lack thereof, of extending duty-free entry to the European Union to Israeli products that are manufactured in settlements in the occupied West Bank. The thesis studies the political and legal background to the ECJ ruling. It further argues that the ECJ verdict that these products are not covered by the free trade agreement between the EU and Israel will have significant legal, political and economic ramifications for Israel and for the Palestinians. Equally important, it will help define the applicability of international law to the Palestinian-Israeli conflict, especially as far as delineating the borders of a future Palestinian state.

Keywords: European Court of justice, Palestinian Israeli conflict, European Union

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Abbreviations

- EC: European Community
- ECSC: European Coal & Steel Community
- ECJ: European Court of Justice
- EEC: Treaty Establishing the “European Economic Community”
- EMA: Euro Mediterranean Association Agreement
- EMA-Israel: Euro Mediterranean Agreement between the European Community and Israel
- EMIA-PLO: Euro Mediterranean Interim Agreement between the European Community and the PLO for the benefit of the Palestinian Authority
- EPC: European Political Cooperation
- EU: European Union
- FCH: Finanzgericht Hamburg (Financial Court of Hamburg)
- GA/RES: General Assembly Resolution
- HHH: Hauptzollamt Hamburg-Hafen (Main Customs Office of Hamburg)
- ICC: International Criminal court
- ICJ: International Court of Justice
- PA: Palestinian Authority
- PLO: Palestinian Liberation Organization
- S/RES: Security Council Resolution
- UN: United Nations

Chapter 1

Introduction

History has long been witness to the many events and instances that have shaped the course of humanity. The Arab-Israeli conflict is one of those events that has spanned many generations and is now arriving at a critical juncture. The prospect of the recognition of a Palestinian State by the UN this September has brought about a flurry of diplomatic statements and declarations from affiliated sides to the peace process. The tedious effort to reach a negotiable settlement has proved futile and has given way to a unilateral approach to be exercised by the Palestinians. Rarely has a conflict been as robust in the face of countless regional and international measures as the Palestinian-Israeli conflict; despite the countless resolutions, propositions and mechanisms aimed at resolving this chronic conflict, the road to peace remains pocked with many religious, political, economic and social elements.

To be sure, the Palestinian-Israeli conflict is the rightful heir to the Arab-Israeli conflict – a conflict which has occupied much of the second half of the 20th century and whose remedy seems ever less tenable as we trudge ahead into the 21st century. The literature covering this multifaceted conflict is voluminous, comprised of numerous books and articles, each proposing a novel way forward. Their topics range from war technicalities (Isakson & Dickson, 2009), the peace process itself (Gilbert, 2002), history of

the land (Bickerton & Klausner, 1995), the Palestinian perspective (Salinas & Rabia, 2009), the Israeli perspective (Rubinstein & Dowty, 1991), and a myriad of scholarly articles that depict possible outcomes of a peaceful resolution (Dumper, 2009) and the structure of a Palestinian state alongside an Israeli one should it exist (Segal, 1989).

The countless UN resolutions and numerous deals signed between the Palestinian and Israeli parties have constrained the peace process and limited external factors from taking initiatives to breathe new life into it (Rothstein & Maoz & Shiqaqi, 2002). This isolation of the peace process from the international community, with only a few parties being directly involved in the process, has had a profound effect on it, more or less branding it as static.

While many new obstacles on the ground are crystallizing either naturally or artificially, certain significant elements of the conflict have remained unchanged due to the mandate that governs them. These elements include the UN resolutions that reflect the will of the international community regardless of their binding power. These resolutions have the capacity to form the backbone of any solution if political engagement by the Palestinians and Israelis fails to deliver a peace deal. The prospect of a peace deal between the Palestinians and Israelis in lieu of UN participation would, *de facto*, exempt both parties from implementing the resolutions concerning them. This situation would be ideal if either party deems these resolutions unsatisfactory. The most likely outcome is the implementation of the resolutions with some modification to accommodate changing realities, regardless of whether they are natural or artificial changes.

Most international and regional institutions established are the result of a political understanding amongst the participating states. Some of these institutions, founded as a corollary of a political agenda, are judicial in nature and hence function in accordance with the treaties that created them. These treaties become their main ‘source of law’ which guarantees their verdict. The verdicts of these regional judiciary institutions are binding to the member states who have signed their conceiving treaties, obliging them to implement and uphold the rule of law discharged by said courts. Another aspect of international relations that is particularly relevant here is supranational institutions. Supranational institutions provide for a mode of governance where a centralized government structure exercises jurisdiction, afforded to it by treaty, on member states (Sandholtz & Sweet, 1996). It resembles a social contract albeit at the international level and among sovereign states. A prime example is the European Union (EU) which has been founded on democratic principles and an ambiguously-defined sense of ‘Europeanness’; moreover, the EU prides itself as the standard-bearer of the principle of rule of law.

Supranational institutions are a new trend in international relations where their scope of influence and effect has still to be fully plotted. It is a new phenomenon based on the culmination of mutual interests among member states seeking a certain degree of unity for beneficial purposes. When the bodies of these institutions allow a certain level of political bickering, the effect of a certain policy may vary from one member to another. However, if the institution is of a judicial nature with binding verdicts, then political maneuvering is minimal to say the least, even if said verdict does not coincide with the

foreign policy of any given member state. Failure to comply would undoubtedly have repercussions towards the disobedient state.

The EU is a prime example of a supranational entity with varying degrees of authority depending on the issue. It is made up of sovereign democratic member states in principle. As an institution, the EU takes root in the democratic framework that is a common feature among its member states, particularly with regards to the separation of powers. Ideally, this principle would label any political maneuvering in the face of a verdict emanating from a judiciary body as political interference in a judicial matter. Such an attempt would be in breach of one of the principle pillars of democracy.

Ideally, the foreign policy of any given state or supranational entity is harmonious with its judicial verdicts should they have a political dimension; but if this were not the case, then in places where law appears to take precedence over politics (and in other places, as well), we find that politics presides over the rule of law. The second Chapter of this thesis will highlight the significant foreign policy positions assumed by the EU as a collective body to see its orientation in regard to the Arab-Israeli conflict. It will also give us an opportunity to evaluate EU foreign policy tools and their effectiveness vis-à-vis a conflict that has made little progress in terms of reaching a negotiated solution. The findings show that the EU's approach resembles the approach undertaken to mitigate past conflicts within the European continent itself. This trend has seen a concomitant push towards economic integration while laying the foundation for a democratic and transparent regional organization based on the rule of law.

The third Chapter will then discuss the ECJ and the verdict, which is the main focal point of this thesis. Accordingly, this section assesses the ECJ's authority and functions – both important indicators in order to accurately assess the weight of any verdict issued by this legal institution. The verdict is a case study on *Brita GmbH v. HHH* where a customs issue became a political matter when the ruling involved an arrangement for a dense political issue, mainly, the borders of a Palestinian state. The verdict's political appeal borders a strong similarity with the Helsinki Accords of 1975 which ultimately recognized the post World War II status quo, and more importantly, Soviet gains in Eastern Europe. As the Helsinki was a political endeavor undertaken to mitigate conflict, the political settlement highlighted in this thesis enjoys judicial support. The verdict is therefore broken down to show the interaction of rules and laws necessary for a legal solution to an international conflict.

The fourth and final Chapter will outline the political, economic, and legal ramifications of the verdict. It will also provide a theoretical analysis of the major factors presented in the thesis based on international relations (IR) theories. The thesis then draws back to the current mode of affairs in the conflict and realizes that judicial resolutions have little effect and that their scope is restricted to the court's jurisdiction. Hence, the prominent feature in IR remains the will of the international community, which in turn reflects the will of the most powerful actors in that community. As things stand, and according to recent statements and events concerning the conflict, even a United Nations resolution will not be able to resolve the conflict unless it is mutually-agreed upon by the Israeli side and the

Palestinian side, along with the enduring support of the United States and, to a lesser extent, the international community at large.

The general foreign policy mood of the EU member states and the EU as an entity will be thoroughly analyzed to provide a suitable context for the legal approach to be discussed in. The contribution this thesis affords to the Palestinian-Israeli conflict lies in the legal approach it undertakes. It draws a legal framework that can offer a suitable medium for the resolution of the conflict, and assesses whether this approach could become an important factor in international relations. The legal approach is based on European law foremost, with the support of international law as a secondary factor. The combination of European law and international law will lend support to the ECJ verdict and hence offer it a resonance of international appeal.

CHAPTER 2

The EU's Foreign Policy towards the Arab-Israeli Conflict

“Despite what is sometimes said, the Europeans do not want to interfere in the negotiations between the parties for the sake of appearing as another mediator. They want to help the parties to settle their differences in a way satisfactory for all. When we try to make our presence felt in the region, we do so in a way that will buttress peace efforts, not complicate them.” - Miguel A. Moratinos, former EU Special Representative for the Middle East process

The instances of conflict and political disagreement among the European countries and more specifically between the EU member states are plentiful, to say the least. This chapter will serve to emphasize the periods of agreement and convergence in foreign policy regarding the issue of the Arab-Israeli conflict. It will trace these periods from the time the EU was born to the most significant positions in recent time. It will also cover the essential EU foreign policy tools necessary for the implementation of its policies, followed by a general brief of the EU's assessment of the region's political landscape.

Europe's involvement in the Palestinian-Israeli conflict predates the birth of the EU insofar as numerous European countries have had a lasting impact on the region well before the emergence of the conflict itself. Great Britain's Balfour Declaration in 1917 set in motion a sequence of events that have defined the Middle East for close to a century. Even though the underpinnings of the conflict between the Israelis and the Palestinians can be

traced back to the European continent, from the Balfour Declaration to World War II and the Jewish mass exodus from Hitler's Holocaust, we find that the continent as a whole has had little significant input in comparison with the United States. The United States in turn has had critical interests in the Middle East since its ascent as a global power which, concomitantly, closely paralleled the Europe's descent from world hegemony (Ross, 2005). This descent greatly affected Europe's role in the politics of the region and it has not gone unnoticed in the eyes of many, particularly former US Secretary of State Henry Kissinger who, in 1974, publicly stated, "The Europeans will be unable to achieve anything in the Middle East in a million years" (Ifestos, 1987, p.369). Kissinger's statement puts into perspective the American perception of European involvement in the Middle East; likewise, it may also reflect how much weight the conflicting parties – both the Arabs and Israelis – attribute to a European mediation and sponsorship of any resolution.

Europe's reaction to its decreasing power found expression in the attempt to congregate and present itself as a single and unified entity – hence its growth in international stature came as an aftereffect of the economic integration and the common market initiative which had initially conceived the European Community (EC). The EC provided a platform for the European countries to coordinate common policies that could affect the region as a whole and at the same time regain some of its past tenure in the international arena.

While the EU has changed from a mainly economic community of six members to an economic and political community of twenty-seven, it has had, nevertheless, trouble

developing a coherent and effective foreign policy, adapting to shifting realities on the ground and taking advantage of opportunities to cut out for itself an autonomous role as mediator in the Arab-Israeli conflict (Musu, 2010). The considerable time taken for policy formulation is a major reflection of the political structure of the Union which itself constitutes a myriad of national interests attempting to converge on a given circumstance.

The economic integration by the EU member states should not overshadow the fact that these individual states themselves have separate economic treaties and agreements with countries outside the EU (George & Bache, 2001). These individual and exclusive economic treaties contracted by each EU member state makes a united EU foreign policy difficult to attain, especially when a country's economic wellbeing vis-à-vis a certain state is put at risk. The establishment of the EU with its many economic, social and security benefits has not replaced or outweighed the relationship EU member states have with countries outside of the Union in a way that would fill the void should an EU member state find it necessary to sever ties with a country for the common interest of the Union. The institutionalization of the EU and its bureaucratic nature ascertains a strong bond between each member state and the Union in a way that renders conflicting individual foreign policy insignificant to internal Union issues. In other words, the EU institutions overlooking internal affairs are independent of the institutions that deal with foreign matters, and rarely do issues cross over from one realm to the other (2001). This certainly makes it easier for the EU to function, and any setbacks on the foreign policy front would not affect progress on the internal front and the *vice versa*. The composition of the EU based on this reality explains the presence of a coherent internal front in terms of economic and security

policies, and the difficulty of obtaining that same coherence on the external (foreign policy) front.

To be sure, differences in the foreign policies of individual EU member states have not completely prevented the EU from converging on major issues concerning the Middle East and the Arab-Israeli conflict. “The European Union has traditionally considered the Mediterranean third countries as strategic partners” (Bindi, 2010, p.183). The relevance of the Middle East to Europe is evident in a number of crucial aspects. EU member states find themselves directly and indirectly implicated in the Middle East conflict for a number of reasons, including (but not limited to) their geographic proximity with the Middle East; their dependence on Middle Eastern oil; their security needs, especially in the sphere of illegal immigration and terrorism (2010); and the general historic role of European states in the region (Greilsammer & Weiler, 1987). This reality has always placed pressure on European countries to engage positively, meaningfully and become reliable actors in a conflict which sometimes benchmarks their involvement on the world stage. Europe’s main input comes in the form of extensive economic and security contributions which should entitle them to a greater role in the affairs of the region should they take advantage of it (Hollis, 1997).

While the Arabs might prefer European involvement in the peace process, the Israelis conversely argue that there is no need for European peace mediation; the Israeli position is close to the US position which holds that Europeans should be much more accommodating to American policies since they benefit from US initiatives and

commitment in the Middle East (1997). The American perspective proved itself to be inaccurate as their policies in the region contributed to the 1973 Arab oil embargo that greatly affected the European continent. The oil crisis made it clear to the Europeans that their interests could only be carried out by direct participation in the affairs of the region, and in particular the Arab-Israeli conflict.

The scope of European involvement in the Middle East has increased gradually and went through a number of phases since it was important to gain consensus before any major statement could be issued (Bindi, 2010). As the EC expanded, its foreign policy statements became more assertive and grew in stature in the bid to become an active and important player in the region. A foreign policy body, dubbed the European Political Cooperation (EPC), was thus created in 1970 for the Middle East as well as globally to aid in the formation of a collective European foreign policy (2010).

