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Bilateralism and the Politics of European Judicial Desire

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BILATERALISM AND THE POLITICS OF EUROPEAN JUDICIAL DESIRE

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Transnational economic integration has long been one of the preferred ways in which powerful global players signal their political and economic strength to potential trade partners. A main goal of the European Union in becoming an influential political and economic elite is expanding its transnational relations. The Mediterranean region receives special attention in this process. A series of free trade agreements have been signed between the EU and Mediterranean countries. The political and socio-economic instability of the region required creativity both in the design of these bilateral agreements and in their judicial interpretation, which involved defining the recognized economic borders of signatory states. This activity raises subtle questions regarding the contractual obligations of the parties, the credibility of the agreements, and the likelihood of successful future agreements.

The problems associated with this interpretive activity recently acquired a constitutional foothold via the European Court of Justice in Brita GmbH v. Hauptzollamt Hamburg-Hafen, a case that involved defining the legitimate and recognized economic borders of the State of Israel. In the Brita case, the ECJ held that Israeli products originating in Israeli settlements in the Occupied Palestinian West Bank do not fall within the territorial scope of the 1995 European Community-Israel Association Agreement. Therefore, the products could not be imported into the Union duty-free, unlike Israeli products manufactured within Israel's 1967 borders. In this Article, we take trade relations between the EU and Israel as an exemplar of transnational bilateralism in volatile political climates and examine the limits and consequences of a supranational court interpreting the economic borders of a signatory state to a bilateral agreement. The argument we develop moves between procedural justice and legitimate judicial behavior

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and between values embedded in transnational contractual settings and their actual applications. It offers an innovative inquiry into the difficulties inherent in bilateralism and in a regional court's attempt to substantiate its constitutional role by unilaterally determining the proper balance between judicial autonomy and regional politics via declaring certain territories of a state illegitimate.

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INTRODUCTION

“Europeans,” an epithet that once denoted belonging to various unrelated—and, at times, hostile—cultures, began their adventurous integration process more than six decades ago. Along the way, established legal cultures merged their traditional roots with concepts of regional reconstruction and unification. Creating an influential economic elite and an appropriate counterpart to the nation-state were two of the defining objectives of the orchestrators of the European project. Attempts at political integration were slow to materialize, however, until the end of the Cold War brought about dramatic transformations that made Europe increasingly receptive to change. This change—a deepening integration within an enlarged continent and the progressive making of a Europe “united in its diversity”¹—culminated in 2009 with the entry into force of the Treaty of Lisbon.²

¹ Draft Treaty Establishing a Constitution for Europe, pmbl. ¶ 5, July 18, 2003, 2003 O.J. (C 169) 1, available at <http://european-convention.eu.int/docs/treaty/cv00850.en03.pdf>.

² Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, 2007 O.J. (C 306) 1. The contemporary Treaty on European Union and Treaty on the Functioning of the European Union are the children of the Lisbon Treaty. Consolidated Version of the Treaty on European Union, Mar. 30, 2010, 2010 O.J. (C 83) 13 [hereinafter EU Treaty];

Contemporary trends in international relations depict a world that is more and more interdependent and interconnected. Ernst Haas—writing on the “New Europe”—argued that interdependence means that supranational organizations such as the European Union (EU) are the appropriate counterparts to “the national state which no longer feels capable of realizing welfare aims within its own narrow borders.”³ Interdependence theorists like Robert Keohane and Joseph Nye have reached the same conclusion. They claim that, “in a world [where] multiple issues [are] imperfectly linked, in which coalitions are formed transnationally and transgovernmentally, the potential role of international institutions in political bargaining is greatly increased.”⁴ Realizing the interconnectivity of contemporary global trade, the EU as a supranational organ has continuously expressed its unabated interest in becoming a leader in global affairs through the various free trade agreements (FTAs) it has signed with non-EU countries. These agreements demonstrate that the EU views regional and transnational integration not only as a crucial element in the creation of a European identity, citizenry, or single market, but also as the fulfillment of the EU’s *real* desire to create a solid circle of political allies.

Explaining regional integration requires an examination of multiple factors. As Milton Friedman states, “there is a way of looking [at] or interpreting or organizing the evidence that will reveal superficially disconnected and diverse *phenomenon* to be manifestations of a more fundamental and relatively simple structure.”⁵ The “simplicity” of this structure, however, is hard to see in the uneasy overlap between regionalism, bilateral agreements, and obligations assumed under other international treaties.⁶ Recent legal developments concerning bilateral agreements (BLTs) between the EU and Israel provided the impetus to rethink the political wisdom behind bilateral relations on both a global and regional scale. Gabriella Blum concluded her recent work on bilateralism and multilateralism with the observation that “BLTs as a source of international law and a tool of international relations should be restored from its currently neglected place in international law scholarship.”⁷ This Article answers this call for such restoration.

The Mediterranean region is “an area of major importance and opportunity for Europe” to develop transnational collaborations.⁸ Recently, the EU reiterated its ambition to bring Mediterranean countries closer to Europe, setting up a special

Consolidated Version of the Treaty on the Functioning of the European Union, Mar. 30, 2010, 2010 O.J. (C 83) 47 [hereinafter TFEU].

³ Ernst B. Haas, *Technology, Pluralism and the New Europe*, in INTERNATIONAL REGIONALISM 149, 159 (Joseph S. Nye ed., 1968).

⁴ ROBERT O. KEOHANE & JOSEPH S. NYE, POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION 35 (1977).

⁵ MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS 33 (1953).

⁶ See Part I.B. *infra*, for further discussion of this overlap.

⁷ Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 HARV. INT’L L.J. 323, 379 (2008).

⁸ EUR. COUNCIL, REPORT ON THE IMPLEMENTATION OF THE EUROPEAN SECURITY STRATEGY—PROVIDING SECURITY IN A CHANGING WORLD (2008), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/reports/104630.pdf.

“Union for the Mediterranean” (UfM) to support this goal.⁹ The transnational coalition formed between the EU and Mediterranean countries like Israel and Morocco proves—as Haas¹⁰ and Keohane and Nye¹¹ observed—that these coalitions are unavoidable in an interdependent era where the distribution of wealth requires global interaction. Furthermore, with the increasing segmentation of the world economy into trading blocs, being part of a bloc and developing credible cross-border regional cooperation is imperative for economic survival, especially for small or less dominant markets and for new regional economic configurations.¹² A set of BLTs have formalized the Euro-Mediterranean Partnership (also known as the Barcelona Process or the UfM), expressed the ideology behind trade liberalization, defined the scope of collaboration, specified commitments and interests, and offered dispute settlement mechanisms in case of conflicts.

A core principle in trade relations that generates disagreements between parties to BLTs is that of “rules of origin.” Determining the country of origin of a product is a critical factor in determining whether customs benefits will apply to the product. The “rules of origin” issue is one of the main features of the 1995 European Community-Israel Association Agreement (AA).¹³ In 1997, the question raised in various EU Member States was whether Israeli settlements in the Occupied Territories, namely the West Bank, Gaza Strip, East Jerusalem, and the Golan Heights, constituted part of the territory of the State of Israel—did products produced in these Israeli settlements violate the rules of origin pursuant to the AA?

Several European customs authorities began to challenge Israel by demanding that it verify the origins of goods coming from the Israeli settlements. This dispute developed into a major source of friction between Israel and Europe. In December 2004, Israel and the EU finally reached a formal agreement.¹⁴ However, the dispute erupted again when a 2002 customs case in Hamburg reached the European Court of Justice (ECJ). In an October 2009 Opinion, Advocate General (AG) Yves Bot

⁹ Joint Declaration of the Paris Summit for the Mediterranean, Secretariat of the Union for the Mediterranean (July 13, 2008), http://www.ufmsecretariat.org/wp-content/uploads/2010/11/ufm_paris_declaration1.pdf. See generally Roberto Aliboni, *New As It Is, the Mediterranean Union Needs an Overhaul*, 15 EUROPE'S WORLD 120 (2010) (warning the EU to take more of a back seat and let Arab governments decide the UfM's future); Dimitar Bechev & Kalypso Nocolaidis, *The Union for the Mediterranean: A Genuine Breakthrough or More of the Same?*, 43 INT'L SPECTATOR, Sept. 2008, at 13 (suggesting that the new UfM is a further “decentering” of European-Mediterranean politics away from Brussels).

¹⁰ Haas, *supra* note 3.

¹¹ KEOHANE & NYE, *supra* note 4.

¹² See generally JEFFREY A. FRANKEL, REGIONAL TRADING BLOCS IN THE WORLD ECONOMIC SYSTEM (1997); TRADING BLOCS: ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS (Jagdish Bhagwati, Pravi Krishna & Arvind Panagariya eds., 1999).

¹³ 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, Eur. Communities-Isr., Nov. 20, 1995, 2000 O.J. (L 147) 3 (entered into force June 1, 2000) [hereinafter AA]. The Fourth Protocol of the agreement outlines the rules concerning the origin of products produced by Israel. Protocol 4 Concerning the Definition of the Concept of ‘Originating Products’ and Methods of Administrative Cooperation to 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, Eur. Communities-Isr., Nov. 20, 1995, 2000 O.J. (L 147) 50 [hereinafter AA Protocol 4].

¹⁴ Notice to Importers: Imports from Israel into the Community, 2005 O.J. (C 20) 2 [hereinafter 2005 Notice to Importers].

proposed that the ECJ should rule that products originating in the Occupied Territories are not entitled to preferential treatment under the AA.¹⁵ In February 2010, in a groundbreaking judgment—*Brita GmbH v. Hauptzollamt Hamburg-Hafen*¹⁶—the ECJ backed the proposal made by AG Bot and ruled that Israeli products originating in Israeli settlements in the Occupied Palestinian West Bank do not fall within the territorial scope of the AA. Therefore, the products could not be imported into the EU duty-free unlike other Israeli products manufactured within Israel's 1967 borders.¹⁷ With this judgment, the ECJ declared and judicially formalized the European position on the legitimate economic borders of the State of Israel. The rules of origin dispute in *Brita* emerged as the litmus test of the legal status of Israeli settlements and the EU response to the illegality of Israel's occupation.

This Article takes trade relations between the EU and Israel as an exemplar of transnational bilateralism in volatile political climates. It moves between procedural justice and legitimate judicial behavior. It places the ECJ's recent judicial response in *Brita* to the question of the legitimate and recognized economic borders of Israel within the context of the EU's increasing role as a leader in global governance. Although we support the Court's moral and political interpretation, we argue that the Court has confused normative aspirations with a real-world situation and misread the legal norms and the values of bilateralism underlying the AA, as well as the parties' legal and political intentions since the inception of bilateral relations.

Many find the ECJ to be an exceptional institution. Joseph Weiler has convinced us that the Court is the institution responsible for the establishment of key constitutional legal doctrines that eventually transformed Europe to its present constitutional status.¹⁸ In her recent study, Karen Alter remarked that the ECJ is comparable to other international courts that have developed important legal doctrines, "but none have been as legally audacious or politically successful in altering so completely the terrain in which they operate."¹⁹ Alec Stone Sweet went further and argued that the Court's impact on the evolution of Europe makes it "the most powerful and influential supranational court in world history."²⁰ The main task of the ECJ, as the Lisbon Treaty provides, is to ensure that "in the interpretation and application of the Treaties the law is observed."²¹ As proponents of the activist role taken by the European judiciary, we applaud its development of doctrines of European integration, its innovative responses to constitutional dialogues with Member States, and its unique ability to bridge legal gaps between twenty-seven different legal traditions. At the same time, however, we argue that, in *Brita*, the ECJ misapplied norms of good bilateral relations and the principles of procedural justice.

¹⁵ Opinion of Advocate General Bot, Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* 2010 ECJ EUR-Lex LEXIS 63 (Oct. 29, 2009), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62008C0386:EN:HTML>.

¹⁶ Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, 2010 ECJ EUR-Lex LEXIS 63 (Feb. 25, 2010).

¹⁷ *Id.* ¶ 58.

¹⁸ See generally Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

¹⁹ KAREN J. ALTER, *THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS* 5 (2009).

²⁰ ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* 153 (2000).

²¹ EU Treaty art. 19.

The *Brita* ruling, we contend, will have an effect beyond Euro-Israeli relations: it will change the legal-political-economic realities of bilateralism between the EU and other countries seeking trade liberalization on the basis of “mutual understanding and solidarity.”²²

In *Brita*, the ECJ missed a unique opportunity to develop a normative model of bilateralism reflective of European norms and values of international trade. In this Article, we challenge basic conceptions relating to the interplay of bilateralism and judicial behavior and present what we perceive to be an appropriate theory of bilateralism. Part I examines basic principles of bilateral relations and separates them into rewards and risks. Part II describes the fragile bilateral relationship between the EU and Israel. Parts III and IV explain the evolution of the rules of origin dispute that culminated with the ECJ’s ruling in *Brita*. In Part V, we argue that bilateralism is premised on certain values and norms and show how recent developments in EU-Israel relations not only violated these values and norms, but redefined bilateralism as a set of relations where unilateral acts can take precedence. Part VI claims that the role of the ECJ in interpreting international agreements must be limited to situations in which the parties’ agreed dispute settlement mechanisms have been exhausted and that any interpretation should take complete account of the norms underlying bilateralism.