The establishment of the EPC brought about a different type of involvement in European foreign policy strategy where it played a central role in coordinating the foreign policy of EC member states. It was responsible for numerous joint declarations and joint actions which helped to keep the EC mindful of the Arab-Israeli conflict (Musu, 2010). It also depicted the EC as a unified entity in terms of foreign policy which helped consolidate the organization as an important actor in international relations. In his paper, "The transformation of just peace: EU and the Middle East peace process," Persson (2009) describes five phases by which the EC approached this particular conflict.

The first phase started in the early 1970s with the EC's attempt to play a role in the conflict through the issuance of statements and declarations. According to Persson, the main element of the EC's foreign policy revolved around United Nations Security Council Resolution 242. This resolution was included in every statement and declaration issued by the EC in regards to the Arab-Israeli conflict and, in particular, when discussing the peace process.

Resolution 242 was adopted by the Security Council in November 1967 in an effort to reverse the consequences of the Arab-Israeli hostilities in June of that year, in addition to dealing more generally with the Palestinian issue that had been on the UN agenda since 1947 (Quigley, 2007). This resolution remains the United Nations' main blueprint for a settlement to this conflict – however, the interpretation of key phrases in the resolution remains ambiguous in their syntax (Perry, 1977). The resolution endorsed “the inadmissibility of the acquisition of territory by war” and called for “withdrawal of Israeli armed forces from territories occupied” in the June 1967 war, and also “achieving a just settlement of the refugee problem” (Lynk, 2007; Quigley, 2007). The omission of the definite article “the” before the word territories caused major controversy in the resolution. The Israelis interpret this omission to mean the withdrawal from *some* but not necessarily *all* of the occupied territories, while the Arab governments and their supporters interpret the word “territories” to mean *all* of the territories (Perry, 1977). The European position on this resolution is clearly reflected in the EPC meeting held in 1971 in Paris.¹ The Foreign

¹ Source: Bulletin of the European Communities, No. 6-1971 p: 31-33.
http://aei.pitt.edu/4547/1/epc_ministers_2nd_meet.pdf (Accessed: 1 April 2011)

Ministers' Conference on Political Cooperation stated that: “[The foreign ministers] consider that it is of great importance to Europe that a just peace should be established in the Middle East... They confirm their approval of Resolution No. 242 of the Security Council dated 22 November 1967, which constitutes the basis of a settlement...and declare their willingness to contribute to the social and economic stabilization of the Middle East.”

This statement by the EPC is an attempt by the EC to interject itself into the conflict as a potential mediator and, more importantly, as one party with a common initiative as opposed to a number of parties with many initiatives which could complicate the matter and substantially hinder progress. The nature of the statement is direct and straightforward – however, the feature most worthy of mention is that it accompanies an international resolution and thus holds no new initiative to be taken into consideration. This fact may underlie the complicated nature of attaining a unified stance during the early stages of the Union.

The second phase of EC involvement in the conflict came as a result of the Arab-Israeli war in October of 1973, or the Yom Kippur War. This war proved to be a pivotal point in the history of the Arab world because it ushered in the employment of Arab oil as a political weapon (Itayim, 1974). Consequently, the quintupling of oil prices and the imposition by the Arab oil-producing states of an oil embargo was a shock for the European states that ultimately forced them out of their reticence (De la Gorce, 1997).

The first reaction saw each member of the EC adopt a position along the lines of their traditional policy, disconnected from each other and without taking into consideration the interest of the European collective. However, the subsequent oil crisis necessitated a Joint Declaration and a more orchestrated and engaging approach to the conflict (Musu, 2010). It dawned on the Europeans that a collective policy would have a far wider-reaching impact than individual policies that might contradict one another and draw a negative outcome. This phase saw the Europeans pushed into acting in cohort as one unit, coordinating their policies in order to reach a compromise solution to the crisis.

This predicament also marked the first tentative step of a European ‘return’ to the Middle East in terms of devising indigenous policies and deviating from the robust American policy in the region. A first communiqué was adopted in Brussels on the 28th of October by the foreign ministers of the EC which called for a political settlement that would entail recognition of all states in the region, including Israel; the withdrawal of Israel from the territories occupied since 1967; and the taking into account of the rights and aspirations of the Palestinian people (De la Gorce, 1997). This communiqué explicitly recognized the “legitimate rights of the Palestinian people,” a tenet which has been regarded as a major shift in policy towards the conflict. This recognition of the right of the Palestinian people and the right of Israel to exist placed the Europeans on middle ground between the two sides and cast the EC as an honest broker to participate as a potential mediator in the conflict.

The European position amounted to little, however, as the dominant and irreplaceable variable in the peace negotiations was the American factor. Their support of bilateral negotiations, which was favorable to the Israelis, took sway as Egypt was the first to break into the American-led peace process (Safty, 1991).

The European reaction to the crisis can be seen as sufficient and efficient in terms of the coordinated effort to confront the crisis and achieve an acceptable result. On the other hand, the sudden Arab convergence over an offensive policy which impacted negatively on the Europeans disconcerted them and brought to surface the fragile nature of European security in terms of social and economic vulnerability to the politics of their Middle Eastern neighbors. The effect of the oil crises on the EC is summed up by Panayiotis where he stated that:

“It made Europeans brutally aware of their vulnerability in both economic and political terms; it changed the pattern of relationships with both Israel and the Arab world, and brought about a dramatic shift towards more pro-Arab attitudes; it revealed the extent of European external disunity and generated calls for more integration as a result of this experience; it had economic effects not imaginable before the crisis; and last but not least, it brought to the surface the uneasy nature of Euro-American relations” (Ifestos, 1987, p.421).

This reality pushed the Europeans into a concerted effort to resolve the growing crisis in a way that would ease pressure off the continent. Thus, the EU statement obtained the desired result where the Arab oil-exporting countries through the Organization of Petroleum Exporting Countries (OPEC) interrupted the cutback on oil for what it considered ‘neutral states’ (Musu, 2010).

Another very important statement by the foreign ministers of the European Council that would have a magnified effect in the many years to come was the position held by the November 6 declaration in 1973. In this declaration, the European foreign ministers expressed through firm hope that negotiation would lead to peace through the application of S/RES/242 in all its parts where the peace agreements should revolve around a number of points, such as: Israel's withdrawal from the occupied Palestinian territories which it had controlled since the Arab-Israeli war of 1967; the guarantee of the territorial integrity and independence of all states in the region; and the international law principle of the inadmissibility of the acquisition of territory by force.

As already alluded to, the American factor is a very important variable in European-Middle East relations which cannot be overlooked. The reason behind European indecision and reluctance to pursue an indigenous policy regarding the Arab world may be found in European dependency on America for security. The EC's launch of the Euro-Arab dialogue prompted President Nixon to outline US views on this matter, stating that "Europeans cannot have it both ways. They cannot have the United States' participation and cooperation on the security front and then proceed to have confrontation and even hostility on the economic and political fronts." Additionally, Henry Kissinger further pointed out that America's allies were losing sight of the greater common transatlantic interest in concentrating on self-assertiveness (2010).

The launch of the Euro-Arab dialogue was an effort by the Europeans to establish a connection with the Arab world that could assess future policies through a formal channel of communication. The US, however, adopted a hostile attitude towards this dialogue and in January 1974 declared that it would not accept a European initiative concerning the Arabs (Al-Dajani, 1980). This US opinion on European involvement weighed heavily on European minds since the Western bloc at the time relied heavily on the US for economic and security initiatives. On the other hand, certain events and incidents would tilt the balance for the Europeans in a way that would favor European convergence over foreign policy in contrast to pursuing US policies vis-à-vis the conflict.

The third phase of EU involvement in the Middle East showed another significant development in the EU's perception of a solution to the conflict. In June 1977, the foreign ministers of the EPC declared in a statement that "a solution to the conflict in the Middle East will be possible only if the legitimate right of the Palestinian people to give effective expression to national identity is translated into fact, which would take into account the need for a homeland for the Palestinian people"² (Tomkys, 1987). This major development in the EU position recognized the Palestinian need of a 'homeland' for their people – a recognition not previously acknowledged prior to this statement.

This statement also contains some of the most relevant features that would become part of the distinctive European stance, such as: the Palestinian question being firmly placed at the heart of the conflict in the Middle East; the acknowledgement of the idea of a

² Bulletin of the European Council 6-1977:62

homeland for the Palestinians; and the claim that the best approach to the conflict was a comprehensive settlement rather than a process built on bilateral negotiations. The logic behind this claim was that if each Arab country undertook separate bilateral peace negotiations and concluded them, it would not solve the Palestinian problem. This is because no real Arab weight would be left to put behind the Palestinians in order to achieve a just and fair solution for them. Moreover, a comprehensive settlement could be better guaranteed since it would include all the sides and would be treated as one package by the international community which would make it easier to maintain and manage. A comprehensive settlement would also provide for greater flexibility in terms of the negotiable details on offer than would the bilateral negotiations have at its disposal.

In a similar statement issued two years later, the EC reasserted its position that a “just and lasting peace can be established only on the basis of a comprehensive settlement which should be based on Security Council Resolution 242 and 338.”³ This statement unequivocally laments Israel’s alleged sovereignty over the occupied territories and the establishment of settlements on these territories which the EC regards as illegal under international law (Persson, 2010).

A few months after these statements were declared, former Egyptian President Anwar Sadat’s visit to Israel and the subsequent opening of bilateral negotiations sponsored by the US completely relegated the Europeans to the sidelines. The EU’s support for these

³ http://aei.pitt.edu/5581/1/002279_1.pdf (Accessed: 19 April 2010)

steps were expressed under the pretense that these steps were “a first step in the direction of a comprehensive settlement” (Musu, 2010, p.39).

The American track in this case favored the Israeli vision of a peace settlement which would proceed through bilateral negotiations between the belligerent states, whereas the Europeans favored a more comprehensive settlement for the conflict (Shlaim, 2000). The somewhat neutral position by the Europeans was deemed as ‘pro-Arab’ by the Israelis and their insistence on an American peace process was viewed as a necessity to gain concessions from the other party. This perception by the Israelis did not hamper efforts by the Europeans to try and gain a foothold in negotiations and further their outlook for a comprehensive peace.

The fourth phase in European involvement sees it take yet another step in identifying the variables necessary for a comprehensive settlement that would be acceptable to both sides without necessarily instigating an economic or political backlash. This task, however, was near impossible since what was acceptable to either party was opposed and perceived as a threat by the other. Nevertheless, from the early 1970s to the beginning of the 1980s, Europe’s involvement gradually increased and an autonomous foreign policy regarding this conflict began to appear.

Whereas the first phase had begun with EC approval of S/RES/242, the second phase had taken a step forward by recognizing the Palestinians’ legitimate rights, and the third phase with the acknowledgment of the Palestinians’ need for a homeland; just as

importantly, the fourth phase saw the EU recognize the Palestinian right to exercise its right to self-determination comprehensively whilst also calling for the inclusion of the Palestinian Liberation Organization (PLO) in the negotiations, thus making the Palestinians an integral component of the negotiations.

The fourth phase was ushered in by the Venice Declaration of 1980 which at the same time announced Europe's aspiration for greater involvement in the region (Hollis, 1997). According to the Venice Declaration, the traditional bonds and shared interests which connect Europe to the Middle East compel EC members to exercise a 'special role' in the search for regional peace. The declaration also paved the way for a distinctive approach to the conflict by the Europeans (1997).

The declaration was a significant milestone in EU involvement where the EC finally committed in a public statement to the two principles of Palestinian self-determination and a negotiating role for the PLO (Tomkys, 1987). The declaration, which referred to the "national rights" of the Palestinian people, represented an enormous step in the evolution of European positions vis-à-vis the Arab-Israeli conflict (De la Gorce, 1997). One of the most important statements in the declaration is the issue of Israeli settlements, which was referred to as an illegality under international law:

“[The foreign ministries of the EU] are deeply convinced that the Israeli settlements constitute a serious obstacle to the peace process in the Middle East...[They]

consider that these settlements, as well as modifications in population and property in the occupied Arab territories, are illegal under international law.”⁴

The statement clearly defines the European position on these settlements and hence all activities that stem from these settlements would be regarded as invalid. These points still form the basis of Europe’s official stance, and though they have not always been trumpeted, the Europeans are capable of reminding the parties in the conflict of their official stance while at the same time drawing attention to what is inadmissible according to international law (Hollis, 1997). The significance of this EU statement is that it ‘referred’ to the regularities of international law which makes it less vulnerable to political pressure and maneuvering. Israel’s reaction to the declaration was extremely negative, not surprisingly, as it was condemned by close to the whole of Israel’s political spectrum (Persson, 2009). Even though It may be argued that statements by the EC in London (1977) and Venice (1980) had only limited effect on the ground, it would be a travesty to suggest that they were made out of short-term expediency (Tomkys, 1987). It should also be noted that while this declaration is important, it also highlights the tendency to converge on a minimum common denominator to enable member states to agree with one another (Musu, 2010).

Throughout their statements and declarations, the EU and its member states have always endorsed the comprehensive settlement approach for the conflict based on the two-state solution, which is also advocated for in S/RES/242 (Asseburg, 2009). Furthermore,

⁴ http://aei.pitt.edu/1393/1/venice_june_1980.pdf
Venice Declaration 12-13 June 1980 (Accessed: 20 April 2011)

Europe's position towards the Palestinians has evolved incrementally after Venice towards a more direct endorsement of the Palestinian right to self-determination and their necessary presence in the peace process and the ensuing peace negotiations (Hollis, 1997).

In the 1999 Berlin Declaration, which constitutes the fifth phase of development in EU policy in the region, the EU for the first time explicitly endorsed the establishment of a sovereign Palestinian State founded on democratic principles and which is also peaceful and sustainable. This state would be next to a secure Israeli State where the issue of Jerusalem and the refugee problem would be resolved in a reasonable and equitable way (Asseburg, 2009). This declaration was supplemented in 2002 by virtue of the Seville Declaration which approved the 1967 borders as a basis for a final settlement agreement between the two conflicting sides (2009).

These five phases constitute the major statements and most significant turning points in EU policies and initiatives towards the conflict between the Arabs and Israelis. As the European Union developed and became more integrated, a considerable change in the nature of the policies concerning the conflict is felt. The first phase saw the EU adopt UN resolutions on the conflict which reflected the will of the international community, while the second phase saw the EU thrust into the conflict through the Arab oil embargo. This brought a necessary reaction by the EU to mitigate the situation where they took up positions regarded as positive by the Arab bloc to ease the corollary oil crises. The third and fourth phases saw the Europeans form a common general idea of a final solution to the conflict that supported a comprehensive settlement and acknowledged the legitimate rights

of the Palestinians. Each phase saw the Europeans take a step forward in their statements which cordially paralleled EU integration and development on the internal front. This culminated in the final phase which saw the Europeans support a Palestinian state as pivotal to any final solution.

One of the main charges brought against the EPC in terms of a common foreign policy is that it is mainly a declaratory policy without much substance behind it and that it simply represented the minimum common denominator of all the different positions present within the Community and in turn lacked the necessary instruments for implementation (Musu, 2010). This perception is often further enhanced by the EU member states' remarkable tendency to follow national policy whilst privileging what was perceived to be national interest over trying to reach a common Community declaration on a crisis (Greilsammer & Weiler, 1987). Many components in the EU foreign policy development support this claim, and while a common policy undoubtedly has a bigger impact on the world stage, it remains fundamental for any actor in regional affairs to be able to support statements by deeds. The foreign policy of any country is as important as the capacity by which that country can influence proceedings.

While it is important to clarify EU foreign policy statements concerning the conflict, it is equally important to identify the relevant foreign policy tools that allow for the implementation of these policies. The essential part of diplomacy is the capacity by which a country can support their positions and induce change. It was asserted that the EU had inconveniently "moved beyond power into a self-contained world of laws and rules and

transnational negotiation and cooperation” and that the European approach was ingenuously and naively seeking to “bind nations together through trade, diplomacy, inducements, compromise, and social interdependencies” (Youngs, 2006, p.22). This in turn led to the belief that European forms of soft engagement would not be sustainable without the security guarantees provided by the US (2006). Therefore, in order to understand the European approach towards the Arab-Israeli conflict and to evaluate its effectiveness, it is crucial to go beyond statements to the actual tools used by the Europeans to support their policies. This will help evaluate whether or not the EU has the necessary capacity in terms of foreign policy tools to implement its policies.

2.1 EU Foreign Policy Tools Used in the Middle East

In her book, *European Union Policy towards the Arab-Israeli Peace Process*, Musu (2010) identifies a set of European foreign policy instruments that have been used to deal with the Arab-Israeli conflict. This so-called foreign policy ‘toolbox’ is comprised of declaratory instruments, operational instruments and economic instruments.

European policy towards the Arab-Israeli conflict and the enduring peace process has mainly been of a declaratory nature whilst lacking substance. The possible objectives of such declarations are to influence change and improve overall European political cooperation in the region. This cooperation aims to establish a viable platform from which possible EU action can emanate. Throughout the years, the EU has made many declaratory statements, albeit incrementally. From the Foreign Ministers Conference in 1971 to the Venice, Berlin and Seville declarations, these declarations have laid down the foundations

of what was to become the specific European position on the Arab-Israeli conflict. The declaratory instrument is thus an integral part of foreign policy and its political weight varies according to the issuing country. Declaratory statements usually identify a country's position and possible future projection when facing an issue and, if used wisely, can help mitigate conflict. As mentioned above, the EU has used declaratory statements generously when pursuing its perception of a just peace in the Middle East peace process, and these declarations themselves have had varying affects. Some have come as support to international resolutions while others have been issued for specific circumstances, such as the Foreign Ministers Declaration concerning the Arab oil embargo.

The operational instrument mainly revolves around the "joint action" initiative. Here, the term "joint action" relates to the extent that "there is agreement on the operation between member states, where sufficient capabilities will be available...[and] the European Council adopts the formal EU decision to take action" (Bjorkdahl & Stromvik, 2008). An example of such a joint action initiative adopted by the ECP is the major political and financial involvement in the preparation, observation and coordination of the first Palestinian elections in 1996. This operational instrument has allowed the EU to assert its foreign policy more forcibly to the extent of establishing the settings conducive to promulgating peace in the region (Asseburg, 2009). It allowed the Europeans to exercise greater depth in conflict management in the region which translated into the EU Border Assistant Missions between Gaza and Egypt and the EU Police Mission for the Palestinian Territories (2009). Another essential aspect of the operational instrument is the joint action initiative that led to the appointment in November 1996 of an EU Special Envoy (now

special representative) to the Middle East peace process whose main objective was to coordinate policies of individual member states and participate directly in negotiations aimed at promoting progress in the peace talks (Musu, 2010). The setback of this position is that it is restricted authority-wise and severely constrained by instructions received from the Council such that it cannot formally commit any member state to new initiatives or decisions which had not been previously agreed upon (2010). In other words, the main participating force in the Middle East conflict was to be directed through the Office of the Special Representative whose initiative making powers were rendered useless in the face of member states. This is in stark contrast to the judicial instrument that is binding to all member states and is used as an internal institution for conflicts of a judicial nature. The judicial factor in EU foreign policy had essentially been nonexistent, but since the EU relies on its own rules and regulations, the crossing of its judicial institutions to the foreign policy spectrum is considered inevitable.

The economic instrument is another essential part of Europe's foreign policy arsenal and probably the most effective with respect to immediate tangible results. In 1995, the EU promoted a Euro-Mediterranean partnership (the Barcelona Process) which had a declared long-term goal of contributing to the stabilization of the eastern and southern Mediterranean region by means of economic integration and closer cooperation to achieve gradual political and economic development (Asseburg, 2009). The Barcelona Process was supposed to develop separately from the peace process and contribute indirectly by providing confidence-building measures and most importantly an alternative forum in which the parties involved in the peace process could continue to meet even when the peace

process was stalled (Musu, 2010). The interesting issue about the European attempt to engage the region is the institutionalization of the policies and the bureaucratization of the decision-making process. Even though this approach may be more rule-regulated and less vulnerable to political bickering, the speed by which decisions are made and the complicated nature of bureaucracy may impede progress.

Indeed, the failure to latch on to an opportunity and improvise reflects that these institutions are slow to intercept any real changes that are needed in the peace process. Furthermore, in terms of non-military aid to the Palestinians, the largest donor has been the EU; and in terms of trade, research and scientific cooperation, the EU has been Israel's primary partner (Asseburg, 2009). The corollary question is, nevertheless, why does the European Union not exploit its economic leverage with the two sides for influence in the peace process? The answer is found in the official position of the EU commission which stated that the suspension of the Mediterranean Association Agreement would "not make Israeli authorities more responsive" while holding back on aid to the Palestinians would undoubtedly lead to a humanitarian crisis (Musu, 2010, p.134). However, firm conditions related to macroeconomic policy and fiscal reform were requested by the EU towards the Palestinians in return for facilitating the transfer of aid to them; but issues of democratic principles or good governance were not included (Youngs, 2006).

These instruments undoubtedly have an effect on the peace process, although their immediate result is somewhat hard to touch on. The EU's architecture is based on institutions and bureaucracies, and this reality has influenced the EU's outlook on the peace

process which, in turn, revolves around institution-building in the Middle East. In a way, the EU's peacekeeping tools and strategies deeply reflect its own foundational design where the economic strategy advanced resemble the common market strategy formulated at the beginning of the European Union project. This also reflects the EU's belief that in creating an economic trade structure dependent on itself for the benefit of the whole (and in this case the Middle East), the chance for conflict would be minimized, much as the case of the European Union after the Second World War.

From another point of view, it may be contended that the instruments of foreign policy available to the EU have not been fully developed. This obstacle runs in tandem with, and corollary to, the persistent desire of member states to maintain control over their foreign policy; their reluctance to proceed too speedily in the direction of political integration within the Union; and the inability to find common interests of sufficient number to justify, in their view, the renunciation of the 'particularisms' of national foreign policies and priorities for the sake of the higher objective of achieving a common European policy (Musu, 2010).

2.2 Conclusion

The EU has routinely been criticized for not challenging US diplomatic primacy in the Arab-Israeli conflict and the biggest failure has been focused on the EU's inability to use the low-level cooperation of the Euro-Mediterranean partnerships (economic agreements) to produce innovative dynamics more favorable to the peace process (Youngs, 2006). The time has come for Europeans to reevaluate their foreign policy approach,

reassess their foreign policy tools, and acknowledge accurately their quantifiable input to the conflicting sides. The EU should also pursue more effective policy coordination with the US that would recognize an autonomous role for the EU within a concerted effort for peace to achieve stability in the Middle East (Asseburg, 2009). The EU should also be conscious of other attempts to reach a settlement to the conflict and, moreover, work to advance those tracks should they be constructive to the peace process (2009).

While it is true that the EU has yet to fully utilize its capacity as a dominant player in world affairs, it is beginning to be a significant actor in the Middle East simply by the cumulative effect of its activities in the economic sector and, more importantly, its repeated pronouncements on the application of international law (Hollis, 1997). Some also argue that the United States' lack of credibility in the region has afforded European initiatives with greater legitimacy and potential (Youngs, 2006). This assumption has not been fully tested as the EU has yet to fully comprehend its real influence and benefit to the parties involved. Moreover, it has failed to effectively utilize this evaluation in terms of policy implementation.

To be sure, the most significant effect on the peace process may not come from the political spectrum of the EU at all, but rather from a judicial institution that is binding to all member states and thus ignorant of the common denominator factor essential to any political undertaking in the Union. This assumption will be evaluated in the following chapter where the European Court of Justice (ECJ) will be scrutinized for any direct or indirect foreign policy affiliations.

As the EU finds itself struggling to change its role in the Middle East from ‘payers’ to ‘players,’ the judicial tract may offer it an alternative track to exert a stronger presence in the politics of the region since its verdicts are binding and guaranteed by European law. As the ECJ is not a political institution, and as politics and economics closely interrelate, the natural corridor for the ECJ to enter the political sphere would most likely be via the economic one. The Middle East is a case particularly illuminating of the strengths and weaknesses of European foreign policy coordination and action (2006). This foreign policy, together with the ECJ, should provide the EU with more direct and assertive approaches to the conflict and, in retrospect, afford it more leverage in the politics of the region.

This brings us to the next chapter on the ECJ and its functions, authority and impact on the political sphere of events related to the EU. The next chapter will also discuss the verdict of a customs issue that may have resounding political implications on the EU.

CHAPTER 3

The European Court of Justice

“Law is the essential foundation of stability and order both within societies and in international relations.” - William J. Fullbright

This chapter introduces the European Court of Justice and defines its place in the general context of the EU organization. It discusses the mode of function of this Court, its authority, jurisdiction and relationship with the foreign policy sphere of the EU; it will also highlight the source of law for the EU and in particular the European Court of Justice (ECJ) to describe the jurisdictional appeal of its verdicts. The second part of this chapter discusses a verdict which emphasizes a connection between an ECJ ruling and foreign policy – mainly, the interaction between judicial law and international relations. The case study will revolve around a German company called Brita GmbH⁵ and describe the process in which the judiciary became involved in a foreign policy issue.

On May 9, 1950, when former French Foreign Minister Robert Schuman announced his proposal to establish a Common High Authority to administer the entire French and German coal and steel assembly in a regional organization susceptible to other European countries, he took care to include in the proposal the establishment of a court of justice which would subject the new authority to judicial control (Brown & Kennedy, 2000). One

⁵ GmbH stands for Gesellschaft mit beschränkter Haftung (a corporate or limited liability company)

year later, in 1951, the Treaty of Paris created the European Coal and Steel Community (ECSC) and created in its midst the ECJ (2000). The ECJ is based in Luxembourg and is in permanent session; it is primarily responsible for directly applying the law in certain types of cases and for interpreting the provisions of EU law to guarantee its uniform and consistent application (Nugent, 2003). This is one of the most fundamental aspects of the ECJ which became a paramount feature of the ECSC and later the EU.

Indeed, the ECJ has had a profound effect in promoting the rule of law within the EU where legal integration has significantly outpaced economic and political integration (Mattli & Slaughter, 1998). It has even been implied that without the Court and a legally enforceable framework (i.e., European law), European integration could just have easily faltered. The existence of this law differentiates the EU community from other international organizations as it gives it a legal identity and an international personality (Church & Phinnemore, 2002). Its existence is fundamental for the function of the EC and at the same time subjects its actions to court jurisdiction. The development and expansion of European law has been vital to the overall progression of European integration where the accrual of authority and influence by the ECJ is undeniably an apparent manifestation of sovereignty by a supranational institution on account of national states (Garrett & Keleman & Schulz, 1998).

This transfer of sovereignty was to be based on democratic standards and rule of law to ensure that the Community is found on transparent and legal grounds. The controversial issue regarding this manifestation of power lies in the impact the ECJ has had

on political discourse. As the EU grew in stature, so did the rules, regulations and laws supporting the legal structure of the Union which, at the same time, strengthened the ECJ by supplying it with a larger legal base from which to check new legislation. Hence the ECJ's role in determining whether new legislation are congruent with the treaty establishing the EU has elevated the status of the ECJ in comparison with other institutions. This position sees the ECJ acquire a participating role in the legislation of the Union corresponding to its circumstantially-acquired discretionary powers in interpreting new legislation.⁶ The official status of the institutions that make up the EU is that, in principle, they are all equal; but inevitably in the real world of politics (as in the world of George Orwell), some are more equal than others (Brown & Kennedy, 2000).