I. PRINCIPLES OF A BILATERAL REGIME

A. Rewards

BLTs have become a common phenomenon²³ in the era of proliferating autonomous trade relations.²⁴ They hold great promise as contractual devices striving to balance the competing interests of two parties.²⁵ They are not open to the entire international community, although they may serve as a stepping-stone towards a multilateral treaty regime. Bilateralism is a form of treaty-making that bridges the gap between universalists, who believe that binding multilateral treaties are the best strategy for regulating international behavior, and unilateralists, who “prefer, if anything, treaties with limited participation, allowing their governments to pick and choose partners and obligations.”²⁶ Despite their limited scope, BLTs are part of the architecture that makes up international and regional law,²⁷ and their success “is

²² AA, *supra* note 13, art. 3(1).

²³ See Blum, *supra* note 7, at 326.

²⁴ Bilateral agreements account for over 80 percent of all preferential agreements notified and in force. See Roberto V. Fiorentino, Luis Verdeja & Christelle Toqueboeuf, *The Changing Landscape of Regional Trade Agreements: 2006 Update* 157 (World Trade Org., Reg’l Trade Agreements Section, Trade Policies Review Div., Discussion Paper No. 12, 2007), available at http://www.wto.org/english/res_e/booksp_e/discussion_papers12a_e.pdf.

²⁵ See generally JOSEPH M. GRIECO, COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE (1990).

²⁶ Blum, *supra* note 7, at 325.

²⁷ The negotiation of free-trade BLTs does not necessarily spell the end of multilateralism and global open trade. See, e.g., David R. Collie, *Bilateralism is Good: Trade Blocs and Strategic Export Subsidies*, 49 OXFORD ECON. PAPERS 504, 518 (1997) (“[B]ilateralism is good for the industrialised countries and may be good for world welfare.”); C. Michael Hathaway & Sandra Masur, *The Right Emphasis for U.S. Trade Policy for the 1990s: Positive Bilateralism*, 8 B.U. INT’L L.J. 207, 228–29

rooted in the structure of the larger global economic environment.”²⁸ The ECJ, for example, maintains that BLTs signed between the EU and third countries or international institutions form an integral part of the *acquis communautaire*—the body of EU laws, treaties and regulations—thereby showing the inevitable interplay between multilateralism and localism.²⁹

In reality, BLTs are adaptable and elastic configurations. They enjoy many advantages over multilateral regimes that mainly seek to promote uniformity at the expense of flexibility:

In a world in which diversity is more natural than uniformity . . . BLTs can produce arrangements that are more coherent in that they tailor their arrangements to the specific needs and circumstances of the particular dyadic relationships they purport to regulate. BLTs are better structured to meet the problems associated with fragmentation, competing values, and cultural diversity.³⁰

Typical rewards provided by bilateral trade agreements include customs concessions, liberalization of free movement of goods and services, “the creation and enhancement of long-term market access opportunities for products and services,”³¹ and improvement of market efficiency via strong and balanced competition. These rewards make the parties to the agreement more attractive to investors.

Further advantages include easier bargaining processes: BLTs require “compromises between fewer parties, reciprocal concessions are easier to secure and monitor, and deeper and more meaningful obligations may be assumed,”³² “monitoring and detection of violations, as well as the ability to retaliate against violations”³³ may operate more effectively in BLTs; and parties who choose to adopt the bilateral path avoid cumbersome treaty-based bureaucracies.³⁴ All of these advantages sometimes make BLTs more effective than other treaties because they “translate legal arrangements, which include only vague standards in their multilateral setting, into concrete commitments in a particular case.”³⁵ The AA refers to amorphous standards such as “common values,”³⁶ “harmonious development,”³⁷

(1990) (“[B]ilateral negotiations are important in furthering free trade objectives world-wide, while at the same time advancing U.S. commercial interests in a pragmatic way.”).

²⁸ Ruth L. Okediji, *Back to Bilateralism? Pendulum Swings in International Intellectual Property Protection*, 1 U. OTTAWA L. & TECH. J. 125, 147 (2004), available at <http://www.uoltj.ca/articles/vol1.1-2/2003-2004.1.1-2.uoltj.Okediji.125-147.pdf>.

²⁹ In *Brita*, for example, the ECJ remarked that “from the moment [a bilateral agreement] enters into force, the provisions of such an agreement form an integral part of the legal order of the European Union[.]” *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 39.

³⁰ Blum, *supra* note 7, at 338.

³¹ Won-Mog Choi, *Defragmenting Fragmented Rules of Origin of RTAs: A Building Block to Global Free Trade*, 13 J. INT’L ECON. L. 111, 113 (2010) (examining the problems associated with the principle of rules of origin and claiming that systems of rules of origin must be harmonized across regional trade agreements).

³² Blum, *supra* note 7, at 351.

³³ *Id.* at 352–53.

³⁴ GRIECO, *supra* note 25.

³⁵ Blum, *supra* note 7, at 370.

³⁶ AA, *supra* note 13, pmb1.

³⁷ *Id.* art. 1(2).

and “democratic principles.”³⁸ These standards guide the EU’s multilateral action,³⁹ including its general policy towards integration with Mediterranean countries as expressed in the Barcelona Process and its successor, the UfM.⁴⁰ The AA then translates and applies these standards to the particular case of trade liberalization between Israel and the EU. Although the use of vague standards may affect legal certainty, when a BLT’s text is supported by specifications of the actual relations, it allows flexibility and projects the parties’ clear intentions to commit themselves to a workable—and more effective—set of mutual obligations.⁴¹

One of the crucial aspects of bilateral relations is dispute settlement. Parties must thoroughly discuss and mutually agree upon preferred mechanisms to settle conflicts in cross-border agreements. Since BLTs have the capacity to bestow all of these advantages, given the limited number of parties and their explicit mutual intentions to establish durable economic relations, they “can be more creative in the solutions they offer to similar problems arising under differing circumstances.”⁴² Consequently, perhaps one of the greatest advantages of bilateral regimes is that they “reduce the need for unilateral pressure.”⁴³ Still, as this article will show, the assumption that BLTs provide nothing but rewards may, in certain circumstances, prove to be wrong.

B. Risks

Although bilateral exchanges are easier to establish, monitor, and maintain, they are not risk-free. Their growth “does not augur well for governments’ ability to provide a consistent and equitable framework for international economic relations.”⁴⁴ They undermine global attempts to unite different legal traditions under a multilateral system of trade.⁴⁵ Jagdish Bhagwati highlights the detrimental impact of bilateralism on the attainment of strong and lasting multilateral treaty regimes. In BLTs, he contends, stronger parties take advantage of the weaker parties’ reliance on them.⁴⁶ The open character of most BLTs and the ease with which they can be

³⁸ *Id.* art. 2.

³⁹ See EU Treaty art. 21.

⁴⁰ See *infra* Part II for a discussion of the UfM.

⁴² *Id.* at 374.

⁴³ Hathaway & Masur, *supra* note 27, at 228.

⁴⁴ Rudolf Adlung & Martin Molinuevo, *Bilateralism in Services Trade: Is there Fire Behind the (BIT-)Smoke?*, 11 J. INT’L ECON. L. 365, 403 (2008).

⁴⁵ The rise of bilateral and regional agreements in recent decades also threatens consensual multilateral norms. See, e.g., JAGDISH BHAGWATI, TERMITES IN THE TRADING SYSTEM: HOW PREFERENTIAL AGREEMENTS UNDERMINE FREE TRADE xi (2008) (stating that FTAs and CUs “directly contradict the principle of nondiscrimination in trade that many economists and policy makers have traditionally valued[.]”); Frederick M. Abbott, *A New Dominant Trade Species Emerges: Is Bilateralism a Threat?*, 10 J. INT’L ECON. L. 571, 581 (2007) (stating that regional agreements “may well reduce the prospects for new WTO agreements[.]”); Beth A. Simmons, *From Unilateralism to Bilateralism: Challenges for the Multilateral Trade System*, in MULTILATERALISM UNDER CHALLENGE? POWER, INTERNATIONAL ORDER, AND STRUCTURAL CHANGE 441, 457 (Edward Newman, Ramesh Thakur & John Tirman eds., 2006) (stressing that the “multilateral trading system has always had a healthy respect for the realities of market power”).

⁴⁶ See generally Jagdish Bhagwati, *Regionalism and Multilateralism: An Overview*, in NEW DIMENSIONS IN REGIONAL INTEGRATION 22 (Jaime de Melo & Arvind Panagariya eds., 1993). What is missing, Bhagwati proclaims, is the “vision thing” to cater to the competing values and interests of all parties. *Id.* at 45. It should also be noted that a cluster of bilateral or regional agreements might be suitable

renegotiated run counter to the goals of international lawmaking. Such accords “run the risk . . . of being more susceptible to power exploitations and to projecting externalities onto third parties.”⁴⁷ Studies in bilateral relations show that superpowers free-ride on weaker states, depriving them of opportunities to make independent decisions and thereby creating conditions for political and economic instability at home.⁴⁸ For example, Frederick Abbott points out that one of the most troubling aspects of the growing power of bilateralism and regionalism—of which *Brita* is an example—“is the exercise of virtually unconstrained political and economic power by the United States and EU to secure concessions from developing (and developed) countries.”⁴⁹ Although Israel is not a developing country—and in fact recently joined the Organization for Economic Cooperation and Development (OECD)⁵⁰—it is certainly in a weaker position than a Union that is made up of twenty-seven Member States and that is considered the world’s largest trader. The EU has sufficient strength to act unilaterally in disputes arising from the AA, either by choosing its preferred judicial forum or by applying norms that conflict with its contractual obligations.

The risks inherent in bilateral agreements are exacerbated when one of the parties is in a humanitarian crisis or in the midst of political unrest. The political reality of the Euro-Mediterranean region dictates that a full multilateral regime—even a limited one—is still a dream: “[w]here differences among countries are materially relevant to the regime, multilateralism is bound to fail.”⁵¹ On the one hand, the political situation and instability in the region left Israel and the EU no other option but to form a bilateral regime to accelerate collaboration between the two. On the other hand, the success of a regional bilateral arrangement like the AA is dependent upon many factors, including the political situation of neighboring countries, whose hostility has a detrimental effect on any bilateral arrangement between Israel and the EU.

Agreements made in different regions demonstrate that a hostile atmosphere may impede bilateral relations. For example, the 1959 bilateral treaty between Egypt and Sudan concerning the right to use the Nile River waters to the exclusion of other countries⁵² was “not tenable and sustainable and thus the need to come up with a new cooperative framework by all riparian states of the Nile Basin [was] inevitable

for a particular area, such as the Euro-Mediterranean region, but unsuitable in other circumstances and regions.

⁴⁷ Blum, *supra* note 7, at 357.

⁴⁸ See, e.g., BHAGWATI, *supra* note 45. Pascal Lamy, Director-General of the WTO, claimed in a 2006 lecture that bilateralism poses risks to the attainment of a global order commensurate with the needs of different states. Pascal Lamy, Director-General, World Trade Org., 2006 Gabriel Silver Memorial Lecture: Multilateral and Bilateral Trade Agreements: Friends or Foes? 6–11 (Oct. 31, 2006), available at <http://www.docstoc.com/docs/46694872/Multilateral-and-bilateral-trade-agreements-friends-or-foes>.

⁴⁹ Abbott, *supra* note 45, at 583.

⁵⁰ The Israeli-OECD Accession Agreement was signed on June 29, 2010. *Israel’s Accession to the OECD*, ORG. OF ECON. COOPERATION & DEV., http://www.oecd.org/document/38/0,3343,en_2649_34487_45697574_1_1_1_1,00.html (last visited June 17, 2011).

⁵¹ Blum, *supra* note 7, at 360.

⁵² These countries included Burundi, Democratic Republic of the Congo, Eritrea, Ethiopia, Kenya, Rwanda, and Tanzania.

and necessary.”⁵³ A full “cooperative framework” in the Mediterranean is unattainable at this stage. The dispute over the rules of origin is an example that highlights the absence of a “cooperative framework” and shows that the lack of serious dialogue between Israelis and Palestinians constantly destabilizes EU-Israeli relations. It also showcases the reality that any BLT promoting trade liberalization is dependent upon the success of such dialogue.