The ECJ has so far been recognized to have considerable impact in the life and work of the European community (Arnall, 1999). In order to secure the consistent and unvaried application of Community law amongst EU member states, the European Economic Community (EEC) Treaty⁷ provides that the national supreme courts are obliged (and the lower courts allowed) to request a preliminary ruling from the ECJ whenever the matter is concerned with the interpretation or validity of the rule of Community law (Schermers, 1974). The EU treaty base, in addition to correlated legislation concerning the arbitration process of various conflicts that may arise among EU institutions and between those institutions and citizens, is subject to the interpretation of the ECJ (Tsebelis & Garrett, 2001). Article 234 of the EEC Treaty that empowers the ECJ to interpret treaties

⁶ The ECJ has bestowed upon itself a role similar to that of the Supreme Court of Justice in the United States by treating the Treaty establishing the EU as a constitution and itself as its guardian (Sweet, 2004).

⁷ Treaty Establishing the European Economic Community signed in Rome in 1957. AKA The Treaty of Rome

has been adopted in a broad view by the ECJ to the extent that it has been extended to associational and other external agreements (Church & Phinnemore, 2002). These external agreements include the Association Agreements concluded by the EU with external countries for close cooperation in areas of security, foreign policy and economics.⁸ A prime example of such an Association Agreement is the “Euro-Mediterranean Agreement” (EMA-Israel) establishing an association between the European Communities and their Member States with the State of Israel, signed at Brussels on 20 November 1995.”⁹ Another example is the “Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community and the Palestinian Liberation Organization (PLO) for the benefit of the Palestinian Authority (PA) of the West Bank and the Gaza Strip, signed at Brussels on 24 February 1997.”¹⁰

The case of *Brita GmbH v. Hauptzollamt Hamburg-Hafen*¹¹ (HHH), which will be discussed shortly, represents an example for the need of ECJ interference when an interpretation of the Association Agreements is required to achieve uniform action throughout the Union. Brita is a German company that filed an annulment lawsuit against the HHH’s request for customs duties at the *Finanzgericht Hamburg*¹² (FCH) who in turn requested a preliminary judgment from the ECJ in order to proceed with the case. As the case with Brita is of a tax and trade nature, it is paramount that a common ruling be achieved to prevent customs tax imbalances among the members of the Union. For

⁸ <http://en.euabc.com/word/67> (Accessed: 16 May 2011)

⁹ Official Journal of the European Union C 100/5

¹⁰ Ibid.

¹¹ Main customs office of Hamburg (Germany)

¹² Finance Court of Hamburg

example, if Brita is declined preferential treatment for its products from the German customs authorities, it can theoretically change its import location to another member state of the EU which does grant them preferential treatment. In this case, and after entry into the EU market, the 'free circulation' of goods valid inside the Community would allow these products free passage into Germany, effectively bypassing the German customs authorities. If agreements are liable to different interpretations by member states that entail favoritism and convenience, then uniform policies and procedures would find it hard to exist; this practice would consequently undermine the whole rationale behind the EU project (Nugent, 2003). To prevent this, and since it relates to the Community law, the ECJ becomes an important factor in the regulation and coordination of a uniform policy concerning such cases.

Even though European integration was a political project and politically motivated, its establishment was based on treaties that were fundamentally economic and resource-based. The treaties establishing these communities that later merged to form the European Union in the Maastricht Treaty of 1992 were based on rule of law guaranteed by the ECJ. This empowering of the ECJ as the guardian of the 'constitutional base' would later be felt in issues of political significance that would undoubtedly influence the general discourse of politics in the EU.

Brita GmbH vs. HHH is also a noteworthy example of how the ECJ may indirectly *interfere* in political discourse, later discussed in Chapter 4. The difference between a political interference and a judicial one is that, in the latter, there is no room for

complacency since failure to comply would hold the negligent party accountable to their actions and a possible penalty would most likely be applied. In the general legal integration framework prevalent in the EU, the submission of national law to Community law by the Court's judicial associates – lower national courts – means that the governments of member states that do not adhere to ECJ rulings are in effect defying their own national judicial courts and, accordingly, exasperating the issue of noncompliance (Mattli & Slaughter, 1998).

In the case of Brita, the FCH had the right to refer questions to the ECJ under Article 234 of the EEC treaty, which the ECJ had resorted to interpreting in the broadest sense. The article includes mention of the “court or tribunal of a Member State” and has thus been interpreted by the Court as embracing any national institution exercising a judicial function (Arnull, 1999). In this way, the Court has broadened its jurisdiction to include most aspects of a judiciary nature in the Union, in line with Article 41's objective of ensuring regularity in the appliance of the law (1999). The jurisdiction of the court greatly reflects the powers manifested in it by the treaties that constitute its statute. The court has jurisdiction in four categories of disputes: The first jurisdiction allows the court to judge whether a member state has violated treaty obligations by acting as an international court; the second jurisdiction sees the court behave as an administrative court especially in the task of reviewing the decisions and the validity of procedural Community issues; the third jurisdiction sees the court preside over suits for damages against the communities, and in this case the court behaves like a civil or administrative court; and the fourth jurisdiction is where the court is charged with assisting national courts in matters related to Community

law (Schermers, 1974). To preserve its critical status as an independent and autonomous arbiter, the court should persevere in legal consistency and show resilience to political endeavors and interferences from interested parties (Garrett et al., 1998).

Nevertheless, the jurisdiction and role of the Court has been revised in the subsequent treaties associated with the EU. The Maastricht Treaty established a structure of cooperation and common action in new areas such as foreign policy, security affairs and justice affairs – however, these areas were purposefully excluded from the jurisdiction of the ECJ (Due, 1998). The Amsterdam Treaty later allowed the ECJ to exercise some jurisdiction on issues related to justice affairs but still precluded it from foreign and security policies (1998). The makers of the treaties were aware that if the ECJ were to be given jurisdiction in the realm of foreign affairs, their national foreign policies would be subject to court rulings and they would lose major influence on the national foreign policies of their respective countries. Since national foreign policy remains an integral part of state sovereignty, the member states were unwilling to submit to a supranational entity in this regard, albeit one of a judicial nature. This point was emphasized in the Maastricht Treaty which declared that common action in the areas of foreign and domestic affairs is to be by way of intergovernmental agreement which would require unanimity (Brown & Kennedy, 2000). In this respect, we notice a conscious attempt to extend the gap between the jurisdiction of the ECJ and matters related to foreign policy. However, the ECJ's ability to interpret the treaties and Community law in a matter consistent with its objective of achieving a uniform policy may result in a spillover effect to the foreign policy arena. The risk of that happening is potentially destabilizing since there is no mechanism in place to

counteract any unwarranted political effects that may arise from a judicial verdict. This is due to the relation that exists between the Court and the other institutions of the EU.

The Council of the European Union is the primary meeting place of the national governments and is responsible for taking policy and legislative decisions (Nugent, 2003). The relationship between the Council and the Court is different than that of government and the judiciary, at least as it is known in the United Kingdom. While a decision from Britain's highest court can be reversed by an act of Parliament, even with retroactive effect, the judgments of the ECJ cannot be reversed by an act of the Council; on the contrary, any measure of the Council having legal effect can be annulled by the Court if deemed contrary to the treaties or other provisions of the Community law (Brown & Kennedy, 2000). Therefore in the case of Brita GmbH, the verdict cannot be appealed as the ECJ is a no-appeals court.

The ruling of the ECJ may be reversed by the Court itself in a subsequent case or by an amendment of the treaties where the threshold for the constitutional revision is exceptionally high, whether through "unanimity among the EU member governments and subsequent ratification by national parliaments, national referendums, or both" (Garrett et al., 1998). Furthermore, the possibility of a subsequent case overturning the ruling is low since legal precedence is an integral part of how the ECJ functions. National courts are also bound by legal precedence where they base their decisions on legal principles that have the potential to vary from one court to another. This is because each court asserts its own interpretation which may not always be identical to the other (1998). Moreover, if the

courts' jurisprudence varied from one dispute to another in reaction to external interference, then the ECJ's legitimacy would certainly become a source of debate. This is because it would lose legitimacy at the time that its claim to power depended strongly on its reputation as an "impartial advocate for the law" (1998).

These pitfalls in overturning an ECJ verdict add more significant weight to them since overcoming them is a feat not easily accomplished. Since the ECJ sits atop the hierarchy ladder in the judicial format of the EU, its verdicts are conveyed to national courts for application. In this case, the national courts find themselves applying Community law rather than national law since the ECJ's rulings are based on the former and not the latter. By adopting the interpretation of the ECJ, national courts are in reality channeling the will of the ECJ, a supranational entity, to the national entity of the state.

The procedural liaison between the ECJ and national courts is prescribed in Article 234 (ex 177) of the EEC, which gives the ECJ jurisdiction in responding to questions put forward to it by national courts and are related to the interpretation of Community law; and also in Article 177, where a national court may ask for a preliminary ruling from the ECJ. This enables national courts to render judgments that are congruent with the legally-accepted interpretation of Union laws and treaties (Caldeira & Gibson, 1995).

In retrospect, the ECJ acts in alternate ways where it can function as a court of international law, a court of appeal, and a court of review and referral all in the same case (1995). In the case of *Brita GmbH v. HHH*, the ECJ submits a verdict that has political

implications for the EU. This verdict will be thoroughly examined to highlight the interaction of laws that played a part in conjuring it; its political reverberations, if any; and whether or not these laws had any significant effects relating to the political issue, prior to being ordained in a judicial ruling.

3.1 The Verdict

On February 26, 2010, *BBC News* ran a headline reading, “EU: Goods made at Jewish settlements are not Israeli.”¹³ A day before, on February 25, 2010, in the case of *Brita GmbH v. HHH*, the ECJ released the judgment in Case C-386/08 which read: “Products originating in the West Bank do not qualify for preferential customs treatment under the EMA-Israel Agreement.”¹⁴ This implies that Israeli products manufactured in Jewish settlements in occupied Palestinian territories are not included in the zone prescribed under the EMA-Israel according to the ECJ.

The significance of this ruling has both political and economic implications. It settles a long and outstanding debate on the status of Israeli settlements in occupied territory. Many a treaty has been signed concerning these territories where the distribution of economic, security and foreign affair rights have taken precedence on social and humanitarian issues. This verdict, simple as it may seem, has the capacity to subject a major block in international relations to its ruling, potentially altering the economic threads in a region where economics and politics greatly influence one another. In this regard, the

¹³ <http://news.bbc.co.uk/2/hi/8538251.stm> (Accessed: 6 May 2011).

¹⁴ Court of Justice of the European Union, Press Release No 14/10, Luxembourg, 25 February 2010

verdict will be thoroughly analyzed and its legal foundation covered to include all the rules, regulations and laws that helped conjure it.

As detailed in the Press Release of the ECJ, Brita is a German company that imports accessories such as home carbonating devices, syrups and drink-makers used mostly for sparkling water from a supplier in Israel. Brita's supplier is Soda-Club Ltd. which has its headquarters in Israel and its manufacturing site is in the Jewish settlement of Mishor Adumim in the West Bank, to the East of Jerusalem (Map 1, p.89). The EMA-Israel, signed in 1995, provides for "free trade between the European Communities and Israel" in accordance with the modalities embedded in the agreement.¹⁴ Since Brita is a German-registered company and based in the EU, it sought to benefit from the preferential treatment provided for under the EMA-Israel and exempt its imports from tax obligations by undertaking the necessary procedures outlined in the Agreement. For this reason, Brita filed 62 customs declarations between February and June 2002, pursuant to the EMA-Israel, in an effort to preclude customs duties.¹⁵

A central aspect in this case is the location of Mishor Adumim and the legal status of this settlement. Settlements in general have featured prominently in Israeli-Palestinian peace talks where some are categorized as industrial zones and others as housing units for the Jewish population. The definition of a settlement is the establishment of a civilian settlement (or industrial zones) which represents a "form of permanent presence in the

¹⁴ Article 6 of the Euro-Mediterranean Agreement Between the European Communities and Israel

¹⁵ International Society of International Law (<http://www.asil.org/insights100623.cfm>) (Accessed: 8 May 2011)

territory under dispute” (Newman 1985, p.192). The categorization of these settlements has no distinction in legal terms, for they ultimately remain settlements in occupied territory. The legal documents dealing with their status have come from different sources. These sources range from UN resolutions that stress on the “inadmissibility of the acquisition of territory by war” to bilateral treaties that distribute jurisdiction and authority on the territories these settlements are founded upon – between the State of Israel on the one hand, and the Palestinian Authority on the other.¹⁶ Some authors have even gone so far as to assume that these settlements represent a form of colonization in the modern era. Ultimately, however, “the implementation of Jewish colonization policies in the West Bank is a central feature of the Arab Israel conflict” (1985, p.192). This colonization comes in the form of settlements, where the underlying strategy behind their establishment was to secure defensible boundaries in addition to creating new realities on the ground to exploit during negotiations in the peace process (Newman, 1981).

The Fourth Geneva Convention explicitly disallows the transfer of citizens from the territory of the occupying power to the territory of the occupied, regardless of the motive.¹⁷ Consequently, Israel’s overt transfers of its citizens and economic incentives aimed at persuading citizens and industries to relocate in occupied territory are in breach of the Geneva Convention on international humanitarian law. Likewise, the EU has always held the view that Israeli settlements are in violation of international law and are thus

¹⁶ Oslo I and Oslo II

¹⁷ Article 49 of the Fourth Geneva Convention

counterproductive to peace.¹⁸ Furthermore, the EU as a political unit has renounced on more than one occasion the Israeli settlements and refused to consider them as part of the territory of Israel.

Mishor Adumim is one of ten industrial sites in the West Bank – it is also the largest in Israel.¹⁹ It is defined as an area of major interest by the Israeli government and is highly subsidized to encourage Israeli industry to locate there by offering cheap land, special low taxes and looser enforcement of ecological laws.²⁰ By establishing these industrial areas on Palestinian land, and employing Palestinians for labor, the Israelis gain control over large pieces of land with less effort and controversy than by building housing settlements.²¹ Mishor Adumim is located in the Israeli municipality of Ma’ale Adumim in the West-Bank and the continued expansion of the former would eventually separate the northern part of the West Bank from its southern part, in addition to isolating East Jerusalem from the West-Bank²² (Aronson, 2007). The existence of Ma’ale Adumim in this specific location is a major obstacle to peace and one of the complicated issues deferred to final status talks of the peace process between the two sides. This delay in tackling complicated issues and postponing them to the ‘final status’ peace talks is the prime strategy used in the peace process to maneuver around obstacles during negotiations and reach a tenable achievement (Shlaim, 2000).