II. ANATOMY OF FRAGILE BILATERALISM

Establishing credible bilateral relations is a long process. The success of such a process depends on many factors, including the anatomy of initial relations, which may give an indication of the likely durability of the parties’ commitments. Bilateral relations between Israel and the EU have always been uneasy, complex, and ambiguous.⁵⁴

Israel was one of the first countries in the world to grasp the significance of the European Economic Community (EEC) and to engage with the European Common Market. The first trade agreement between the EEC and Israel was signed in June 1964.⁵⁵ This was a non-preferential trade agreement that reduced the EC’s MFN tariff on approximately twenty industrial and commercial products of special interest to Israel. Six years later, in June 1970, a new five-year preferential trade agreement was signed,⁵⁶ allowing for a 50 percent reduction in Community tariffs on Israeli manufactured exports and a 40 percent reduction on a limited number of Israeli agricultural exports. In May 1975, the EEC and Israel signed their first FTA, under which the Community agreed to abolish all trade barriers on Israeli-manufactured goods by the end of 1979.⁵⁷ Israel hoped to upgrade the 1975 agreement, but differences over the Middle East peace process rendered this impossible for a long time. The uneasy relationship between Israel and the EU was exacerbated by the June 1980 Venice Declaration⁵⁸ which, *inter alia*, recognized the Palestinian

⁵³ Biong Kuok Deng, *Cooperation between Egypt and Sudan over the Nile River Waters: The Challenges of Duality*, 11 AFR. SOC. REV. 38, 40 (2007).

⁵⁴ For a detailed and updated analysis of EU-Israeli relations, see SHARON PARDO & JOEL PETERS, *UNEASY NEIGHBORS: ISRAEL AND THE EUROPEAN UNION* (2010) (arguing that, since the early days of EEC-Israel relations, politics could not be isolated, making relations between the parties complex and uncertain).

⁵⁵ Accord Commercial Entre la Communauté Économique Européenne et l’État d’Israël, Eur. Economic Community-Isr., June 4, 1964, 1964 J.O. (64) 1518. The agreement came into force in July 1964 and was signed under Article 111 of the Treaty Establishing the European Economic Community.

⁵⁶ The agreement came into force in October 1970 and was signed under Article 113 of the Treaty Establishing the European Economic Community. Daphna Kapeliuk-Klinger, *A Legal Analysis of the Free Trade Agreement of 1975 Between the European Community and the State of Israel*, 27 ISR. L. REV. 415, 417 (1993).

⁵⁷ Agreement Between the European Economic Community and the State of Israel, Eur. Economic Community-Isr., May 11, 1975, 1975 O.J. (L 136) 3. Regarding the 1975 agreement, see, for example, Benny Toren, *The Impact of the FTA Agreement with the EEC on Israeli Industry: A Follow-Up, in EUROPE AND ISRAEL: TROUBLED NEIGHBOURS* 113, 114 (Ilan Greilsammer & Joseph H. H. Weiler eds., 1988) (“The general idea behind the Agreement . . . was a brilliant one.” It was scheduled “to grant easier access for nonsensitive imports in a gradual process [.]”); Kapeliuk-Klinger, *supra* note 56.

⁵⁸ *The Venice Declaration: June 13, 1980*, PALESTINE-ISRAEL J. POL., ECON. & CULTURE, July 31, 1999, at 116, available at http://www.knesset.gov.il/process/docs/venice_eng.htm. The central parts of the declaration discuss: (i) the Palestinian problem, (ii) the status of Jerusalem, and (iii) the question of the Jewish settlements.

Liberation Organization (PLO) as a legitimate partner to peace talks (at a time when Israel viewed the PLO as a terrorist organization).⁵⁹ Considered a landmark in Europe's Middle East policy, the Venice Declaration was viewed by Israel as discriminatory, interventionist, and sympathetic to the Arab countries. The EU has since been framed by many as an anti-Israel group of nations with an anti-Semitic history and anti-Semitic sentiments.⁶⁰

The breakthrough in Israeli-Palestinian relations signaled by the September 1993 signing of the Declaration of Principles (the Oslo Accords) led not only to a marked improvement in the tone of EU-Israeli relations but also to a qualitative change in the nature of relations between the two parties.⁶¹ Negotiations for a new trade agreement between the EU and Israel started immediately. At the heads of state summit held in Essen in December 1994, European leaders gave impetus to these discussions by deciding “that Israel, on account of its high level of economic development, should enjoy a *special status* in its relations with the European Union on the basis of *reciprocity* and common interests.”⁶²

One year later, Israel and the EU signed a new trade agreement. The AA was a significant upgrade from the 1975 agreement and was classified as an instrument of the Euro-Mediterranean Partnership (EMP), also known as the Barcelona Process.⁶³ The AA created new provisions for the liberalization of services, adopted new rules for the movement of capital, simplified trade conditions, established the free movement of goods, and included Israel as a full member of the Union's research and development program. The agreement also put in place a framework for ongoing political dialogue. The parties agreed to establish an Association Council that would meet annually at the foreign minister level in order to examine major issues arising within the agreement, as well as other bilateral international issues of mutual interest.⁶⁴ The agreement also called for the establishment of an Association Committee that would meet at an official level and consist of representatives of the EU Council, the European Commission, and senior Israeli officials.⁶⁵ In addition, the

⁵⁹ *Id.* ¶ 7.

⁶⁰ For a discussion on Israel's perceptions of the European Union, see generally Yehezkel Dror & Sharon Pardo, *Approaches and Principles for an Israeli Grand Strategy towards the European Union*, 11 EUR. FOREIGN AFF. REV. 17 (2006) (examining EU-Israeli disagreements and outlining a set of foundational principles for an Israeli grand strategy towards the EU); Sharon Pardo, *Between Attraction and Resistance: Israeli Views of the European Union*, in EXTERNAL PERCEPTIONS OF THE EUROPEAN UNION AS A GLOBAL ACTOR 70 (Sonia Lucarelli & Lorenzo Fioramonti eds., 2010) (exploring some of the main perceptions of the EU in Israel, focusing on Israeli public opinions, political elites, organized civil society, and the press).

⁶¹ Declaration of Principles on Interim Self-Government Arrangements, Isr.-Palestinian Liberation Organization, Sept. 13, 1993, 32 I.L.M. 1525.

⁶² Presidency Conclusions, Essen European Council (Dec. 9–10, 1994), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/00300-1.EN4.htm (emphasis added).

⁶³ The EMP was launched in November 1995 with the aim of redefining the EU's relationship with the Mediterranean states on Europe's southern periphery and of developing a new framework for peaceful and cooperative relations in the Mediterranean region. See BARCELONA DECLARATION ADOPTED AT THE EURO-MEDITERRANEAN MINISTERIAL CONFERENCE (1995), available at http://trade.ec.europa.eu/doclib/docs/2005/july/tradoc_124236.pdf [hereinafter BARCELONA DECLARATION] (initiating the EMP).

⁶⁴ AA, *supra* note 13, art. 67.

⁶⁵ *Id.* arts. 70–75.

agreement created eleven sub-committees consisting of experts for the discussion of professional matters. Finally, the agreement also launched a parliamentary dialogue.⁶⁶ The AA entered into force on June 1, 2000 and has formed the legal basis for EU-Israeli relations ever since.

The EU has become Israel's most important trading partner. Not only is it the largest source of Israel's imports, it is also its second largest export market. Israel, of course, is a much smaller trading partner from the viewpoint of the EU; however, it is one of the EU's best trading partners in the Euro-Mediterranean area. In 2009, Israel was ranked as the EU's 29th major trade partner, with total trade between the two economies amounting to approximately EUR 25 billion.⁶⁷ For Israel, this meant that, in 2009, 37 percent of its imports (excluding diamonds) came from the EU and 29 percent of its exports (excluding diamonds) were directed to the European market.⁶⁸

Two further examples attest to Europe's desire to engage Israel in its activities. First, Israel is a full partner in the newly established UfM and participates in all of its programs.⁶⁹ An Israeli representative is a deputy secretary-general at the UfM secretariat, alongside five deputies from Greece, Italy, Malta, the Palestinian Authority, and Turkey. Second, Israel is the first non-European country fully associated with the EU's Framework Programs for Research and Technological Development (FP) since 1996. Among the Associated Countries to the Seventh FP, Israel is the EU's third biggest partner, after Switzerland and Norway, in terms of program participation.⁷⁰ The EU is now Israel's second biggest source of research funding, and Israeli researchers participate in all activities covered by the FPs.

Following the launch of the European Neighborhood Policy (ENP) in December 2004, the EU and Israel adopted the EU-Israeli Action Plan, which, although already six years old, will remain the reference document for EU-Israeli relations until a new instrument is adopted.⁷¹ The Action Plan calls on the two parties to intensify political and security cooperation, introduce a significant element of economic integration, boost socio-cultural and scientific cooperation, and share responsibility in conflict prevention and resolution.⁷² The ENP acted as a catalyst in boosting EU-Israeli relations, and the Action Plan marked an important turning point in these relations. Its provisions reflect the growing importance of Europe to Israel.

⁶⁶ *Id.* arts. 3–5.

⁶⁷ Council of the Eur. Union, Ninth Meeting of the EU-Israel Association Council: Statement of the European Union, ¶ 33 (June 15, 2009), available at <http://parlis.nl/pdf/bijlagen/BLG20260.pdf> [hereinafter Statement of the European Union].

⁶⁸ Press Release, Central Bureau of Statistics of the State of Israel, Summary of Israel's Foreign Trade by Country—2009, at 1–2, (Jan. 19, 2010), available at http://www.cbs.gov.il/hodaot2010n/16_10_010e.pdf.

⁶⁹ The UfM, launched in Paris in July 2008, aims to provide a new political impetus to the failed Barcelona Process/Euro-Mediterranean Partnership by creating a new framework that offers greater co-ownership opportunities to the southern Mediterranean partners. See Institutional Documents of the UfM, available at <http://www.ufmsecretariat.org/en/institutional-documents>.

⁷⁰ Statement of the European Union, *supra* note 67, ¶ 42.

⁷¹ EU-ISRAEL ASS'N COUNCIL, EU/ISRAEL ACTION PLAN (2004), available at http://ec.europa.eu/world/enp/pdf/action_plans/israel_enp_ap_final_en.pdf.

⁷² *Id.*

In June 2008, the EU-Israel Association Council vowed to intensify EU-Israeli relations within the framework of the ENP in three main areas: diplomatic cooperation; Israeli participation in European agencies, working groups, and programs; and Israel's integration into the European Single Market.⁷³ In December 2008, the EU External Relations Council in Brussels reaffirmed its determination to upgrade bilateral relations and issued guidelines for strengthening political dialogue structures with Israel.⁷⁴ In order to implement this political decision, the EU and Israel agreed to finalize negotiations reviewing the content of the Action Plan, with the aim of adopting a new legal document to replace the Action Plan.

However, Israel launched Operation Cast Lead in the Gaza Strip two weeks after the Brussels meeting. Europe was outspoken in its criticism of both the operation and Israel's subsequent economic blockade of Gaza. The EU led the way in calling for the end of the siege. Tensions between the EU and Israel were also exacerbated by the refusal of the new Israeli right-wing government to support the creation of an independent Palestinian state. In response to these new tensions, talk of upgrading EU-Israeli relations has effectively been frozen. At the meeting of the EU-Israel Association Council held in Luxembourg in June 2009, the EU emphasized that the upgrade process needed to be seen in the broader context of sustained progress towards a resolution of the Israeli-Palestinian conflict.⁷⁵

III. THE RULES OF ORIGIN DISPUTE

A. Political Evolution

Rules of origin define whether a particular product originates in one of the countries party to an FTA and hence, whether the product's exporter is entitled to tariff concessions granted under the agreement. Governments apply rules of origin for two main reasons:

First, to distinguish foreign from domestic products, when imports are not to be granted national treatment. Second, to define the foreign origin of a product and, in particular, the conditions under which it will be considered as originating in a preference-receiving country[.]⁷⁶

⁷³ Council of the Eur. Union, Eighth Meeting of the EU-Israel Association Council, Statement of the European Union, ¶¶ 3–4 (June 16, 2008), available at http://www.exeterpsc.org.uk/EU_Israeli_Council_Meeting.html.

⁷⁴ Council of the Eur. Union, Council Conclusions, Strengthening of the European Union's Bilateral Relations with its Mediterranean Partners, annex ¶ 9 (Dec. 8–9 2008), available at http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/gena/104571.pdf [hereinafter Council Conclusions].

⁷⁵ See Statement of the European Union, *supra* note 67, ¶ 2. In May 2010, the European Commission declared that the “deterioration in the overall political context . . . and a lack of progress in the Middle East Peace Process, negatively affected the process of upgrading bilateral relations between the EU and Israel.” *Commission Staff Working Document Accompanying the Communication from the Commission to the European Parliament and the Council Taking Stock of the European Neighbourhood Policy (ENP): Implementation of the European Neighbourhood Policy in 2009: Progress Report Israel*, at 2, SEC (2010) 520 (May 12, 2010).

⁷⁶ Rod Falvey & Geoff Reed, *Rules of Origin as Commercial Policy Instruments*, 43 INT'L ECON. REV. 393, 393 (2002).

In other words, rules of origin identify the “economic nationality” of a product for customs purposes. They ensure that tariff concessions benefit only products originating in the salient countries or territories and not products from other countries or territories.⁷⁷

Rules of origin in EU FTAs are typically based on the following three principles: the nature of the originating products (wholly obtained products or sufficiently processed products); the use of a proof of origin by an authorized exporter or by the customs authority that issues the origin/movement certificate; and the administrative cooperation between the parties to the FTA for the approval of the origin certificate and for pre- and post-verification procedures.⁷⁸ Above all, and as this article shows, the success of rules of origin regimes is almost entirely based on *cooperation, mutual trust, and shared responsibilities* between the customs authorities of the parties to the FTA.