¹⁸ <http://www.adl.org/international/EU-4-PeacePlatforms.asp> (Accessed: 8 May 2011)

¹⁹ <http://www.scribd.com/doc/24306891/Decode-Jerusalem> (Accessed: 9 May 2011)

²⁰ Ibid.

²¹ Ibid.

²² See Map 2

The West-Bank, on the other hand, is governed by the Israeli-Palestinian Interim Agreement, also referred to as the Taba Accord (or Oslo II). This Agreement was signed in Washington on September 28, 1995 (Gold & Morrison, 2010). The agreement established three areas in the West Bank: Area A, which would be under the direct jurisdiction of the Palestinians; Area B, which would be under the jurisdiction of both the Palestinians and the Israelis; and Area C, which would be under the exclusive jurisdiction of the Israeli government.²³ According to Article IX (5) (b) (1) of the Interim Agreement, the Palestinians have the right to sign economic agreements with state and international organizations. Additionally, according to Article IV of ANNEX III of the Agreement, special provisions are given for Area C stated in Appendix 1. Moreover, Article 6 of Appendix 1 clearly lists the special provisions for Area C which are mainly rights in the fields of commerce and industry, including, *inter alia*, issues related to imports and exports.²⁴ These special provisions were to be granted to the Palestinians after the conclusion of the first phase of redeployment. The protocol concerning the redeployment from the West Bank was concluded on January 15, 1997 and signed by Israeli Prime Minister Benjamin Netanyahu and Palestinian Authority Chairman Yasser Arafat.²⁵ Ultimately, the Taba Accord's major political achievement was in crystallizing the mutual recognition between the Israelis and the Palestinian Authority which, prior to this agreement, did not exist. It was considered a milestone in the Arab-Israeli peace process.

²³ Israel-Palestinian Liberation Organization: Interim Agreement on the West Bank and the Gaza Strip

²⁴ <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/THE+ISRAELI-PALESTINIAN+INTERIM+AGREEMENT.htm> (Accessed: 10 May 2011)

²⁵ http://www.adl.org/israel/final_status/borders_1.asp (Accessed: 10 May 2011)

The Taba Accords have governed Israeli-Palestinian relations since 1993 and acknowledge the Palestinians' right to engage in dialogue and negotiations in addition to signing agreements with states and organizations (2010). This right first materialized with the signing of the Euro-Mediterranean Interim Association Agreement on Trade and Cooperation between the European Community and the Palestinian Authority in 1997. The Accords gave legitimacy to the agreements conducted by the Palestinian Authority in the eyes of the Israelis.

The Interim Agreement further stated that “neither side shall initiate or take any step that will change the status of the West Bank and the Gaza Strip pending the outcome of the permanent status negotiations” (2010). According to Oslo II, Israel and the Palestinians were to complete a final status agreement by October 1999. This never occurred, however, and the status of the West Bank and the Gaza Strip were not conclusively declared between the two conflicting sides. Furthermore, the interpretation of the last statement means that any unilateral declaration from either side concerning the West Bank and Gaza would be void of any legal recognition.²⁶ Since Israeli annexation of the West Bank and the Gaza Strip would be in blatant breach of international law and ‘possibly’ condemned by the international community, then the only other scenario this statement aims to dismiss is a possible unilateral declaration of independence by the Palestinians irrespective of any peace talks. As the Taba Accords did not accurately specify in a way that would leave no room for doubt and interpretation who governed over these territories, but rather distributed authority over them, the general international law principle of *pacta tertiis nec nocent nec*

²⁶ A Palestinian declaration of Statehood is therefore subject to Israeli approval

prosunt (or the relative effect of treaties) finds particular expression in this scenario. This principle is found in Article 34 of the Vienna Convention and states that a treaty creates neither obligations nor rights for a third state without its explicit consent.²⁷ Consequently, the distribution of authority between the Palestinians and Israelis concerning the West-Bank and the Gaza Strip is not binding to other states. A more elaborate interpretation would include 'other states' or 'groups of states.' Hence the EU's free trade agreement with the Palestinians does not concern itself with the internal dissemination of authority endorsed by this Interim Agreement.

Map 2 (p.90) demarcates the Area in the West Bank which is considered to be Area C, and thus falls under the exclusive jurisdiction of Israel. Map 1 (p.89) shows the location of Mishor Adumim and it lies in Area C which subjects it to the exclusive jurisdiction of Israel, in addition to the special provisions provided for under Annex III of the Interim Agreement.

A Pandora's box, so to speak, was opened when Brita filed for preferential treatment for its products at the German customs declaration. In these declarations, it was stated that the State of Israel was where these goods originated, and the invoices supplemented by Soda-Club reaffirmed that the products originated from Israel. These invoices are issued by the customs authority of the exporting state as stipulated in all Association Agreements between the EU and other countries. There had already been past complications between the EU and Israel concerning products imported from the Jewish

²⁷ <http://www.mallat.com/LawPageDS/CJEU18Mar10.pdf> (Accessed: 7 May 2011)

state. These complications persisted at the insistence of Israel to continue exporting to the EU goods manufactured in the Palestinian Territories but marked as “Made in Israel” while continuing to benefit from the EMA-Israel and the corollary-free circulation of its goods in the EU (Musu, 2010). On May 12, 1998, the Commission of the European Community issued a statement declaring that Israel was suspected of breach of treaty for exporting products into the Community that did not originate in Israel and were thus not eligible for preferential treatment (Hauswaldt, 2003).

Seven years later in 2005, the EU’s Council of Ministers released a communiqué addressing this festering issue. The communiqué stated, “operators presenting documentary evidence of origin with a view to securing preferential treatment for products originating from Israeli settlements in the West Bank...were informed that putting the products in free circulation could give rise to a customs debt.”²⁸ In this respect, the communiqué also requested for subsequent verification in addition to a detailed inquiry (name of city/village/industrial zone) on the Proof of Origin for imports originating from Israel.

Upon receiving Brita’s application, the German customs office granted provisionally the preferential tariff to the products and, in the spirit of the communiqué, requested the added proof outlined in said communiqué which in turn reaffirmed the provisions of the standard EMA-Israel.

²⁸ Official Journal of the European Union: Notice to importers: imports from Israel into the Community (2005/C 20/02)

The German customs authorities forwarded these requests to the Israeli customs authorities who, under Article 32 of Protocol 4 to the EMA (which the EMA-Israel stems from), are responsible for verification. Their reply was, “Our verification has proven that the goods in question originate in an area that is under Israeli customs responsibility. As such, they are originating products pursuant to the EMA-Israel and are therefore entitled to preferential treatment under that agreement.”²⁹ This response did not entirely satisfy the German custom officials for various reasons. First of all, the German customs office did not think that their Israeli counterparts were in an unbiased position to provide an objective response since the issue at hand is more political than a simple customs issue; and secondly, their response did not enclose the adequate information requested to help take the appropriate decision. Article 33 (6) of the Protocol to the EMA states that:

“If in cases of reasonable doubt or if there is no reply within 10 months of the date of the verification request or if the reply does not contain sufficient information to determine the authenticity of the document in question or the real origin of the product, the requesting customs authorities shall, except in exceptional circumstances, refuse entitlement to the preferences.”³⁰

Further complicating matters, and after the EU had concluded a free trade agreement with the Palestinians that came into force in 1997, two EU trading partners were now claiming responsibility for products originating from the same place, namely the West Bank (Hauswaldt, 2003).

²⁹ European Customs and Trade Communiqué 43rd edition (July/August 2010).

³⁰ EEA Agreement: Protocol 4 On rules of Origin

The German customs authorities, having perceived the information provided as inadequate to make a decision on the goods, asked the customs authorities of Israel for a second time to indicate whether or not the goods that were filed for preferential treatment by Brita originated from Israeli-occupied settlements in the West Bank.³¹ This second request differed from the first one in that it was much more direct and focused on a core issue, namely the origin of the products in question. The Israeli customs authorities failed to reply to the request within the 10-month period required for verification purposes and, consequently, the German customs office denied the entitlement to preferential treatment on the grounds that it could not be established in the absence of doubt that the imported goods fall within the scope of the EMA-Israel Agreement.³² This outcome brought a “post-clearance recovery of customs duties in the amount of EUR 19,155.46” claimed by the German customs authority from Brita (Kornfeld, 2010, p.2). The HHH denied a customs protest filed by Brita which then sought action of annulment for the levied custom duties at the FCH (2000). Unsure as to how to interpret the EMA-Israel and issue a verdict, the FCH asked the ECJ whether the preferential treatment provided for under the EMA-Israel may be granted in respect for goods manufactured in the occupied Palestinian territories and which the Israeli authorities have confirmed as being of Israeli origin without providing more detail.³³ It also referred the question of whether these goods are permitted preferential treatment without differentiating between the EMA-Israel and the EMIA-PLO. The referral was supplemented by the opinion of the FCH which concluded that “since both the EC-Israel Agreement and the EC-PLO Agreement provide for such preferential Agreement,

³¹ Opinion of Advocate General of the ECJ Yves Bot. Delivered on 29 October 2009 Case C-386/08

³² Ibid.

³³ Court of Justice of the European Union. Press Release No 14/10 February 25, 2010

then the products originating in the occupied territories should – in its opinion – be granted preferential treatment.”³⁴ Since this case is now in the judicial sphere, what follows is the legal framework that would clearly define the impact the rule of law had on this conflict, and its corollary interpretation into the political realm.

3.2 Ruling of the Court and Legal Context

As this case involves treaties between states, or between international organizations and states, it is only natural to view the Vienna Convention on the Law of Treaties (which governs the interpretation of treaties) as our analytical baseline. Since the case presented to the ECJ requires a correct interpretation of the EC-Israeli Agreement, the Vienna Convention on the Law of Treaties provides the courts with important articles pertaining to this cause. Article 31 of the treaty, entitled *General rule of interpretation*, states that “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Furthermore, “there shall be taken into account...any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” (Linderfalk, 2007, p.2). This statement requests the simple and ordinary interpretation of the treaty whilst also considering the general context the treaty was signed under. It also recognizes supplementary agreements concluded that are also related to the dispute – in this case, the Oslo Accord and the Taba Accord (or Oslo II). Consequently, to interpret the EMA-Israel, it should be looked at in the context of the Association Agreements conducted by the EU with the Middle East and southeastern Mediterranean region in Barcelona, and

³⁴ Ibid.

also in the context of Oslo I and II since the core of the issue (the occupied territories) are subject to the diktat of these accords.

3.3 The Barcelona Process

The EMA-Israel and the EMIA-PLO Agreements came into fruition under the auspices of the Euro-Mediterranean partnership which was established in Barcelona in 1995, hence dubbed the Barcelona Process. The central feature of this Mediterranean policy was to implement bilateral free trade agreements between the EU and each Mediterranean country with minor tailoring to establish a wide partnership at a time when world trade liberalization accelerated (Vasconcelos & Joffe, 2000). The partnership and the Barcelona Process rested on the responsiveness of the Mediterranean countries' economies for structural adjustment to maintain a stable macroeconomic environment (2000). It was essential for the whole region to elevate their economic capabilities in terms of trade and competitiveness for the mutual benefit of the two adjacent regions. Firstly, a very important objective would be met by the Europeans in the realm of restricting immigration by tackling the fundamental reason behind it: The economy; and second of all, an increase in economic and financial activity would nevertheless be accompanied by political stability, an otherwise important prerequisite for peace. These two objectives were an integral part of the Association Agreement and a correct implementation of the agreements would have the capacity to promote these positive changes. In this regard, the Barcelona Process was not just an economic agreement in that it comprised important political and security provisions as well. The Barcelona Process was ultimately meant to set up real conditions for long-term stability and economic development essential to achieve a political breakthrough (Musu,

2010). The long-term EU strategy behind the Barcelona Process is to promote democratization since their own experience has shown that a democratic framework is a potent and efficient tool for conflict resolution between states and diminishes the risk of conflict between them (Behrendt & Hanelt, 2000).

As the Barcelona Process wrought bilateral agreements in the Mediterranean countries, its inclusion of a bilateral agreement that acknowledges the West Bank and the Gaza Strip is a clear indication of the distinction made by the EU between the State of Israel and the occupied territories of the West Bank and Gaza.

3.4 The EMA-Israel Association Agreement

The EMA-Israel entered into force on June 1, 2000 and provided for a free trade area between the European Community and Israel according to the provisions stipulated in the agreement. One of the key clauses in the agreement concerns the territorial scope of the now-established free trade area. Accordingly, Article 83 of the EMA-Israel states:

“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.”

The question that this Article raises concerns the ambiguous boundaries of the State of Israel. Normally a non-issue concerning the territorial integrity of other states, this issue, as

it pertains to Israel, remains controversial for a number of reasons. A sensible review of the borders would be to check the records of the United Nations since each country's borders are recorded at the time of entry to the organization. If for some reason they are not stated in definite, which is rarely ever the case, then a review of the resolutions dealing with that country should be reviewed for possible enunciation of the borders.

The Vienna Convention on the Law of Treaties provides the ECJ with a legal linkage between the EMA-Israel and the UN Charter, thus giving legal impetus to the resolutions conceived in this legal international institution. Article 31 of the Law of Treaties includes the preamble of a treaty as pertaining to a legal part of the treaty and to be considered in the event of treaty interpretation. Accordingly, the EMA-Israel states in its preamble the "importance attached" to the principles and observance of the UN Charter which forms the very basis of the association. This can be interpreted in such a way that the resolutions relevant to the parties to the treaties may be sought for clarification issues. This last sentence will be brought into play when the ECJ invokes the issue related to the interpretation of the territorial scope central to the case surrounding Brita with the HHH.

Since the territorial scope of each of the two treaties is considered to be one of the fundamental issues, the boundaries of the two states should be examined to clarify this pivotal point. In his book, *Palestine and the Law*, Mussa Mazzawi gives a carefully weighed discussion on the legal boundaries of the State of Israel. On November 29, 1947, the United Nations General Assembly passed GA/RES/181 which effectively partitioned Palestine into a two state territorial solution: One for the Jews and another for the Arabs

(Khalidi, 2008). On May 14, 1948, the Jewish Council issued a unilateral declaration of independence proclaiming the birth of the State of Israel (Bentwich, 1952). As Mazzawi points out, the Israeli declaration of independence revolves around the latter's acceptance of the resolution in key parts of the declaration in a show of subordination which was aimed at exalting the resolution they believed gave them legal right to establish a state. More so, the declaration, in its most specific part proclaiming the birth of the State of Israel, invokes the partition resolution: "Accordingly...by virtue of our natural and historic right and on the strength of the resolution of the United Nations General Assembly, hereby declare the establishment of a Jewish State in Eretz-Israel"³⁵ (Mazzawi, 1997, p.134).

The declaration further reiterates Israel's desire to implement the resolution as further proof of its existence, hence the logic behind Mazzawi's deduction that the Jewish state owes its very existence to GA/RES/181 through its explicit recognition of the resolution as a source of law concerning its very statehood. Map 3 (see Appendix) shows the boundaries recognized by the GA/RES/181, and a simple comparison with the previous maps would clearly show the difference between the UN-recognized boundaries and the artificially-manufactured reality on the ground. Furthermore, in the opinion of the Advocate General of the ECJ concerning *Brita GmbH v. HHH*, the preamble of the EMIA-PLO (which includes a commitment to S/RES/242 and to the principles of the UN) would effectively solicit an Israeli withdrawal from the occupied territories and induce the provisions of the resolution. Insofar as its relationship with the EU is concerned, this would

³⁵ Mazzawi also points out that it would not be logical or fair to argue that the partition resolution which served as the basis of the establishment of the State of Israel cannot equally legally serve as the basis of the establishment of the Palestinian Arab State (this issue will not be discussed).

entail the State of Israel to “terminate all claims or states of belligerency and to respect the territorial integrity and political independence of every state in the area.”³⁶

Likewise, the EEC also contains in its preamble a statement of adherence to the UN principles and charter “INTENDING to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure development of their prosperity, in accordance with the principles of the Charter of the United Nations” (Church & Pinnemore, 2002). Since the UN Charter calls for member states to facilitate the implementation of decisions taken by the governing bodies of the organization and provide all necessary assistance required, it becomes binding for the ECJ to respect UN resolutions that are related to a case under its review. Furthermore, the statement recognizes Europe’s desire to ensure development with overseas countries – which also finds particular expression in the Association Agreement between the European Community and the overseas Middle East and southeastern countries – by way of respecting the resolutions sanctioned by the organization. Should a judicial case contain political elements within it, then UN resolutions could play an important role in contributing to its outcome. In this scenario, no distinction would be made between resolutions of a Chapter VI nature, which comprise the “peaceful settlement of disputes,” and those of Chapter VII, which consents to the use of force when implementing the provisions of the resolution and is also binding to member

³⁶ Opinion of the Advocate General Yves Bot. Delivered on 29 October 2009. Case C-386/08

states.³⁷ When provisions of a resolution enter the judicial domain, they will enjoy the power of a court of law order which is binding to the conflicting sides by rule of law³⁸.

This brings us to the terms and provisions of the EMIA-PLO Association Agreement which define the obligations set between the two sides. More specifically, these terms and provisions also specify the responsibility and scope of the agreement from the European perspective based on the terms agreed with the PA concerning the West Bank and Gaza Strip.

3.5 The EMIA-PLO Association Agreement

As mentioned earlier, the EMIA-PLO (for the benefit of the Palestinian Authority) was signed in 1997 as part of the Association Agreement's framework for stronger ties between the two sides. The Association Agreements are similar in nature where the same preamble is used in all of them. As stressed in the Agreement, the free trade arrangement necessitates that the modalities of the agreement apply to products that originate in the West Bank and the Gaza Strip, where the invoice declarations required to verify the products are issued by the customs authority of the Palestinian Authority to the customs authority of the importing European country. Article 73 further states that the "agreement shall apply to the territories in which the treaty establishing the European community is applied and to the territory of the West Bank and the Gaza Strip." This reiterates the European desire to make a separate agreement with the Palestinian Authority since, in their

³⁷ Chapters VI and VII of the Charter of the United Nations

³⁸ The International Court of Justice and the Criminal Court of Justice are binding only to member states that announce their submission to the jurisdiction of these courts

opinion, the West Bank and Gaza Strip are not included in the EMA-Israel. Another important factor not to be missed is that the products that originate from the West Bank and the Gaza Strip should go through the customs authorities of the Palestinians to be valid for preferential treatment from the German customs perspective.

3.6 The Ruling

It becomes clear from the ECA-PLO that the customs authority responsible for invoice declarations in the territory of the West Bank and Gaza belongs to the Palestinian customs authority (at least as far as the European Union customs authority is concerned). Furthermore, in applying the general principle of international law (*pacta tertiis nec nocent nec prosunt*), then the internal agreement between the Israeli government and the Palestinian Authority derived from the Taba Accord (which effectively distributes authority between the two sides) is not legally binding to the EU customs authority as previously explained. The failure to implement the Taba Accords which maintained exclusive Israeli jurisdiction over “Area C” cannot justify the Israeli customs authority’s reply that the products originated from an area under Israeli control. The signing of the Taba Accords, however, provides legal cover to the agreement signed by the PA over the West Bank and Gaza Strip, especially in terms of signing economic treaties; more specifically, Taba recognizes Palestinian jurisprudence over these territories. From the ECJ’s point of view, however, the responsibility of issuing the invoices cannot be transferred to another customs office since the treaty does not sanction such an act. Therefore it would be technically incorrect for the customs authority in Germany to accept the invoice declarations from the Israeli customs authority on products originating outside their area of jurisdiction.

From the ECJ's point of view, the ruling is mainly concerned with the interpretation of the EMA-Israel as well as the EMIA-PLO Agreement. The ruling will be given in the context of a customs dispute between Brita GmbH and the HHH pertaining to the refusal of the German Customs Authority to endow preferential treatment on the import of products manufactured in the West Bank. The ECJ thus concluded that the EMA-Israel Association Agreement and the EMIA-PLO Interim Association Agreement is presided over by international law and, more specifically, under the aegis of the international law of treaties.³⁹ The treaties were interpreted in good faith according to Article 41 of the Vienna Convention and the ECJ adopts the view that the signing of two treaties is a clear indication by the EU of the distinction they perceive between the territories of Israel and those of the West Bank and Gaza Strip.

As stipulated in the Vienna Convention, by giving the "ordinary" meaning to the treaties, it becomes clear that each of the two treaties have their own territorial scopes. The EMA-Israel territorial scope is defined in Article 83 and is restricted between the European Community and the territory of the State of Israel, while Article 73 of the EMIA-PLO treaty recognizes the Palestinian Authority's jurisdiction over the West Bank and the Gaza Strip. The ECJ also recognizes the submission of the EMA to the UN Charter and its principles and hence acknowledges the United Nations Security Council resolutions as well as the General Assembly resolutions related to the case under review. Moreover, the ECJ is aware that the EU is of the view that products obtained in the territories which have been

³⁹ Judgment of the Court (Fourth Chamber) 25 February 2010 Case C-386/08

placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under the agreement. Hence on these grounds, the Court ruled on February 25, 2010:

“The Customs authorities of the importing Member State may refuse to grant the preferential treatment provided for under the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States of the one part, and the State of Israel, of the other part, signed in Brussels on 20 November 1995, where the goods concerned originate in the West Bank. Furthermore, the customs authorities of the importing Member State may not make an elective determination, leaving open the questions of which of the agreements to be taken into account – namely, the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part, and the Euro-Mediterranean Interim Association Agreement on trade and cooperation between the European Community, of the one part, and the Palestinian Liberation Organization (PLO) for the benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the other part, signed in Brussels on 24 February 1997 – applies in the circumstances of the case and of whether proof of origin falls to be issued by the Israeli authorities or by the Palestinian authorities.”⁴¹

Whereas Chapter 2 went over the foreign policy orientation of the EU and Chapter 3 introduced the ECJ and examined the case of *Brita GmbH v. HHH*, the following chapter will now consider these findings and connect them in order to draw a picture of the implications that this seemingly ordinary judicial ruling has had on the Palestinian-Israeli conflict.

⁴¹ Ibid.

Chapter 4

Political, Legal and Theoretical Analysis

“We need international support so that our people live a life of normality, of dignity, of liberty and freedom. I hope that our cry for freedom may be heard.” – Mahmoud Abbas

This chapter discusses the political ramifications of the verdict in addition to its economic effects. It highlights whether the verdict induced any real change on the ground or whether its fate was similar to the abundant foreign policy statements discussed in Chapter 2 of the thesis. Moreover, this chapter also evaluates the content of the thesis with contemporary international relations theory and gives a brief indication of the current affairs of the Palestinian-Israeli conflict.

The complete reliance on the rule of law is the greatest innovation pioneered by the European Communities in their endeavor at European integration which has shown the perseverance required to achieve that end (Romano, 1997). The rule of law is mundane without the existence of a judicial entity that can enforce the law irrespective of possible problematical repercussions. Applying the philosophy derived from Newton’s Third Law of Motion – for every action there is an equal and opposite reaction – it becomes needless to say that the ECJ verdict in the case *Brita GmbH v. HHH* has repercussions to the same extent in which political resolutions and laws contributed to its making.

The verdict was based on the fact that “products originating in the West Bank do not fall within the territorial scope of the EMA-Israel and do not therefore qualify for preferential treatment under that Agreement.”⁴⁰ The case from the onset was concerned with certain Israeli products being imported from the occupied territory of the West Bank to Germany, but because of the verdict, it has now surpassed this boundary to include all Israeli products originating from the West Bank and the Gaza Strip destined for Europe.

4.1 Economic Impact

The direct economic implications of the verdict are simple to determine, where all products originating from the territories not included in the scope of the ECJ’s interpretation of the EMA-Israel are now eligible to customs duties. Furthermore, the ECJ’s interpretation of the territorial scope of the EMA-Israel does not include the West Bank and the Gaza Strip. Hence, this verdict will render Israeli exports from the West Bank and Gaza Strip less competitive in the EU market, whereas exports from Israel proper would be more competitive since they would be exempt from custom duties under the EMA-Israel. Taking this into consideration, what would the direct effect of this verdict have on Israel’s domestic economy? The answer should be sought in the context of the general trade relation between the two countries.

⁴⁰ <http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-02/cp100014en.pdf> Court of Justice of the European Union. Press Release No 14/10. Luxembourg, 25 February 2010. (Accessed: 17 May 2011)

The EU and Israel retain a strong trading partnership where the EU is Israel's main source of imports and its second largest market for exports behind the United States.⁴¹ In the last decade, trade between the two countries has increased significantly and continues to show a strong inclination for growth.⁴² In the realm of speculation, it would be logical to assume that industrial relocation in the occupied territories should decrease since the products originating there will have taxes levied on them upon entry into the EU market. Theoretically speaking, and against the backdrop of the ECJ's verdict, if two rival Israeli companies export to the EU, the company located in the occupied territories would fare less well than the one located within the territorial scope of the EMA- Israel since the latter company's products are eligible for tax free entry. In addition, newly-founded companies would find it more reasonable to locate in Israel proper especially if the nature of their business is export-based. At the same time, if there is a general atmosphere of disadvantage in regards to locating industrially in the occupied Palestinian territories, then the incentive to go there would diminish since businesses of all types prefer a positive environment in which to establish themselves. Any negative assumption regarding a company can negatively affect its ratings in the market, especially in the field of stock exchange. In this regard, companies tend to steer away from adverse settings since the impact therein can be potentially economically damaging.

At the extreme end of speculation, industries may look to relocate from the occupied Palestinian territories to the area subject to the EMA-Israel, especially if they are

⁴¹ <http://www.spiegel.de/international/europe/0,1518,680380,00.html> (Accessed: 17 May 2011)

⁴² <http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/israel/> (Accessed: 26 May 2011)

export based and depend on the preferential treatment of their products for competition in the EU market. However appropriate this may sound, the fact remains that the Israeli government encourages the process of locating in the occupied territories for the reasons explained in Chapter 2. Taking this into consideration, the decision of whether to locate in the occupied territories of the West Bank and the Gaza Strip is weighed carefully by Israeli companies. Their calculations include the potential economic benefits provided for under the EMA-Israel and the financial gains it may produce, compared with the overall Israeli economic and financial policy in the occupied Palestinian territories, which, in turn, includes major subsidizing measures and lax enforcement. Nevertheless, the temptation to locate outside the occupied territories should be greater since the preferential treatment of the Israeli products in the EU would allow them to compete under favorable conditions in a market that is home to a population of nearly 500 million.⁴³ The only other possible alternative is that the Israeli government provides even greater incentives than the ones currently present in order to attract industries and business to the occupied Palestinian territories. These new incentives should be able to counterbalance what the EU has to offer in terms of economic and financial benefits to render the EMA-Israel unworthy of a relocation process.

The verdict also has repercussions on the Palestinian economy, albeit one of less intensity since the Palestinians' major trading partner is Israel and not the EU. In his article, "Israeli Policy towards the Occupied Palestinian Territories: The Economic Dimension, 1967-2007", Arnon (2007) argues that since 1967, Israeli policy has been directed at

⁴³ http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-QA-09-031/EN/KS-QA-09-031-EN.PDF

preventing the division of the land into two states and two economic sovereign entities whilst also negating the “One State Solution.” This means that policies implemented were deliberately aimed at fusing the Palestinian economy with the Israeli one in a way that would make the perseverance of the former only possible at the clemency of the latter. As Arnon put it, “Forming one unit could bring about the integration of Palestinians into the Israel polity and generate a new political reality... that is, the establishment of a single political and economic entity...where Israel would dictate the terms of the union with no prior negotiations” (2007, p.574) This design of the economy was perceived as a suitable means to managing Palestinian aspirations for statehood. The principal factor behind not allowing the Palestinians an independent and sustainable economy was to prevent them from unilaterally declaring a state and acquiring the necessary economic capacity to preserve that state.