In 1993, two years prior to the signing of the AA, the EU questioned the status of Israeli orange juice exported to European markets. The Union suspected that Israeli orange juice producers were adding Brazilian juice concentrate to the juice, which they then labeled “Israeli juice” so as to enjoy tax benefits under the EU-Israeli agreement. Although the Union was not able to find conclusive evidence of fraud, it published a First Notice to Importers in 1997 informing Community importers that there were grounds for doubt about the validity of the origin certificates for orange juice coming from Israel and that the importers would be liable for duty recovery. The notice further informed Community importers of problems relating to Israel’s implementation of the rules of origin regarding products from Israeli settlements in the Occupied Territories.⁷⁹

The Fourth Protocol to the AA defines the concept of “originating products” and the methods of administrative cooperation. The protocol specifies the origin criteria for different categories of product. Goods are considered to be originating in Israel if (i) they are “wholly obtained in Israel” or (ii) they are products obtained in Israel that contain materials not wholly obtained in Israel, provided that these materials have undergone sufficient processing in Israel within the meaning of the Fourth Protocol.⁸⁰ The Protocol also states that products may acquire originating status.⁸¹ However, during the disputed period, the AA did not allow “diagonal cumulation”—the export of goods that were substantially manufactured elsewhere to be treated as if they originated in Israel. Both Israel and the EU agreed that such exports violated the Fourth Protocol on the rules of origin.

⁷⁷ For a general discussion on rules of origin, see STEFANO INAMA, RULES OF ORIGIN IN INTERNATIONAL TRADE (2009); THE ORIGIN OF GOODS: RULES OF ORIGIN IN REGIONAL TRADE AGREEMENTS (Olivier Cadot, Antoni Esteveordal, Akiko Suwa-Eisenmann & Thierry Verdier eds., 2006); Moshe Hirsch, *Rules of Origin as Trade or Foreign Policy Instruments? The European Union Policy on Products Manufactured in the Settlements in the West Bank and the Gaza Strip*, 26 FORDHAM INT’L L.J. 572 (2003).

⁷⁸ The so-called “EUR. 1 form” is used in multilateral agreements within the pan-Euro-Mediterranean cumulation of origin system. The exporter fills out the EUR. 1 form and then sends it to the customs authority, which approves the form, stamps it, and returns it to the exporter.

⁷⁹ Notice to Importers: Importations from Israel into the Community, 1997 O.J. (C 338) 13.

⁸⁰ AA Protocol 4, *supra* note 13, art. 2.

⁸¹ AA Protocol 4, *supra* note 13, annex I note 2.3.

Significantly, the AA does not provide a specific definition as to what constitutes the “territory of the State of Israel.” Article 83 of the AA provides that:

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.⁸²

The rules of origin question surrounding products from Israeli settlements in the Palestinian Occupied Territories was raised again by the European Commission in its July 1997 memorandum to the Israeli government and in its May 1998 communication to the European Council and European Parliament. In this communication, the European Commission concluded that, according to UN General Assembly and Security Council resolutions, no Israeli settlement in the West Bank, Gaza Strip, East Jerusalem, or the Golan Heights could be considered part of the territory of the State of Israel. In addition, the Commission argued that the EU, through its declarations and statements on the Middle East conflict, had consistently endorsed the principles enshrined in the relevant UN General Assembly and Security Council resolutions. Accordingly, the European Commission determined that the territorial scope of the AA should be limited to Israel’s pre-1967 borders. Thus, exports originating in Israeli settlements in the Occupied Territories did not qualify for preferential treatment under the terms of the AA; any origin certificates issued by Israel for goods produced in Israeli settlements contravened the Association’s Protocol on rules of origin.⁸³

The European Commission further argued that Israel’s breach of the AA had placed the Union’s Member States, as “High Contracting Parties,” in violation of Article 1 of the Fourth Geneva Convention.⁸⁴ The Commission also maintained that, in failing to rectify this situation, the Commission itself, as guardian of EU treaties, was in breach of its obligation under EU law. As a result, the Commission recommended that if Israel’s “violations of the rules of origin should be confirmed they should be brought to an end.”⁸⁵ Two further EU fact-finding missions to Israel in September 1998 and October 1999 confirmed that Israel was in breach of the provisions concerning the rules of origin. Consequently, the EU General Affairs and External Relations Council decided in 1998 to resolve the brewing conflict at a technical level through a dialogue with Israel. Israel reacted furiously to the decision. The Director General of the Ministry of Agriculture threatened to cancel the benefits for Palestinian agricultural products under the Paris Protocol⁸⁶ and denounced the European move as imposing sanctions on Israel and as “defining for us the borders

⁸² AA, *supra* note 13, art. 83.

⁸³ *Communication from the Commission to the Council and the European Parliament: Implementation of the Interim Agreement on Trade and Trade-Related Matters between the European Community and Israel*, at 8, SEC (1998) 695 final (May 12, 1998) [hereinafter *Implementation of the Interim Agreement*].

⁸⁴ *Id.* at 7; *see also* Convention (IV) Relative to the Protection of Civilian Persons in Time of War, art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (“The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”).

⁸⁵ *Implementation of the Interim Agreement*, *supra* note 83, at 15.

⁸⁶ *See infra* Part III.B for a discussion of the Paris Protocol.

of the State of Israel.”⁸⁷ The discussions surrounding this dispute were long-winded and cumbersome, with Israel failing to provide satisfactory answers. The nature of the dispute transformed from an economic-legal issue into a political-legal dispute.

In 2001, the Commission held that it was duty-bound to ensure proper implementation of the AA and to protect the Union’s customs revenues. In November 2001, the Commission decided to clarify its 1997 Notice to European Importers by publishing a second notice regarding the customs benefits accorded to goods produced in the Occupied Territories. The second notice warned that:

As to the substantial errors in the application of the Agreements, operators are informed that arising from the results of the verification procedures carried out, it is now confirmed that Israel issues proofs of origin for products coming from places brought under Israeli administration since 1967, which, according to the Community, are not entitled to benefit from the preferential treatment under the Agreements.

Community operators presenting documentary evidence of origin with a view to securing preferential treatment for products originating from Israeli settlements in the West Bank, Gaza Strip, East Jerusalem and the Golan Heights, are informed that they must take all necessary precautions and that putting the goods in free circulation may give rise to a customs debt.⁸⁸

As expected, the Israeli interpretation of its recognized area was very different from the European position. During closed Israeli-EU meetings and in inter-ministerial correspondences, Israel argued that, under domestic law, East Jerusalem and the Golan Heights formed part of the territory of the country. Israel also claimed that Israeli jurisdiction applied to all Israeli settlements, even though the West Bank and Gaza had not been formally annexed to the State of Israel.⁸⁹ Israel further claimed that it was generally accepted that its territory included the Occupied Territories, especially since there had been no official protest from the EU. Israel tried to reinforce its case by pointing to previous trade agreements between Israel and the EU pursuant to which the Occupied Territories were regarded as falling within Israeli jurisdiction.

B. “Entire Territory”

The starting point of the Israeli legal argument was Article 31 of the 1969 Vienna Convention on the Law of Treaties,⁹⁰ which “partly reflects customary law and constitutes the basic framework for any discussion of the nature and

⁸⁷ Wybe Th. Douma, *Israel and the Palestinian Authority*, THE EUROPEAN UNION AND ITS NEIGHBOURS: A LEGAL APPRAISAL OF THE EU’S POLICIES OF STABILISATION, PARTNERSHIP AND INTEGRATION 433, 447 (Steven Blockmans & Adam Łazowski eds., 2006) (quoting Danny Krichman).

⁸⁸ Notice to Importers: Imports from Israel into the Community, 2001 O.J. (C 328) 6.

⁸⁹ Interview with a Senior Official of the Israeli Ministry of Finance, in Jerusalem (May 27, 2010). In the early 1980s, Israel unilaterally annexed East Jerusalem and the Golan Heights. Basic Law: Jerusalem, Capital of Israel, 5740, SH No. 980 p. 186; Golan Heights Law, 5742–1981, 36 LSI 7, art. 1 (1981).

⁹⁰ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter Vienna Convention].

characteristics of the treaties.”⁹¹ Article 31(1) stipulates that the general rules of treaty interpretation include *good faith*, *ordinary meaning*, and *context*. Article 31(1) reads: “[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.”⁹² This provision is applicable to any document connected with the treaty. Israel argued that previous dealings between the EU and Israel bolstered the claim that the Occupied Territories were an inseparable part of the recognized “territory of the State of Israel” to which Article 83 of the AA referred. Israel further referred to Article 29 of the Vienna Convention on the Law of Treaties, which states that “[u]nless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its *entire territory*.”⁹³ It should be noted that the term “*entire territory*,” as Malcolm Shaw remarks, is a general rule:

[B]ut it is possible for a state to stipulate that an international agreement will apply only to part of its territory. In the past, so-called “colonial application clauses” were included in some treaties by the European colonial powers, which declared whether or not the terms of the particular agreement would extend to the various colonies.⁹⁴

Despite the “considerable degree of flexibility”⁹⁵ within Article 29, practice suggests that, “in the absence of evidence to the contrary, a treaty would under customary law apply to all the territory of a party, including colonies[.]”⁹⁶ As we shall argue, all legal agreements and documents substantiating EU-Israel relations,⁹⁷ in contrast to many political declarations, show no “evidence to the contrary”⁹⁸ and explicitly and implicitly treat the *entire territory* of Israel, including the territories under dispute, as part of the larger territory covered by the AA.

Another document that Israel relied on regarding the issue of the country’s *entire territory* was the 1947 General Agreement on Tariffs and Trade (the GATT Agreement).⁹⁹ Article XXVI(5)(a) of the Agreement stipulates that “[e]ach government accepting this Agreement does so in respect of its metropolitan territory and of the other territories for which it has international responsibility, except such separate customs territories as it shall notify to the Executive Secretary to the Contracting Parties at the time of its own acceptance.”¹⁰⁰

⁹¹ MALCOLM N. SHAW, *INTERNATIONAL LAW* 903 (6th ed. 2008).

⁹² See Vienna Convention, *supra* note 90, art. 31(1).

⁹³ *Id.* art. 29 (emphasis added).

⁹⁴ SHAW, *supra* note 91, at 926.

⁹⁵ IAN M. SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 90 (2d ed. 1984).

⁹⁶ SHAW, *supra* note 91, at 926–27 n.114; see also LORD A. MCNAIR, *THE LAW OF TREATIES* 116–17 (1986); SINCLAIR, *supra* note 95, at 87–92. The interpretive problem that may arise regarding the Occupied Territories is whether Israel actually exercises “sovereignty” over these territories. The Delegation of the United Kingdom to the Vienna Conference stated that “the expression ‘its entire territory’ applie[s] solely to the territory over which a party to the treaty in question exercised its sovereignty.” *Id.* at 90.

⁹⁷ One notable exception is the technical arrangement made between the EU and Israel in 2004–2005. 2005 Notice to Importers, *supra* note 14; see also *infra* notes 108–10 and accompanying text for a discussion of this arrangement.

⁹⁸ SHAW, *supra* note 91, at 927 n.114.

⁹⁹ General Agreement on Tariffs and Trade, May 30, 1950, 55 U.N.T.S. 187.

¹⁰⁰ *Id.* art. XXVI(5)(a).

Israel relied on a 1964 report of the United Nations International Law Committee that determined that this Article refers to the territory over which the member countries have “international responsibility.”¹⁰¹ Israel argued that this rule should apply to the Occupied Territories. Accordingly, Israel used its various trade agreements with the EU as precedents. Israel argued that its 1964 trade agreement with the EEC did not include an incidence clause. According to the incidence clause of the 1970 trade agreement, (a) the agreement applied to participating European territories and to the State of Israel and (b) the agreement applied to French regions overseas. Israel claimed that territories to which the 1970 agreement did not apply were restricted; the non-restriction of the Territories which Israel occupied in 1967 testified to the fact that the parties’ *intention* was that the recognized area of Israel included the Occupied Territories.

In addition, Israel drew upon the 1994 Paris Protocol on Economic Relations between Israel and the PLO. The Protocol was attached as an appendix (Annex V) to the September 1995 Interim Agreement on the West Bank and Gaza Strip between Israel and the PLO (also known as the Oslo II Agreement or the Taba Agreement).¹⁰² According to the Israeli interpretation of the 1994 Paris Protocol, the territories of Israel, the West Bank, and the Gaza Strip constituted a *single customs area*, implying that all goods from the West Bank and Gaza Strip should be regarded as originating in Israel. The 1995 Interim Agreement was signed by the EU as a witness; Israel argued that this fact alone supported its claim that, in terms of interpretation, the EU was aware that the Occupied Territories constituted a part of the recognized area of Israel. It is important to note that Article XVII(2)(a) of the 1995 Interim Agreement states that, from a territorial perspective, Israel had authority over the settlements—a subject that would be further discussed within the framework of a permanent agreement.¹⁰³ Israel reminded the EU that the AA was signed about two months after the Union signed the 1995 Israeli-PLO Interim Agreement as a witness. Therefore, Israel stated that the proximity between the two events raised questions regarding the Union’s intentions regarding the recognized territory of Israel. Not only was the EU a witness to the 1995 Israeli-PLO Interim Agreement, according to which agreement authority over the settlements rested with Israel, but the EU also did not restrict the Occupied Territories from the provisions of Article 83 of the AA.

The “*entire territories*” language included in the AA could, according to Israel, be explained by explicit stipulations within the agreement. Articles 36 and 37 of the

¹⁰¹ Rep. of the Int’l Law Comm’n to the Gen. Assembly, 16th Sess., May 11–July 24, 1964, ¶ 16, U.N. Doc. A/CN.4/SER.A/1964/ADD.1; GAOR, 19th Sess., Supp. No. 9 (1964).

¹⁰² Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palestine Liberation Organization, annex V, 36 I.L.M. 551.

¹⁰³ *Id.* art. XVII(2)(a) (stipulating that: “[t]he territorial jurisdiction of the Council shall encompass Gaza Strip territory, except for the Settlements and the Military Installation Area shown on map No. 2, and West Bank territory, except for Area C which, except for the issues that will be negotiated in the permanent status negotiations, will be gradually transferred to Palestinian jurisdiction in three phases, each to take place after an interval of six months, to be completed 18 months after the inauguration of the Council. At this time, the jurisdiction of the Council will cover West Bank and Gaza Strip territory, except for the issues that will be negotiated in the permanent status negotiations. Territorial jurisdiction includes land, subsoil and territorial waters, in accordance with the provisions of this Agreement.”).

Fourth Protocol discuss the territorial application of the Protocol. For example, Article 36(1) determined that “[t]he term ‘Community’ used in this Protocol does not cover Ceuta or Melilla. The term ‘products originating in the Community’ does not cover products originating in these zones.”¹⁰⁴ Moreover, Article 36(2) provides: “This Protocol shall apply . . . to products originating in Ceuta and Melilla, subject to particular conditions set out in Article 37.”¹⁰⁵ These articles serve as examples of the EU’s style of bilateral behavior: when it wishes to restrict coverage of certain territories, it leaves no room for legal maneuver.

In July 2003, at the third Euro-Mediterranean trade ministerial meeting, a new protocol was endorsed that allowed for the extension of the pan-European system of diagonal cumulation of origin to the Mediterranean countries. This would require an amendment to the Fourth Protocol on the origin of goods in the AA. Israel strongly supported the initiative and expressed its expectation to participate, but was told that the rules of origin dispute needed to be solved before the AA could be amended to incorporate this change.

Israel also clings to the relatively recent EU-Israel Action Plan—adopted well into the disputed period in December 2004—which still does not include an incidence paragraph.¹⁰⁶ While the Action Plan is not a legal document, but rather a political declaration tailored to Israel’s economic and political situation, it nonetheless outlines the agreed-upon strategic objectives of cooperation between the EU and Israel. Israel argues that even when the EU established a new political framework to strengthen EU-Israeli relations, the EU chose not to clarify the issue of the *entire territory* of the State of Israel. Seven years after first raising questions about the status of Israeli products from the Occupied Territories, the EU once again did not restrict the Action Plan to Israel’s pre-1967 borders.

While this last argument in Israel’s legal arsenal remains to be tested, readers should consider the “frozen” upgrade process in EU-Israeli relations. It can be argued that in 2008, far from restricting its relations with Israel to the pre-1967 borders, the EU actually intended to upgrade relations by offering Israel gradual integration into the European Single Market.¹⁰⁷

Be that as it may, Israel succumbed to European pressure on this issue. On December 12, 2004, following a proposal by Ehud Olmert—then Israel’s Minister for Industry, Trade, and Labor—the EC-Israel Joint Customs Cooperation Committee adopted a “technical arrangement” that made a clear distinction between goods produced in Israel and those from the Israeli settlements in the Occupied Territories. Under the terms of this arrangement, Israeli customs authorities are

¹⁰⁴ AA Protocol 4, *supra* note 13, art. 36(1).

¹⁰⁵ AA Protocol 4, *supra* note 13, art. 36(2). The 1997 EC-PLO Interim Association Agreement contains a similar application article. Protocol 3 to the Euro-Mediterranean Interim Association Agreement on Trade and Cooperation Between the European Community of the One Part, and the Palestine Liberation Organization (PLO) for the Benefit of the Palestinian Authority of the West Bank and the Gaza Strip, of the Other Part Concerning the Definition of the Concept of “Originating Products” and Methods of Administrative Cooperation, art. 35, Eur. Community-Palestine Liberation Org., June 2, 1997, 1997 O.J. (L187) 29 [hereinafter EC-PLO AA].

¹⁰⁶ See EU-ISRAEL ASS’N COUNCIL, *supra* note 71.

¹⁰⁷ Council Conclusions, *supra* note 74, ¶ 9.

required to identify the place of production and accompanying postcode on all preferential proofs of origin issued in Israel for export to the Union. This arrangement allows European customs authorities to apply the provisions of the AA to goods originating in Israel (and which therefore qualify for preferential duty), as opposed to goods coming from the Israeli settlements in the Occupied Territories, which are subject to non-preferential duties.¹⁰⁸

In February 2005, a new notice was issued to customs operators informing them that the EU and Israel had arrived at an agreement for the implementation of the Fourth Protocol of the AA. It stated that “products coming from places brought under Israeli Administration since 1967 are not entitled to benefit from preferential tariff treatment” under the AA; therefore, the full customs duty should apply to those products.¹⁰⁹ European representatives took pains to stress that the agreement was purely a measure to enable European customs officials to impose duties in accordance with the AA. It was not to be regarded as a solution to the dispute between Israel and the EU over geographical applicability of the agreement. This technical arrangement allowed Israel to call the location of the settlements “Israel,” while enabling the EU to charge a tariff on goods produced beyond Israel’s 1967 borders and thus avoid recognizing the legality of the occupation.¹¹⁰

IV. THE *BRITA* CASE

The *Brita* case arose out of a preliminary reference to the ECJ by the Hamburg tax court (*Finanzgericht*).¹¹¹ Brita GmbH is a German company that manufactures water filtration products. It imports carbonation systems, products for the preparation of soda, and soft drinks manufactured by Soda-Club Ltd. (Soda-Club) into Germany. The manufacturing facility of Soda-Club is located in the Adumim Industrial Park in Maale Adumim, the largest Israeli settlement in the occupied Palestinian West Bank between Jerusalem and Jericho. Even though Soda-Club’s systems and accessories are produced in the Palestinian Occupied Territories, Brita marked all of these products “Made in Israel” and applied for an exemption from customs duties under the AA. To that end, Brita filed customs declarations stating that the State of Israel was the country of origin of these systems and accessories. Soda-Club presented invoices declaring that the goods were all produced in Israel.

Between February and June of 2002, the German customs authorities approved Brita’s application and granted preferential tariffs to Soda-Club’s products. However, they were suspicious about the location of the Soda-Club factory;

¹⁰⁸ Council of the Eur. Union, Fifth Meeting of the EU-Israel Association Council, Statement of the European Union, ¶ 40 (Dec. 10, 2004), available at <http://www.eunp.tu-chemnitz.de/bibliothek/Dokumente%20und%20Literatur%20Kapitel%20II%20-%20Regionaler%20Schwerpunkt%20Mittelmeer%20und%20Nahe%20Osten/Declaration%20-%20perspectives%20of%20EU-Israel%20relations.pdf>.

¹⁰⁹ 2005 Notice to Importers, *supra* note 14.

¹¹⁰ The technical arrangement did not fully resolve the entire territory question. Since 2008, the United Kingdom has been calling on the EU to be stricter in its application of the agreement, insisting that goods produced beyond the 1967 borders should be labeled as originating in Israeli settlements in the Occupied Territories. See U.K. DEP’T FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS, TECHNICAL ADVICE: LABELING OF PRODUCE GROWN IN THE OCCUPIED PALESTINIAN TERRITORIES ¶¶ 4–5 (2009), available at <http://www.defra.gov.uk/foodfarm/food/pdf/labelling-palestine.pdf>.

¹¹¹ See Op. Advoc. Gen., *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 3.

following the European Commission's 2001 Notice to Importers regarding imports from Israel into the Community, the German authorities requested from the Israeli authorities verification of the proof of origin of Soda-Club's products. In their reply, the Israeli authorities declared: "[o]ur verification has proven that the goods in question originate in an area that is under Israeli Customs responsibility. As such, they are originating products pursuant to the [EC-Israel] Association Agreement and are entitled to preferential treatment under that agreement."¹¹²

Not satisfied with this answer, in February 2003, the German authorities asked the Israeli authorities to indicate whether Soda-Club's products had been manufactured in the Occupied Territories.¹¹³ In September 2003, after the Israeli authorities failed to provide this information, the Port of Hamburg Principal Customs Office (*Hauptzollamt*) applied customs duties in the amount of EUR 19,155.46 to Soda-Club's products on the grounds that the Customs Office could not establish conclusively that the products fell within the scope of the AA.¹¹⁴ Brita contested the duties and appealed against their recovery.¹¹⁵

The appeal was dismissed in June 2006.¹¹⁶ A month later, Brita brought an action before the Hamburg tax court,¹¹⁷ which in turn referred four questions to the ECJ. First, should the importer of goods that originate in the West Bank be granted the preferential treatment requested? Second, if the answer to the first question is negative, is the customs authority of a Member State bound under the AA, *vis-à-vis* an importer who is requesting preferential treatment for goods imported into the EU, by an Israeli certificate of origin? Third, if the answer to the second question is negative, may the customs authority of the country of importation automatically refuse to grant preferential treatment solely because, pursuant to its request for verification under Article 32(2) of the Fourth Protocol to the AA, it was confirmed only by the Israeli authorities that the goods were manufactured in an area subject to Israeli customs jurisdiction? And fourth, if the answer to the third question is negative, may the customs authority of the importing country automatically refuse to grant preferential treatment under the AA?¹¹⁸ Simply put, the Hamburg court asked the ECJ whether Soda-Club's products could be granted the preferential treatment of the AA or the 1997 EC-PLO Interim Association Agreement when these products had been formally certified as of Israeli origin by the Israeli customs authorities. The German court believed that it did not ultimately matter whether the Israeli or the Palestinian customs authorities issued the certificate of origin. It felt that products originating in the West Bank should be granted preferential treatment in either circumstance because both the AA and the 1997 EC-PLO Interim Association Agreement provide for such preferential treatment.¹¹⁹

On October 29, 2009, Advocate General Yves Bot delivered his Opinion on the four questions. AG Bot did not agree with the solution proposed by the Hamburg

¹¹² Brita, 2010 ECJ EUR-Lex LEXIS 63, ¶ 32.

¹¹³ *Id.* ¶ 33.

¹¹⁴ *Id.* ¶ 34.

¹¹⁵ Op. Advoc. Gen., Brita, 2010 ECJ EUR-Lex LEXIS 63, ¶ 57.

¹¹⁶ *Id.*

¹¹⁷ *Id.* ¶ 58.

¹¹⁸ *Id.* ¶ 59.

¹¹⁹ *Id.* ¶ 106.

court for two main reasons: first, he did not believe that the terms of the AA supported a finding that the West Bank was part of the territory of the State of Israel¹²⁰ and second, he did not believe that the solution envisaged by the *Finanzgericht* respected the sovereignty of the Palestinian authorities, although it was pragmatic.¹²¹

On the question of whether the German customs authorities were bound by the verification carried out by the Israeli customs authorities, AG Bot stated that the administrative cooperation mechanism established by the AA was based on *mutual trust* between European and Israeli customs authorities and on mutual recognition of their documents.¹²² However, Bot pointed out that such mutual recognition is not absolute. According to his Opinion, where the customs authorities of the exporting country have failed to act or respond to a verification request, the customs authorities of the importing country do not have an obligation to recognize the decision taken by the former authorities.¹²³

Regarding the obligation to refer the dispute to the joint EU-Israeli Customs Cooperation Committee, AG Bot explained that the German customs authorities were entitled to adopt a measure unilaterally without first referring the matter to the Committee. AG Bot believed that the procedure established by the AA was *not* the appropriate framework for resolving this conflict because the dispute did not relate to the facts determining the origin of the goods at issue, but rather to the interpretation of the recognized area of the State of Israel.¹²⁴ The question, in other words, was political rather than legal. Consequently, Bot determined that the German customs authorities were not under an obligation to submit the dispute to the joint EU-Israeli Customs Cooperation Committee.¹²⁵

AG Bot did not agree with the German court on whether goods certified as being of Israeli origin, but proving to originate in the West Bank, are entitled without distinction to preferential treatment under the AA or under the 1997 EC-PLO Interim Association Agreement. According to AG Bot, the crux of the case was the recognized territory of the State of Israel. He reviewed how this question had been interpreted by looking at various UN Resolutions. AG Bot considered the 1947 United Nations Special Committee on Palestine (UNSCOP) Partition Plan, which was approved in November 1947 by UN General Assembly Resolution 181, because it defined the borders of the state of Israel.¹²⁶ That Resolution called for the partition of the British-ruled Palestine Mandate into an Arab state and a Jewish state. The Jewish People's Council declared the establishment of the State of Israel on May 14, 1948 based on Resolution 181 and its Partition Plan.