The fundamentals behind this arrangement lie in Israel’s perception of a future Palestinian state – a state which would not only be demilitarized, but also subordinate to Israel. The best means of achieving this would undoubtedly be through the control of the economic sector. Israel treaded the difficult path between the two-state solution and the one-state solution in its economic policy since it oriented its long-term strategy of maintaining authority over the disputed land. From the Israeli perspective, a two-state solution would effectively submit to a Palestinian state, and this solution runs counter to historic Zionist doctrine. On the other hand, a one-state solution would see the state shared with Arabs and would hence lose its exclusive Jewish identity. The current status quo thus

represents the most convenient solution for Israel since the present arrangement facilitates the growth of the Jewish state at the expense of a Palestinian one.

When Israel signed the Oslo accords with the Palestinian Authority, and later the Paris Accord in 1994,⁴⁴ it kept in place the Customs Union which is a ‘supposed’ union between the Israeli and Palestinian Customs Authority. It was responsible for controlling all trade to Israel and the occupied Palestinian territories regardless of the place of origin of the products. During the negotiations, the Palestinians refused to maintain the Customs Union and sought its abolishment. The consequent negotiations that resulted were a typical carrot & stick maneuver by Israel. Knowing that the Palestinians’ main commodity for export is labor, and in return for accepting to keep the Customs Union in place, the Israelis approved an increase in the number of Palestinian labor workers permitted to enter Israel (Young, 2006). In return, the Palestinians accepted to maintain the Customs Union which was completely under the control of the Israelis. All the trade customs restrictions and policies implemented were for the specific interest and sole benefit of the Israeli State (Arnon, 2007). Furthermore, Israel’s restrictions on Palestinian trade arrangements were to hinder any Arab-Palestinian economic integration that could add weight to a Palestinian claim to the right to self-determination which would eventually lead to a declaration of independence.

⁴⁴ The Paris protocol was signed in 1994 as an economic treaty that provided a peculiar arrangement for the economy of the West Bank, and the Gaza Strip

The Paris Accord was signed mainly for economic reasons – specifically, to negotiate Palestinian responsibility in terms of trade and customs policy. However, the overall design was aimed at channeling most of the trade originating from the occupied Palestinian territories into Israel, which in reality facilitated the Palestinians’ economic dependence on Israel⁴⁵ (Young, 2006). The considerable planning to limit Palestinian economic prosperity aimed to serve one purpose: To hinder any attempt by the Palestinians to declare an independent state. Not surprisingly, in terms of economy, the Palestinians have traditionally relied mostly on foreign aid which, more often than not, has come with political strings attached (2006).

Moreover, the financing of the Palestinian Authority and the majority of their revenue is dependent on Israeli transfers as prescribed in the Paris Accord. The Palestinian economy in this case is unlike any other in the world, as it has no legal framework or boundaries within which it can function – more importantly, its revenue gathers outside of its jurisdiction. Even though the Paris protocol was concluded for economic reasons, the political interpretation of this accord, in reality, is most evident in a recent political ploy. On April 27, 2011, the two rival Palestinian groups, Fatah and Hamas, signed a reconciliation pact that called for, among other things, the end of the state of war between them.⁴⁶ Israel voiced its strong disapproval at the reconciliation deal which resulted in

⁴⁵ <http://www.alternativenews.org/english/index.php/topics/economy-of-the-occupation/2870-palestinian-economic-dependency-on-israel> (Accessed: 22 May 2011)

⁴⁶ <http://www.voanews.com/english/news/middle-east/Why-HamasFatah-Agreement-At-This-Juncture-122029154.html> (Accessed: 18 May 2011)

Israel cutting off the transfer of ‘tax money’ to the Palestinian Authority.⁴⁷ Israeli Finance Minister Yuval Steintz announced that he had suspended a routine handover of \$88 million in customs and other levies that Israel collects on behalf of the Palestinians under interim peace deals.⁴⁸ This relationship between Israel and the Palestinian Authority resembles that between a father and his child, whereby Israel’s behavior regarding the tax money is treated as an allowance that can be withheld should differences arise. The tax money represents around 70% of the Palestinian Authority’s revenue, and the economic structure that is modeled around Israel’s collection of this tax money for subsequent transfer to the Palestinian Authority ultimately undermines the latter’s sovereignty.

A state cannot survive and persist without a viable economy. If an economy of a state is subordinate to that of another state, then its politics would be vulnerable to influence from that state as this scenario demonstrates. Arnon (2007) argues that the most important interest for the Palestinians is sovereignty, and with sovereignty comes the right to decide and implement economic policies according to one’s own best interest. Sovereignty allows for the precise designation of borders and determination of economic policies within these borders. However, since a self-designation of economic borders would be disregarded by the Israelis, it would not achieve any economic objective. Therefore the ideal solution would be for an economic border to be recognized by an outside entity.

⁴⁷ <http://www.bbc.co.uk/news/world-middle-east-13223939> (Accessed: 18 May 2011)

⁴⁸ <http://israelmatzav.blogspot.com/2011/05/breaking-israel-refuses-to-transfer-tax.html> (Accessed: 18 May 2011)

The delineation of economic borders between the State of Israel and the occupied territories of the West Bank and Gaza Strip is one of the consequences of the ECJ verdict which happens to be binding to 27 European Countries that represent a single economic bloc. It is too early to assess the definite impact this verdict has had on the Palestinian economy, or if it has added any significance to a political Palestinian claim. The significance of this verdict, however, is that it corresponds to Palestinian efforts in trying to carve out an exclusive economic boundary that could sustain an independent state. In other words, it is a step in the right direction, and even though it is limited to European relations in the area, it will certainly have a tangible economic effect on the region.

4.2 Political and Legal Impact

The verdict undoubtedly has political clout even though its focal point is based on economic issues. It is never clear where the economic dimension of the verdict ends for the political one to start, since rarely are the politics and economy of a state in disjunction. The intertwined nature of these two realms lends credence to the considerable weight of the ECJ's verdict.

The first impression this verdict portrays is that it is legally binding to the parties directly involved in the verdict, albeit with reverberations on a third party, mainly the Palestinians. The intriguing aspect is that it constitutes a political settlement to a political conflict that was not reached by political means. It is a binding non-negotiable settlement enforced through a judicial track on a complicated political conflict. It bears resemblance to second-track diplomacy through judicial means whereby the verdict itself was economic

but the implications political. The flaw in this assumption is that the side which benefited the most was not a party to the judicial proceedings; this in turn constitutes the second impression.

The difference between a political outcome and a judicial one is that the former may be refuted at any given stage, while the latter holds accountable the party that may or may not acquiesce to it. Moreover, political agreement goes through a number of constitutional processes before it is ratified and implemented. Different institutions – such as the cabinet or legislature – that represent a vibrant spectrum of different interests play a major role in discussing and voting on the relevant treaty. The inclusion of minor adjustments is not infrequent at each phase of the ratifying process, and when many ‘minor adjustments’ do combine, the objective behind the agreement in the first place may be rendered obsolete. A political agreement is also vulnerable to complete change or alteration when, for example, the incumbents behind the political agreement are replaced by a political faction opposed to the agreement or of a different ideological conviction. This last scenario is not frequent in international relations, but it has occurred in the past⁴⁹ and there are no mechanisms in place to prevent such an inconvenient practice from taking place.

In standard judicial cases, specific verdicts rarely carry meaning for third parties, whereas in this case the Palestinians who were not a party to the judicial conflict formed an integral part of the details to the proceedings and were at the same time affected by the

⁴⁹ President George Bush, upon entering office, withdrew from the Kyoto Protocol, an international environmental agreement entered into by his predecessor.

outcome. The verdict settles a long debate of whether the Israeli settlements in the occupied Palestinian territories can legally function as part of the Israeli State or not. Since the verdict does not consider these settlements to be part of Israel, then the only other possible conclusion is that they are Palestinian. This position is also maintained by the foreign policy statements of the EU – the only difference is that there is no legal power behind these statements that enforces the respect of those political endeavors.

The same can be said about countless UN resolutions that have had little impact on the conflict. These resolutions have only been expressed in political statements with no real tangible effects. The ECJ verdict is not only binding, but has the ability to influence change on the ground. It ruled on a customs issue that would have immediate effects on trade relations, while its political effect would be confining Israel's jurisdiction to outside the occupied territories in its economic relationship with the EU. It has also found expression in UN resolutions of a Chapter VI nature whose provisions have not been applied prior to this verdict. Chapter VI resolutions are passive resolutions that lack enforcement mechanisms. The ECJ verdict incorporated Resolutions 181 and 242 while examining the 'context' under which the agreements were fashioned. The provisions of these resolutions, which constrict Israel's jurisdiction to outside the occupied territories, are now incorporated in the framework of EU and Israeli economic relations. This scenario is testimony to the legal and binding power of Chapter VI resolutions which, under normal circumstances, have lost appeal due to their lack of substantial clout. To be sure, such scenarios are rare in practice, but the significance of its existence is important to states that have their perceived rights subject to a veto in the UN Security Council. As mentioned earlier, the scope of this

approach has not been fully examined, but precedence should give encouragement for this type of approach to be followed.

In a sense, this verdict has provided a feint impression of the prevalence of the 'rule of law' on an issue that had snubbed countless UN resolutions aimed at instigating any progress in the conflict. The main effect these resolutions had on the conflict in was making it appear as immune as possible to any imposed solution, even a judicial one. In a way, this verdict provides a new dimension to the Palestinian-Israeli conflict that takes into consideration previous attempts at dealing with the conflict (e.g., UN Resolutions 181, 242 and 338) and incorporating them in a binding verdict issued by a court of justice. The utilization of this approach is not fully comprehensible as it is relatively new and may not apply to the majority of political disputes. However, *Brita GmbH v. HHH* case is testimony to its existence. The benefit of this approach in the political sense is that it has the capacity to instigate progress when a political matter is deadlocked.

The judicial factor in international relations is a new approach that has the potential to instigate progress, regardless of whether the dynamics of the verdict can be politically utilized. Virtually, no literature can be found on the progressive nature of the judicial impact on IR. Even though politics is the prime factor in international relations, the judicial factor has been gaining ground as an important secondary factor supporting political initiatives. The International Court of Justice (ICJ), the International Criminal Court (ICC) and the European Court of Justice themselves are all establishments of a political dimension.

To be sure, the ECJ verdict on *Brita GmbH v. HHH* carries significant political appeal since the verdict has entered into an applicable domain between the EU and Israel. Law and the legalization of disputed settlements affect political processes and political outcomes (Keohane, 2000); in the case of the territory of Palestine, this verdict has provided us with a lucid springboard with respect to the demarcation of political boundaries by the rest of the international community. The verdict can be interpreted as being a first step in recognizing the legitimate rights of the Palestinians to a state.

As previously explained, the verdict indirectly delineates the economic boundaries of the Palestinian territories; *ipso facto*, in order for an independent state to be fashioned, a politically-recognized boundary must exist. The rhetorical question that comes to mind is, since when do economic boundaries not reflect the political boundaries of any given state? Economic authority should, in reality, succeed political authority. But by delineating the economic boundary of the Palestinian state, the verdict has logically demarcated the political boundary of the Palestinian state which does not contradict UN resolutions and the EU political position towards the conflict. This point satisfies one of the key pillars required for sovereignty to take hold according to international law. The other pillars include a government, a fixed population and the capacity to enter into relations with other states. The other question that should be addressed is, how can this reality be turned into a political reality? Since the boundaries of the state have now been recognized (to a certain extent, at least) by major international blocs, in terms of international law, can a court

declare the birth of an independent state? Crawford (2006) affords a suitable answer to this question in his paper, "The Creation of States in International law," where he states that:

"The formation of a new State is... a matter of fact, and not of law. It is through recognition, which is a matter of law, that such new States become a member of the Family of Nations and subject to International Law. As soon as recognition is given, the new State's territory is recognized as the territory of a subject of International Law" (2006, p.4)

In this case, the main concern for the Palestinians is to gain recognition through political means, where an added component to their claim of sovereignty and independence is the recognition of their economic boundaries by a major actor in international relations, notably the EU. This should carry some weight into the final status negotiations if ever they should occur.

In the context of contemporary international relations, the application of international law has become more germane to political affairs as rules have become more specific and compulsory and the delegation of conflict resolution to legal entities more frequent (Goldstein & Kahler & Keohane & Slaughter, 2001). This practice entails more stability while at the same time curbs dual standards and the manipulation of rights in political decisions. It offers a predetermined set of standards by which verdicts derive their rulings from and thus creates an atmosphere of justice in the complex world of politics. Much literature has been written on the International Court of Justice concerning its 'flawed' jurisdictional design which is based entirely on consent and which lacks the sufficient enforcement mechanisms necessary to guarantee an execution of its verdicts. The

International Criminal Court also faces the same dilemma where it may only exercise jurisdiction at the consent of the countries that have submitted to its stature.⁵⁰ This reality undermines the judicial factor in international relations where weak states are obliged to turn to political institutions rather than judicial ones to obtain a negotiated 'justice' that more often than not depends on the political leverage of any given state.

The decision to submit to the jurisdiction of various international legal entities remains non-obligatory, and in the case of the ICJ, even if a country does submit, the acceptance of the ruling requires a subsequent clear submission. In the case of *Brita GmbH v. HHH*, the case found its way to a legal entity through an interpretation problem between two states. The important factor in this case is that it was referred to the legal entity that is responsible for the interpretation of treaties that are related to the European Community, the ECJ. The ECJ, unlike the ICJ or the ICC, is binding to all members of the EU regardless of the consent factor.