AG Bot drew upon two other UN Security Council Resolutions, Resolution 242 and Resolution 338, which are referred to in the preamble to the 1997 EC-PLO

¹²⁰ *Id.* ¶¶ 108, 110, 112.

¹²¹ *Id.* ¶¶ 111–12.

¹²² *Id.* ¶ 76.

¹²³ *Id.* ¶¶ 76–79, 82.

¹²⁴ *Id.* ¶¶ 98–104; see also *infra* Part III.B for a discussion of Israel's "entire territory."

¹²⁵ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 104.

¹²⁶ G.A. Res. 181 (II), U.N. Doc. A/RES/181(II) (Nov. 29, 1947), <http://domino.un.org/unispal.nsf/0/7f0af2bd897689b785256c330061d253>.

Interim Association Agreement.¹²⁷ Resolution 242, adopted in November 1967, calls for the “[w]ithdrawal of Israel armed forces from territories occupied” in the June 1967 Six-Day War, for the “[t]ermination of all claims or states of belligerency,” and for “respect for and acknowledgement of the sovereignty, territorial integrity and political independence of every State in the area[.]”¹²⁸ Resolution 338, adopted in the last stage of the 1973 Yom Kippur/October War, “[c]alls upon the parties concerned to start immediately after the cease-fire the implementation of Security Council resolution 242 (1967) in all of its parts[.]”¹²⁹ The EU Council, AG Bot continued, was asked to verify this issue.¹³⁰ Following a written question from the European Parliament, in 2000, the EU Council stated:

Regarding the territorial scope of the Association Agreement, Article 83 applies only “to the territory of the State of Israel.” The term “Israel” covers the territorial waters, which surround Israel, and under certain conditions also some sea-vessels. No further definition is contained in the agreement. For its part, the EC considers that the agreement applies solely to the territory of the State of Israel within its internationally recognised borders in accordance with the relevant UNSC resolutions. The EC and its Member States continue to base their relations with Israel and the Palestinians on the principles of international law, including the Fourth Geneva Convention on the Protection of Civilians (1949) prohibiting, inter alia, the establishment of settlements.¹³¹

AG Bot also invoked the 1995 Interim Agreement on the West Bank and the Gaza Strip.¹³² According to Article XI(1) of the agreement, “[t]he two sides view the West Bank and the Gaza Strip as a single territorial unit, the integrity and status of which will be preserved during the interim period.”¹³³

The above legal and political constructions led AG Bot to conclude that “the territories of the West Bank and the Gaza Strip do not form part of the territory of the State of Israel.”¹³⁴ Therefore, “it seems difficult to maintain that a product originating in the West Bank and, more generally, in the occupied territories, is entitled to preferential treatment under the EC-Israel Agreement.”¹³⁵ It was not acceptable, in AG Bot’s view, that “the preferential treatment under the EC-Israel Agreement . . . be applied to a product originating in the West Bank.”¹³⁶ It appeared to him that the EU had concluded the 1997 EC-PLO Interim Association Agreement with a view towards granting a preference to products originating in the West Bank and the Gaza Strip, because it “considered that those products were not entitled to such a preference under the EC-Israel Agreement.”¹³⁷ Thus, for AG Bot, the 1997

¹²⁷ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 111; EC-PLO AA, *supra* note 105.

¹²⁸ S.C. Res. 242, ¶ 1(i)–(ii), U.N. Doc. S/RES/242 (Nov. 22, 1967).

¹²⁹ S.C. Res. 338, ¶ 2, U.N. Doc. S/RES/338 (Oct. 22, 1973).

¹³⁰ Op. Advoc. Gen., *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 113.

¹³¹ Reply to Written Question P-2747/00 by Alain Lipietz (Verts/ALE) to the Council, 2001 O.J. (C 113E) 163.

¹³² Interim Agreement on the West Bank and the Gaza Strip, *supra* note 102.

¹³³ *Id.* art. XI(1).

¹³⁴ Op. Advoc. Gen., *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 112.

¹³⁵ *Id.* ¶ 115.

¹³⁶ *Id.* ¶ 120.

¹³⁷ *Id.* ¶ 121.

EC-PLO Interim Association Agreement was meant to stimulate trade between Palestine and the EU. “To accept that products originating in those territories are entitled to preferential treatment under the EC-Israel Agreement and are thus regarded as products of Israeli origin would have the consequence of divesting the EC-PLO Agreement of some of its effectiveness.”¹³⁸

Before concluding his Opinion, AG Bot found support for his propositions in the *Anastasiou*¹³⁹ jurisprudence, which he believed was comparable to the *Brita* situation¹⁴⁰ despite the differences in the historical, political, and bilateral evolution of the cases. *Anastasiou* concerned the Agreement of December 19, 1972 Establishing an Association between the European Economic Community and the Republic of Cyprus,¹⁴¹ which contained an origin of goods mechanism similar to the one found in the AA. In that case, “[p]roducers and exporters of citrus fruits established in the northern part of Cyprus exported their products to the United Kingdom. The EUR.1 certificates attached to those products were issued by authorities other than those of the Republic of Cyprus.”¹⁴² The ECJ held that:

[w]hile the *de facto* partition of the territory of Cyprus, as a result of the intervention of the Turkish armed forces in 1974, into a zone where the authorities of the Republic of Cyprus continue fully to exercise their powers and a zone where they cannot in fact do so raises problems that are difficult to resolve in connection with the application of the [EEC-Cyprus] Agreement to the whole of Cyprus, that does not warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol on the origin of products and administrative cooperation.¹⁴³

The *Anastasiou* Court went on to say that “[a]cceptance of certificates by the customs authorities of the importing State reflects their total confidence in the system of checking the origin of products as implemented by the competent authorities of the exporting State.”¹⁴⁴ However, “competent authorities” did not include the “authorities of an entity such as that established in the northern part of Cyprus, which is recognized neither by the Community nor by the Member States; the only Cypriot State they recognize is the Republic of Cyprus.”¹⁴⁵ On this basis, AG Bot concluded finally that “[g]oods certified by the Israeli customs authorities as being of Israeli origin but which prove to originate in the occupied territories, more specifically the West Bank, are not entitled either to the preferential treatment under the EC-Israel Agreement or to that established by the EC-PLO Agreement.”¹⁴⁶

¹³⁸ *Id.* ¶ 125.

¹³⁹ Case C-432/92, *The Queen v. Minister of Agric., Fisheries & Food ex parte Anastasiou (Pissouri) Ltd.*, 1994 E.C.R. I-3087. See generally Christopher Greenwood & Vaughn Lowe, *Unrecognised States and the European Court*, 54 CAMBRIDGE L.J. 4 (1995); Panos Koutrakos, *Legal Issues of EC-Cyprus Trade Relations*, 52 INT’L & COMP. L.Q. 489 (2003).

¹⁴⁰ Op. Advoc. Gen., *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶¶ 132–35.

¹⁴¹ Agreement Establishing an Association between the European Economic Community and the Republic of Cyprus, Eur. Economic Community-Cyprus, Dec. 19, 1972, 1973 O.J. (L133) 2.

¹⁴² Op. Advoc. Gen., *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 134.

¹⁴³ *Anastasiou*, 1994 E.C.R. I-3087, ¶ 37.

¹⁴⁴ *Id.* ¶ 39.

¹⁴⁵ *Id.* ¶ 40.

¹⁴⁶ Op. Advoc. Gen., *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 139.

The ECJ ruled on *Brita* on February 25, 2010 and reached similar results. It examined questions 1 and 4 together and noted that the answer depended on the interpretation given to Article 83 of the AA, which defines the territorial scope of the AA.¹⁴⁷ In this respect, the Court recalled that the AA is an act of an EU institution within the meaning of Article 267(b) of the TFEU—the provision on preliminary references. Therefore, the Court found that the AA is governed by the international law of treaties and must be interpreted in accordance with those rules.¹⁴⁸ Although the EU and some of its Member States are not bound by the Vienna Convention, the Court remarked that a series of provisions in that Convention reflect customary international law and, as such, form part of the European legal order.¹⁴⁹ Among the relevant rules the Court used “to ‘colour’ the interpretation given on the basis of”¹⁵⁰ the Convention, the Court specifically mentioned Article 34 to the Vienna Convention on the Law of Treaties, which states that “[a] treaty does not create either obligations or rights for a third State without its consent.”¹⁵¹ In view of those rules, the Court held that Article 83 of the AA had to be interpreted in a manner consistent with the general rule regarding third States.¹⁵²

That being so, the Court held that the AA applied solely to the “territory of the State of Israel” while the 1997 EC-PLO Interim Association Agreement applied solely to the “territories of the West Bank and the Gaza Strip.”¹⁵³ It followed, then, that the customs authorities of each exporting country should have exclusive competence within their territorial jurisdiction to issue origin/movement certificates. Referring to its decision in *Anastasiou*, the Court remarked that “the validity of certificates issued by authorities other than those designated by name in the relevant association agreement cannot be accepted[.]”¹⁵⁴ Thus, the Court ruled that products originating in the West Bank do not fall within the territorial scope of the AA and, therefore, that such products cannot qualify for preferential treatment under this agreement.¹⁵⁵ Furthermore, the ECJ ruled that the German customs authorities may not make “an elective determination” between the AA and the 1997 EC-PLO Interim

¹⁴⁷ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 38.

¹⁴⁸ *Id.* ¶ 39; see TFEU arts. 217–18, 267(b); Vienna Convention, *supra* note 90, arts. 1, 3(b), 31. The ECJ frequently highlights its jurisdiction to interpret AAs. See, e.g., Case C-162/96, *A. Racke GmbH & Co. v. Hauptzollamt Mainz*, 1998 E.C.R. I-3655, ¶ 41 (finding that the provisions of a Cooperation Agreement between the Community and Yugoslavia were directly effective and could be invoked, along with provisions of customary international law, in order to challenge the legality of a Community Regulation); Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719, ¶ 7 (finding that the Court was competent to respond to questions regarding the Association Agreement between the Community and Turkey).

¹⁴⁹ *Id.* ¶ 42; see also Case C-416/96, *El-Yassini v. Sec’y of State for Home Dep’t*, 1999 E.C.R. I-1209, ¶ 25 (discussing the EEC-Morocco Cooperation Agreement and remarking that “[t]he Court has consistently held that a provision of an agreement concluded by the Community with third countries must be regarded as being directly effective”); *Racke*, 1998 E.C.R. I-3655, ¶ 24.

¹⁵⁰ Pieter Jan Kuijper, *Case C-386/08, Brita GmbH v. Hauptzollamt Hamburg-Hafen Judgment of the European Court of Justice of 25 February 2010*, 37 LEGAL ISSUES OF ECON. INTEGRATION 241, 249 (2010) (annotating the case).

¹⁵¹ Vienna Convention, *supra* note 90, art. 34.

¹⁵² The rule is known as: “*Pacta tertiis nec nocent nec prosunt.*” *Brita*, 2010 ECJ EUR-Lex Lexis 63, ¶ 44.

¹⁵³ *Id.* ¶ 47; see also EC-PLO AA, *supra* note 105, art. 73.

¹⁵⁴ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 57 (citing *Anastasiou*, 1994 E.C.R. I-3087, ¶¶ 37–41).

¹⁵⁵ *Id.* ¶ 58.

Association Agreement; therefore, the ECJ left open the question of which of the two trade agreements should be taken into account.¹⁵⁶

The ECJ then examined questions 2 and 3 together.¹⁵⁷ The Court explained that the verification mechanism for the origin of goods is based on a division of powers between the customs authorities. After all, the exporting customs authorities are best positioned to directly verify the facts that determine origin.¹⁵⁸ However such a verification mechanism can only function if the importing customs authorities accept the decisions made by the exporting customs authorities.¹⁵⁹ The Court ruled that importing customs authorities can refuse to grant preferential treatment in two cases: first, where the exporting customs authorities do not reply to the importing customs authorities within ten months, and second, where the exporting customs authorities' reply does not contain sufficient information to ensure the authenticity of invoice declarations or to determine the real origin of products.¹⁶⁰ Because the first answer given by the Israeli customs authorities did not contain sufficient information and the second letter from the German customs authorities remained unanswered, the Court ruled that Israel's statement that the goods qualify for preferential treatment under the AA was not binding upon the German customs authorities.¹⁶¹

The Court clarified that in this case, the aim of the verification request was to establish the exact place of origin of the manufactured goods and to determine whether those products fell within the territorial scope of the AA. The Court unequivocally declared that "[t]he European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under [the EC-Israel Association] agreement."¹⁶²

Regarding the obligation to bring the issue before the EC-Israel Customs Cooperation Committee, a joint administrative working group,¹⁶³ the Court held that such a technical body "cannot be regarded as having competence to settle disputes concerning questions of law such as those relating to the interpretation of the EC-Israel Association Agreement itself."¹⁶⁴ The Court asserted that such disputes *could* be submitted to the EU-Israel Association Council.¹⁶⁵ However, while the Court held

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ¶ 59.