The verdict which ruled on an economic conflict had an international political appeal to it since it ruled on a controversial political issue based on international law and not national law. Moreover, it provided for a precedent in politics where a high-profile political issue had been decided by a court of law in what began as a low-profile customs case. The political importance of this verdict in legal terms is that the ECJ verdict denying Israel jurisdiction over the occupied territories has now become a legal precedent for future

⁵⁰ <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/Jurisdiction+and+Admissibility.htm> (Accessed: 20 May 2011)

judicial cases. The fact that the territories of Palestine and the jurisdiction over them is preordained in an ECJ ruling makes subsequent cases related to this issue subject to this edict.⁵¹ The numerous political statements issued by the European foreign policy department on these settlements in the occupied territories now have administrative effect in the relationship between the EU and Israel, and most specifically in trade relations. Since the ECJ is a non-appeals court, the parties to the conflict have no other choice but to submit to this ruling.

The economic, political and legal aspects of this case have been thoroughly analyzed. What remains important is to see if this case engages theories of international relations or if it is an *ad hoc* case that has surfaced only under the context of coincidental circumstances and convenience.

4.3 Relevant International Relations Theories

The primary actors in international relations are sovereign states, so says the realist paradigm in international relations theory (Burley, 1992). This dominant paradigm has had to accommodate the emergence of international organizations such as the United Nations and the European Union who, despite their lack of ‘statehood’ in the conventional sense, do enjoy a certain degree of sovereignty in their actions. In addition to the emergence of new actors in international relations, Keohane (2000) argues in his article, “Legalization and World Politics” that there has been a considerable move to law in deciphering many issues

⁵¹ The general rule is that courts are bound to follow the decisions made by courts that are higher than themselves in the hierarchy chain, and at the same time courts are bound by their own previous decisions.

of world affairs. Keohane lists a number of cases where governments faced legal actions, such as: The European Court of Human Rights' ruling that Britain's ban on homosexuals in the armed forces violates the right to privacy constituted in the EU; and the indictment of former Yugoslav President Slobodan Milosevic over war crimes. The case of *Brita GmbH v. HHH* can be added to this growing list where the ECJ ruled that Israeli settlements in the occupied territories are not to be considered Israeli. This trend of international institutions becoming increasingly legalized is also supported by the proliferation of legally-binding treaties in recent years. As Keohane explains, "most agreements trace their lineage to hortatory political pronouncement but often come closer to hard law over time" (2000, p.386).

The realist paradigm also holds that states are the primary actors in international relations and their behavior is based on their definition of national interest; and since anarchy is the defining characteristic in international relations, then it precludes any possibility of enforceable supranational law (Burley, 1992). This is in sharp contrast to the case presented in this thesis where international law and a supranational ruling established by the ECJ verdict found expression on a national level. The mechanism for the legal dispute of settlements is now embedded in most treaties. This provides a framework for states to interact with each other and settle their disputes according to preset procedures and away from the anarchic international relations reality advocated by the realists.

In a sense, it may be argued that the states of Europe have defined their national interests in terms of formal European institutions, but this would diverge from a realist

perspective towards the paradigm of institutionalism. Institutionalism, on the other hand, manifests itself in the birth of the European Union, where the institutionalization of domestic norms into a broad regional organization with an international personality was formed on a treaty base. This institutionalization saw the establishment of supranational governance that resembles, at least in its structure, a state. Enter the liberal paradigm, whose conception of international relations is that it is structured and influenced by the domestic state model, while also envisioning law to operate and govern relations among states and where this law is ultimately supranational and enforceable by courts (1992). Hence the liberal paradigm in international relations provides for the *Brita GmbH v. HHH* case a suitable medium in which to find expression for the dispute of settlement processes.

Since the European states are in close proximity to one another, their security collaborations and coordination existed prior to the birth of the EU. The first step into real integration was an economic step; and the last step, which would prove to be the most difficult indeed, was in coordination and harmony in the foreign policy arena. The emergence of this Union as a single bloc lends support to the argument that the international relations arena is not state-exclusive but rather contains institutions with an international personality which, even though they cannot be considered states in the conventional prose, certainly behave like ones. The relationship that these regional and legal institutions have with other international institutions cannot be based on an anarchic relationship in an anarchic environment, but rather on strict rules and regulations in an effort to organize the new complex structure of international relations. Liberal

internationalism recognizes international law as a force for world order whilst also linking its operation to liberal and economic institutions (1992).

Where economic liberalism prevails, so too should international liberalism and the prominence of rule of law in the international arena. Had it not been for the free trade Association Agreement between the EU and Israel, which is advocated for by economic liberalism, then the rules and regulations governing that treaty would not have surfaced in a way that would prompt the judicial body of the EU to issue a verdict, and where this verdict would influence the relationship between two sides at the trade and political levels. Economic liberalism allowed for international law to be the decisive factor in defining the political and economic relationship between the EU and Israel, consistent with the international liberalism paradigm. To put it differently, the trade relations (EMA) borne from economic liberalism had a political materialization when it put into legal force EU foreign policy statements concerning the same issue, prior to the verdict.

The primary divide in theorizing about European politics is in choosing between the intergovernmentalist approach and the multi-tiered governance – or federalist – approach (Sandholtz & Sweet, 1996). In their article, “Supranational Governance: The institutionalization of the European Union,” Sandholtz and Sweet (1996) describe the intergovernmentalist approach as a paradigm in which states control the integration and policy formulation process and where neither supranational institutions nor transnational actors have a significant autonomous impact on the politics of the states. The federalist approach, on the other hand, sees the EU influencing political and economic decisions that

are then adopted by member states. Instead of siding with one over the other, we will look at how these two theories fare with respect to the behavior of the EU and the judicial verdict presented.

The intergovernmental approach can best be seen in the Chapter 2 of this thesis, specifically in the area of foreign policy. According to this chapter, the foreign policy of the EU is based on “intergovernmental agreements” which is mandatory for any statement issued on behalf of the EU. The unanimity approach to EU foreign policy statements is advocated by the founding treaties. This process of foreign policy formulation demonstrates the lack of influence the EU structure possesses in terms of foreign policy initiatives. The foreign policies of the EU were most notable for their common denominator approach apparent in most statements issued.

In the area of judicial hierarchy and economic relations on the other hand, we notice that the EU takes precedence in respect to national institutions as demonstrated by the *Brita GmbH v. HHH* case. As the FCH requested an interpretation of the EMA-Israel from the ECJ, it provided the latter with its advisory opinion which would eventually turn out to be in contradiction to the verdict. Furthermore, this verdict became binding to all member states even though they were not party to the conflict. This satisfies the federalist approach theory that the EU enjoys significant autonomous impact on the politics of the state, since it affected the economic relation between the Community and Israel; the EU’s political perception of the economic boundary of Israel; and bestowing an illegality status on Israeli settlements in the occupied territories.

In this scenario, institutional rules governed the behavior of important actors (Keohane, 2000). The plurality in state structures recognized by the liberalist paradigm broadens the scope of state behavior possibilities. Security and national interest are not the only factors that shape state behavior. Rather, as this case has shown, trade relations and rules of legal institutions embedded in agreements also affect state behavior regardless of whether a parallel and harmonious political policy existed prior. In the case of *Brita GmbH v. HHH*, however, the politics of the sides' party to the verdict had supporting political policies to the economic misapprehension. However, this did not play a defining role in the final outcome of the judicial proceedings. Economic issues may sometimes take priority to political ones in a way that the realists would not foresee. Accordingly, the move towards 'frame-working' international relations has been gaining appeal, especially with the inaptitude of the political institutions to make any headway in times of political deadlock.

As recently as May 22, 2011, President Obama gave a speech at the annual AIPAC (American Israeli Public Affairs Committee) conference in which he endorsed the formation of a Palestinian state based on the 1967 borders with land swaps.⁵² The Israelis have refused this idea, overlooking the term "land swaps," while the Palestinian Authority is threatening to undertake a unilateral action by going to the Security Council in September for recognition of a Palestinian State. The land swaps advocated by the Obama administration would take into consideration the changed reality on the ground. For land

⁵² http://www.thejewishweek.com/blogs/political_insider/obamas_speech_aipacs_problem (Accessed: 25 May 2011)

swaps to work, however, there should be a comprehensive Arab-Israeli summit where Egypt and Jordan would play a decisive role in the land swaps as well. The Gaza Strip, as it stands, is not viable. A comprehensive land swap arrangement would see Egypt relinquish some of the area adjacent to the Gaza Strip while at the same time taking from the Israeli south. A solution of this sort should, to a certain degree, guarantee the viability of the states established by the peace talks.

As Obama gave reassurances to the Israel lobby that the United States would veto any resolution aimed at declaring a Palestinian State, the Palestinians remain hopeful and vigilant. Such a dead end would allow them to invoke GA/RES/377, or the “United for Peace” resolution. This resolution states that in instances where the United Nations Security Council fails to act in order to maintain international peace and security due to disagreements between the five permanent members, the General Assembly will convene in a special emergency session effectively replacing the deadlocked Security Council.⁵³

4.4 Conclusion

The resolution of any international conflict requires the combined effort of numerous institutions, organizations and states for an attempt to diffuse it. In the context of international liberalism, this thesis has provided a demonstration of the full effect of the bureaucratization and legal network that can ultimately help to diffuse a conflict. The difficulty this approach faces is the issue of submission to the jurisdiction of international

⁵³ [http://www.undemocracy.com/A-RES-377\(V\)](http://www.undemocracy.com/A-RES-377(V)) (Accessed: 25 May 2011)

courts. This is generally a non-issue when a regional organization includes a court as part of its founding treaty and makes its jurisdiction automatic upon entry into the organization; but the misdemeanor this fact holds is that the bureaucratic and legal network becomes regional in scope, hence the authoritative power and enforcement mechanisms remain restricted to those boundaries with no international influence and appeal.

Moreover, since the conflict in question is of an extremely political nature, its patrons would not consent to a settlement provided by a judicial verdict inept to political rumination. This brings us to one of the most important elements in this case study, which is that neither the Palestinians nor the Israelis have a right of appeal since they were not directly involved in the proceedings. Furthermore, the case, in its own right, was an internal customs case that only concerns the European Union and its subjective outlook on the region. This means that the EU has not pushed for this verdict to become a political undertaking to solve the conflict but rather kept open the possibility of a negotiable solution to the conflict.

Another important aspect of this case is that even though the boundary delineation by the European Court of Justice does not concern the Israelis and the Palestinians, it subjects a major economic partner to the Middle East region to its ruling. This serious change in the economic pattern of the region may have a profound effect on vital economic dimensions in the region which could potentially change alliances and perspectives. The two outcomes possible due to this new reality is that the economic boundary demarcated by the European Court of Justice eventually becomes the political boundary of the Palestinian

state, or that the verdict will just add more weight to a Palestinian claim for recognition in their quest for statehood.

The findings of this thesis also show that the EU's approach resembles the approach undertaken to mitigate conflict in the European continent itself – mainly, a push towards economic integration while laying the foundations for a democratic and transparent regional organization based on the rule of law. This was evident from the political statements issued, as well as from the economic and security incentives provided to the feuding sides. A very important factor to be considered from this thesis is that EU member states had greater international leverage – in terms of outcome when applying their foreign policy initiatives – when they worked in a concerted effort.

The verdict, on the other hand, has shown the interrelation of rules, laws and regulations when presented with an international political conflict. As this legal network grows, it would be safe to assume that a projection to the future would inevitably show a more precise and structured mechanism for conflict resolution. For now, the prominent feature in IR remains the will of the international community which, in turn, reflects the will of the most powerful actors in that community. As things stand, and according to recent statements and events concerning the conflict, even a United Nations resolution will not be able to solve the conflict unless it is mutually-agreed upon by the Israeli side and the Palestinian side, along with the enduring support of the United States and, to a lesser extent, the international community at large.

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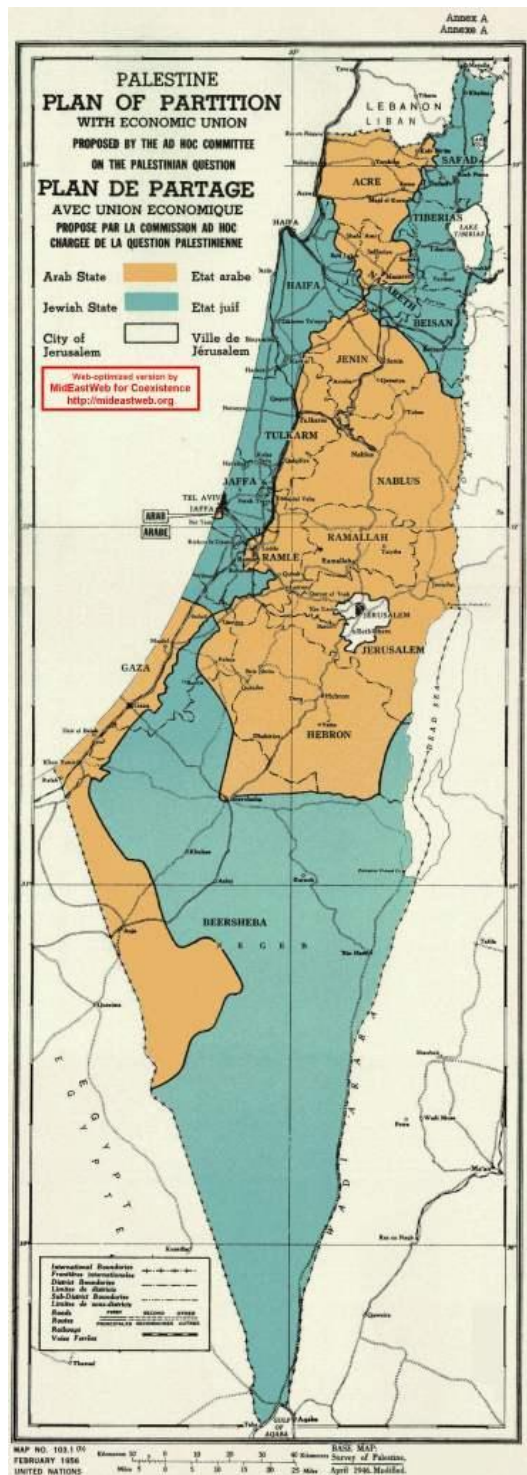
Appendix



Map 1



Map 2



Map 3