¹⁵⁸ *Id.* ¶ 61.

¹⁵⁹ *Id.* ¶ 62; *see, e.g.*, Joined Cases C-23/04, C-24/05 & C-25/04, *Sfakianakis A EVE v. Dimosio*, 2006 E.C.R. I-1265 (concerning the AA between the Republic of Hungary and the EC and holding that the customs authorities of the importing state are bound to take account of judicial decisions delivered in the exporting state on actions brought against the verification results of the validity of goods movement certificates conducted by the customs authorities of the exporting state); Case C-218/83, *Les Rapides Savoyards Sàrl v. Directeur Général des Douanes et Droits Indirects*, 1984 E.C.R. 3105 (discussing Protocol 3 to the Agreement between the European Economic Community and the Swiss Confederation as it related to rules of origin and holding that the system laid down by the Protocol can function only if the customs authorities of the importing state recognize the determinations legally made by the authorities of the exporting state).

¹⁶⁰ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 60.

¹⁶¹ *Id.* ¶¶ 60, 65–67.

¹⁶² *Id.* ¶ 64.

¹⁶³ *See* AA Protocol 4, *supra* note 13, art. 39.

¹⁶⁴ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 69.

¹⁶⁵ *Id.*; *see also* AA, *supra* note 13, art. 75(1).

that both Israel and the EC had the *right* to bring the question of the territorial scope of the AA before the EU-Israel Association Council, there was *no obligation* to bring the issue before the joint Customs Cooperation Committee since the question did not fall within the Committee's competence.¹⁶⁶ The Court ruled that "the fact that the dispute was not referred to the Association Committee, an emanation of the Association Council, cannot be used as justification for derogating from the system of cooperation and respect for the areas of competence as allocated under the Association Agreement[.]"¹⁶⁷ For these reasons, the Court concluded that the German customs authorities were not bound by the Israeli origin certificates or by the Israeli replies to verification requests, as these did not contain sufficient information to enable determination of the origin of the products.¹⁶⁸

The longstanding bilateral relations between Israel and the EU were embedded with political and legal complexities that the ECJ was expected to address. These complexities created normative gaps in the interpretation and application of the AA. Normative gaps, although not uncommon, are typically loopholes awaiting closure.¹⁶⁹ In the next Part, we show how the Court did not fill these normative gaps in *Brita*. In fact, the Court actually widened these gaps by assuming a political role, by dismissing the AA's dispute settlement mechanisms, by disregarding the parties' long bilateral history, and by failing to seriously accept the invitation to develop a coherent understanding of the norms defining a good BLT.

V. CONVOLUTED BILATERALISM

A. Strategic Incompleteness

In the contracting approach to governance, a basic distinction is made between complete and incomplete contracts.¹⁷⁰ BLTs defining the scope of regional integration take the latter form. The distinction between the two types of contracts reflects the distinction drawn between neoclassical rationality and bounded rationality. The former denotes that agents will choose the best contract available from a variety of other alternatives. The contract will specify the entire array of rights and duties that define their relationship. In order for a contract to be treated as "complete," it has to provide sufficient information and details, as well as "specify

¹⁶⁶ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 71.

¹⁶⁷ *Id.* ¶ 72.

¹⁶⁸ *Id.* ¶ 73.

¹⁶⁹ See, e.g., Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, 2, 10–11, U.N. Doc. A/HRC/4/18 (Feb. 5, 2007) (by Miloon Kothari) (discussing the normative gap in the non-recognition of the right to land in international human rights law); see also Luis Ernesto Chiesa Aponte, *Normative Gaps in the Criminal Law: A Reasons Theory of Wrongdoing*, 10 NEW CRIM. L. REV. 102 (2007) (evaluating the normative gap between an absence of a justification and a finding of wrongdoing in criminal law); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007) (analyzing the normative gap between communities and arguing that it can be filled by allowing legal pluralism to flourish); Amnon Lehari, *The Global Law of the Land*, 81 U. COLO. L. REV. 425, 446 n.121 (2010).

¹⁷⁰ See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

certain provisions in anticipation of the circumstances or contingencies that might arise to alter the terms specified [.]”¹⁷¹

The conditions for complete contracting between two states are seldom fulfilled in practice. It is difficult to think of two states that would transfer sovereignty in a way that renders their agreement “complete,” because it is impossible to foresee or describe every possible contingency. Furthermore, this strategy would leave no space for future renegotiation in light of specific political events or economic considerations. If parties chose to define their bilateral relations using the complete contract model, unforeseen situations might result in the parties terminating their contractual relationships.

Incomplete contracts, on the other hand, emerge from the imperfections and costs generated by a contracting environment that prevents many actors from specifying complete contracts. After all, “[m]ost real contracts are vague or silent on a number of significant matters.”¹⁷² A major advantage of incomplete contracts is that they act “as an important institutional check on the future behavior of actors” and offer states added flexibility to correct *ex post* occurrences.¹⁷³ As such, forming incomplete contracts is the dominant strategy of states that enter into BLTs, whether in regional or extra-regional settings. Strategic incompleteness is part of the rationale that informs the design of international institutions:¹⁷⁴ it “may be desirable for a party that feels it can extract a greater payoff or rent after renegotiations rather than as part of the agreement *ex ante*.”¹⁷⁵

EU treaties are incomplete contracts. For example, the 1957 Treaty of Rome, the foundational agreement of the EEC, was structured as a “framework document”¹⁷⁶ because it would have been impossible to specify a complete set of responsibilities and obligations at the *ex ante* contracting stage. The AA is an example of an incomplete bilateral arrangement. Its stipulations are not hermetically sealed. Certain clauses in the agreement remain unspecified in order to allow Israel and the EU to correct future unforeseeable deficiencies. Such corrections are not a manipulative political tool so long as both parties are aware of the basic principles that define the scope and essence of the relevant agreement.

With regard to the EU-Israel rules of origin dispute, from a legal point of view, the political environment at the time when the AA was signed (1995) was not significantly different from the time when the agreement came into force (2000).

¹⁷¹ ALEXANDER COOLEY & HENDRIK SPRUYT, CONTRACTING STATES: SOVEREIGN TRANSFERS IN INTERNATIONAL RELATIONS 25 (2009).

¹⁷² Eric Maskin & Jean Tirole, *Unforeseen Contingencies and Incomplete Contracts*, 66 REV. ECON. STUDS. 83, 83 (1999).

¹⁷³ COOLEY & SPRUYT, *supra* note 171, at 6.

¹⁷⁴ See, e.g., Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001) (offering a systematic account of the wide range of design features that characterize international institutions).

¹⁷⁵ COOLEY & SPRUYT, *supra* note 171, at 10.

¹⁷⁶ ANDREW MORAVCSIK, THE CHOICE FOR EUROPE: SOCIAL PURPOSE AND STATE POWER FROM MESSINA TO MAASTRICHT 157 (1998).

Thus, the dispute cannot, we argue, be an extension of an unforeseen legal deficiency.¹⁷⁷

Oliver Williamson explains governance structure amongst firms as a function of three elements: uncertainty, the frequency of transactions, and asset specificity.¹⁷⁸ A similar logic applies to governments that agree on a structure of norms and procedures before entering into formal contractual arrangements with other governments. In this way, parties regulate interstate relations that are frequent and involve transaction-specific assets. Regional integration is no different. Asset specificity and the frequency of transactions will determine the depth of integration—which also includes the degree to which a provision in the agreement requires a change in the behavior of its parties—between the EU and other contracting parties to the specific regional project in question.¹⁷⁹ The AA involves transaction-specific assets in various fields of industry and trade. Moreover, the European Neighborhood Policy, the EU-Israel Action Plan, and the upgrade process in the relations between Israel and the Union fueled frequent interaction between the two parties, consequently increasing transactions.¹⁸⁰

Economic relations between Israel and the EU continue to intensify.¹⁸¹ One would expect the parties to manage conflicts via an agreed-upon supranational or third-party institution. As this Article shows, however, the EU preferred, in this instance, to depart from mutually agreed-upon dispute settlement mechanisms and opted instead for a unilateral path. Alexander Cooley and Hendrik Spruyt claim that “political elites do not merely seek to maximize the economic benefits for their states. Strategic politicians fear a loss of office and diminishing autonomy.”¹⁸² To these, one should add the fear of sending false political signals to the international community and thereby losing present (and future) trade partners.

Another explanation for the strategy employed by the AA is *relational contracting*. Business dealings are riddled with relational contracts—informal agreements and unwritten codes of conduct that affect the behavior of individuals within a given firm.¹⁸³ Charles Goetz and Robert Scott explain the term “relational contract” as an agreement that presents an “opportunity to exploit certain economies.

¹⁷⁷ A counterargument to this claim may be based on a certain defining political event taking place during that time. Readers should be reminded that the AA was signed shortly after the signing of the 1993 Oslo Accords between Israelis and Palestinians, when the international community was almost confident that the dispute was history—a confidence that convinced the Noble Prize Committee to award the leaders of both camps the Noble Peace Prize in 1994. *The Nobel Peace Prize 1994*, NOBELPRIZE.ORG, http://nobelprize.org/nobel_prizes/peace/laureates/1994/ (last visited Mar. 7, 2011). The euphoria after the Oslo Accords was high, and there were those European leaders who argued that the “Oslo spirit” was stronger than reality. For an in-depth discussion of the political dimension, see generally PARDO & PETERS, *supra* note 54.

¹⁷⁸ WILLIAMSON, *supra* note 170.

¹⁷⁹ George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT’L ORG. 379, 383 (1996).

¹⁸⁰ See *supra* Part II.

¹⁸¹ Council of the Eur. Union, Tenth Meeting of the EU-Israel Association Council, Statement of the European Union, ¶ 28 (Feb. 22, 2011), available at http://ec.europa.eu/delegations/israel/press_corner/all_news/news/2011/20110222_01_en.htm.

¹⁸² COOLEY & SPRUYT, *supra* note 171, at 148.

¹⁸³ On the importance of informal agreements in organizations, see, for example, PETER M. BLAU, *THE DYNAMICS OF BUREAUCRACY* (2d ed. 1963).

Each party wants a share of the benefits resulting from these economies and consequently seeks to structure the relationship so as to induce the other party to share the benefits of the exchange.”¹⁸⁴ While conventional contracts reduce performance standards to more specific and unambiguous obligations, “relational contracts create unique, interdependent relationships, wherein unknown contingencies or the intricacy of the required responses may prevent the specification of precise performance standards.”¹⁸⁵ On this issue, Giandomenico Majone is correct to argue that the 1957 Treaty of Rome is an example of a relational contract—a contract “sett[ing] for a general agreement that frames the entire relationship, recognizing that it is impossible to concentrate all the relevant bargaining action at the *ex ante* contracting stage.”¹⁸⁶ In this contractual model:

the parties do not agree on detailed plans of action, but on general principles, on the criteria to be used in deciding what to do when unforeseen contingencies arise, on who has what power to act and the range of actions that can be taken, and on dispute resolution mechanisms . . . for adapting the contract to unforeseen contingencies, without compromising its credibility.¹⁸⁷

Parties to an incomplete contract are generally concerned with the legal consequences that attach when disputes fall through the gaps in the contract. One approach holds that complete contracts are possible. According to this view, the existence of a contractual gap indicates that parties failed to reach an agreement over some contingency, so that the contract imposes no legal obligations in the event of such a contingency.¹⁸⁸ Another approach refutes the idea of the complete contract and recognizes the unavoidability of incomplete contracts. It questions how a court should reach a decision on a purported breach of contract when no explicit term stipulating failure on the part of the defendant is expressed in the contract. Charles Goetz and Robert Scott, for example, contend that courts should fill unavoidable

¹⁸⁴ Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1092 (1981).

¹⁸⁵ *Id.*

¹⁸⁶ GIANDOMENICO MAJONE, DILEMMAS OF EUROPEAN INTEGRATION: THE AMBIGUITIES AND PITFALLS OF INTEGRATION BY STEALTH 73 (2005). In other words, a relational contract “allows the parties to utilize their detailed knowledge of their specific situation and to adapt to new information as it becomes available.” George Baker, Robert Gibbons & Kevin J. Murphy, *Relational Contracts and the Theory of the Firm*, 117 Q. J. ECON. 39, 40 (2002). The incompleteness of the 1957 Treaty of Rome gave the ECJ a wider interpretive space. The ECJ, in turn, responded to its new interpretative prowess quickly. In two landmark cases, the ECJ announced that the “European project” is more than a simple regional arrangement, but rather a *sui generis* construction within international law and that treaty provisions have direct effect. Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585, 594 (establishing the supremacy of EC law and holding that “the law stemming from the Treaty . . . could not, because of its special and original nature, be overridden by domestic legal provisions”); Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 (concerning a reference for preliminary ruling regarding whether Article 12 of the EEC Treaty had direct application within the territory of a Member State).

¹⁸⁷ MAJONE, *supra* note 186, at 72–3.

¹⁸⁸ Ayres and Gertner argue that when courts are requested to interpret incomplete contracts, they should penalize the parties in a way that will incentivize them to reveal information during contract negotiations and write complete contracts. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 93 (1989).

contract gaps with terms that maximize the joint benefits of the parties.¹⁸⁹ Did the Court in *Brita* maximize the joint benefit of the parties?

Given the legal and political evolution of EU-Israel relations and the joint treatment of rules of origin, it cannot be claimed that the dispute between Israel and the EU was an unforeseen situation at the *ex ante* contracting stage. Is one of the parties guilty of deception? Charles Lipson once contended that, since “most economic actions are reasonably transparent”—deception is less common in economics than in security relations.¹⁹⁰ The history of EU-Israel relations reveals that the parties were aware of the agreed territorial scope of the AA.¹⁹¹ Although European expectations of the Oslo Peace Process were not realized, goodwill—as evidenced by the upgraded relations between the EU and Israel—did not falter.¹⁹² In any case, thwarted regional expectations cannot render the rules of origin dispute an unforeseen event. Incompleteness, as a contractual strategy, cannot arm a supranational court with the power to dismiss dispute settlement mechanisms specifically prescribed by the BLT in question.

B. Cooperation, Respect, and Reciprocity

In *Brita*, the ECJ reminded the parties that a “system of cooperation and respect” is embedded in the AA.¹⁹³ The Court did not, however, define this terminology. The terms *cooperation* and *respect* could mean many things, including reciprocity, mutual respect, ethical management of the agreement, transparency, legal certainty, legitimate expectations, attention to specific political and economic sensitivities, and exhaustion of mutual dialogue prior to unilateral acts. In *Sfakianakis*, an earlier case concerning the AA between Hungary and the EEC, the Court referred to a “division of responsibilities together with mutual trust between the authorities of the Member State concerned and those of [Hungary].”¹⁹⁴ That means, *inter alia*, that the “provisions tend to reinforce the cooperation mechanisms between the contracting States” and ensure “that the powers of each State regarding investigations into the origin of goods are duly respected.”¹⁹⁵ In *Brita*, “cooperation and respect” should have required the EU’s close attention to the legal-political situation as well as conflict management according to the dispute settlement mechanisms recognized by the AA.

Although we are still “a long way theoretically and empirically from . . . understanding . . . the conditions under which governments comply with international agreements,”¹⁹⁶ the international community treats principles of cooperation and respect, mutual trust and division of responsibilities as crucial to the credibility of bilateral collaborations. Derogating from the dispute settlement

¹⁸⁹ Goetz & Scott, *supra* note 184, at 1117.

¹⁹⁰ Charles Lipson, *International Cooperation in Economic and Security Affairs*, 37 WORLD POLITICS 1, 17 (1984).

¹⁹¹ See PARDO & PETERS, *supra* note 54.

¹⁹² *Id.*

¹⁹³ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 72.

¹⁹⁴ *Sfakianakis*, 2006 E.C.R. I-1265, ¶ 21.

¹⁹⁵ *Id.* ¶ 51.

¹⁹⁶ Beth A. Simmons, *Compliance with International Agreements*, 1 ANN. REV. POL. SCI. 75, 91 (1998).

mechanism that an agreement recognizes will have a detrimental effect on principles of cooperation and respect. These principles are vital for a durable agreement promoting compliance into the future.¹⁹⁷

Israel and the EU chose to solidify these principles in a written document—the AA. Scholarship on treaty design argues that trust does not necessarily lead to a written treaty between the parties. Indeed, the fact that the parties signed the AA arguably demonstrates their mutual suspicion in times of crisis. The act of agreeing on a text normally suggests that parties to a treaty like the AA are well aware of terms such as those controlling the territorial range of the agreement and the mechanisms available in cases of crisis. Charles Kegley and Gregory Raymond remark that “[a]lliance agreements would not be committed to writing if there were not a perceived need to reduce apprehensions about the reliability of allies in times of crisis.”¹⁹⁸

If a written agreement allays suspicion, then why, in *Brita*, did the EU act unilaterally prior to exhausting mutually agreed-upon resolutions? As this Article shows, the answer is perhaps grounded in the fact that many BLTs are “more utilitarian, limited, interest-based exchanges that are thin on values and symbolism.”¹⁹⁹ Irrespective of the accuracy of the ECJ’s ruling, cooperation between Israel and the EU in resolving the dispute was imperative for the success of the AA’s political and economic benefits. Cooperation with certain methods of dispute resolution—namely, those stipulated by the AA—was also an anticipated expression of *respect*.

The concept of cooperation and respect in international relations and bilateral arrangements is closely linked to the principle of reciprocity. States, like individuals and corporations, generally consent to be bound by obligations only if there is some sort of *quid pro quo*. “Reciprocity refers to the interdependence of obligations assumed by participants within the schemes created by a legal system.”²⁰⁰ Reciprocity is a basic principle that lends legal systems the appearance of being grounded in justice and serves as a basis to “build a mutually rewarding relationship.”²⁰¹ It is well-recognized that “[a] regional trade treaty . . . will . . . imply

¹⁹⁷ Studies show that where significant national interests are involved, governments try to resist or ignore international jurisdiction. This results in a failure on the part of international courts to properly act as judicial organs and diminishes the role of international law. *See, e.g.*, Dana D. Fischer, *Decisions to Use the International Court of Justice: Four Recent Cases*, 26 INT’L STUD. Q. 251, 274 (1982) (applying this argument to four cases before the ICJ and concluding that this practice affects the ICJ’s ability “to perform the traditional role of a court”). Within the EU-Israel setting, it is apparent that national interests exist for both sides and that if Israel might have objected the EU had offered the ECJ as an arbiter.

¹⁹⁸ CHARLES W. KEGLEY, JR. & GREGORY A. RAYMOND, *WHEN TRUST BREAKS DOWN: ALLIANCE NORMS AND WORLD POLITICS* 47 (1990).

¹⁹⁹ Blum, *supra* note 7, at 346.

²⁰⁰ RENÉ PROVOST, *INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW* 121 (2002).

²⁰¹ ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 139 (1984). This understanding, in the words of Lawrence Becker, means the following: “that we should return good for good, in proportion to what we receive; that we should resist evil, but not do evil in return; that we should make reparation for the harm we do; and that we should be disposed to do those things as a matter of moral obligation.” LAWRENCE C. BECKER, *RECIPROCITY* 4 (1986).

elements of reciprocity[.]”²⁰² By 2011, when the AA enters its sixteenth year of existence, reciprocity between Israel and the EU should have been systemic:

[R]eciprocity moves from a bilateral to a systemic level, whereby the state accepts to bear an obligation on the basis of a legitimate expectation that the system will generally ensure the imposition of similar or corresponding obligations on all members of the system. Immediate reciprocity would be a transitional stage, a means to enable the attainment of full equality and the exclusive reliance on systemic reciprocity.²⁰³

Although the AA is part of a wider regional policy aimed at achieving a stable Euro-Mediterranean multilateral regime, the individuality of agreements between the EU and each Mediterranean partner personifies the relationships between them. Each agreement takes into account the special circumstances of the contracting states, including political stability, economic and demographic situations, social and cultural ideologies, and legal tradition. “Cooperation and respect” require the design of policies that are commensurate with these disparate circumstances.²⁰⁴

C. *Legitimate Expectations*

“Legal certainty” and “legitimate expectations” are two fundamental principles in BLTs and both have been recognized as fundamental principles of EU law. Strictly applied by the European judiciary,²⁰⁵ legal certainty is required where the law imposes a financial burden on private parties.²⁰⁶ It requires that “Community legislation must be certain and its application foreseeable by individuals.”²⁰⁷ That is, sufficient information must be made public for parties to have a clear idea of what is legally included in their duties and rights.

²⁰² PROVOST, *supra* note 200, at 121.

²⁰³ *Id.* at 122. This distinction resembles the distinction made by some international relations scholars between “specific” and “diffuse” reciprocity. See Robert O. Keohane, *Reciprocity in International Relations*, 40 INT’L ORG. 1, 4 (1986).

²⁰⁴ Reciprocity is affected by non-trade parameters. In our case, the political situation and its social effects on the region influenced the dealings addressed in *Brita*. Joel Trachtman once wrote, in that respect, that:

It is important to recognize that reciprocity may be limited by the fact that other, non-trade social policies are at stake. Thus, when we speak of reciprocal market access, if the barrier is simply a tariff, we only need worry about the effects on the domestic industry when the tariff is reduced. Where the barrier is regulation that is embedded in society and serves other purposes beyond protection, reciprocation may become much more difficult.

Joel P. Trachtman, *Unilateralism, Bilateralism, Regionalism, Multilateralism, and Functionalism: A Comparison with Reference to Securities Regulation*, 4 TRANSNAT’L L. & CONTEMP. PROBS. 69, 85 (1994).

²⁰⁵ The principle of legal certainty was recognized by the ECJ as early as 1960. See *Joined Cases 42 & 49/59, SNUPAT v. High Authority of the European Coal and Steel Community*, 1961 E.C.R. 53, 87 (“[T]he principle of respect for legal certainty, important as it may be, cannot be applied in an absolute manner, but that its application must be combined with that of the principle of legality[.]”).

²⁰⁶ See, e.g., *Case 169/80, Administration des Douanes v. Gondrad Frères*, 1981 E.C.R. 1931, ¶ 17 (“The principle of legal certainty requires that rules imposing charges on the taxpayer must be clear and precise so that he may know without ambiguity what are his rights and obligations and may take steps accordingly.”).

²⁰⁷ *Case T-115/94, Opel Austria GmbH v. Council of the Eur. Union*, 1997 E.C.R. II-39, ¶ 124.

The doctrine of legitimate expectations is rooted in principles of good faith and legal certainty. It has been recognized as “one of the fundamental principles of the Community”²⁰⁸ and requires that, if a Community institution directs a party to take a certain action, the institution may not renege on such direction if the party will suffer loss as a result.²⁰⁹ In *Brita*, the ECJ repeated the rule that any agreement signed by the Council of the European Union is part of European law:

[I]t should be recalled that an agreement concluded by the Council of the European Union with a non-Member State in accordance with Articles 217 TFEU and 218 TFEU, constitutes, as far as the European Union is concerned, an act of one of the institutions of the Union . . . that, from the moment it enters into force, the provisions of such an agreement form an integral part of the legal order of the European Union; and that, within the framework of that legal order, the Court has jurisdiction to give preliminary rulings concerning the interpretation of such an agreement.²¹⁰

If that is the case, then legal certainty and legitimate expectations are relevant principles for BLTs signed between the EU and third countries. They are principles that protect the rights and duties of European subjects. In *Brita*, it seems that the ECJ did not adequately adhere to its own principle of legitimate expectations. The political and economic evolution of EU-Israel relations shows that the parties had sufficient information about regional conditions to maintain relations and relied on this information in their domestic markets.

The EU and the national courts of Member States were expected to follow the conditions set in the AA and to let joint institutions established by the AA manage the dispute. Referring the case to the ECJ and making it the final arbiter in interpreting cross-border bilateral disputes emerging from the AA devalued the principles of legal certainty and legitimate expectations.²¹¹ We agree that parties to a BLT should be aware that “choices made at a given point in time have important downstream consequences that may not be readily apparent to the contracting parties at the time of the initial agreement.”²¹² However, as already argued, the early steps towards formalizing EU-Israel relations were made in a political and legal environment that was not very different from that which exists today. Furthermore, the EU gradually upgraded its relations with Israel and formally granted it a special status.²¹³ Do these acts not amount to a sincere intention to continue the economic dialogue between the parties, according to the *original* stipulations of the AA? Although new regional events ignited political unrest and raised other concerns, the basic political and legal features dominating the region at the time the AA was signed did not change in a way that could throw into question the original commitment. No regional political or legal event was so earth shattering as to dislodge core principles such as legal certainty and legitimate expectations.

²⁰⁸ Case 112/80, *Dürbeck v. Hauptzollamt Frankfurt am Main-Flughafen*, 1981 E.C.R. 1095, ¶ 48.

²⁰⁹ *See, e.g.*, Case 120/86, *Mulder v. Minister van Landbouw en Visserij*, 1988 E.C.R. 2321.

²¹⁰ *Brita*, 2010 ECJ EUR-Lex LEXIS 63, ¶ 39.

²¹¹ The ECJ has been criticized from its limited applicability of the principle of legitimate expectations—or the finding that an expectation is worthy of protection. *See* JÜRGEN SCHWARZE, *EUROPEAN ADMINISTRATIVE LAW* 1171 (1992).

²¹² COOLEY & SPRUYT, *supra* note 171, at 4.

²¹³ *See* PARDO & PETERS, *supra* note 54.

D. Trust and Signaling

1. A Matrix of Signals

Establishing bilateral political and economic relations with Mediterranean countries is a way for the EU to signal its cohesion as a Union with a legal personality, its intention to play an active role in global affairs, and its special interest in regions that are geographically and strategically close to its borders. This signaling theory has been widely applied in international political economics to justify a country's decision to commit itself to multilateral agreements or BLTs.²¹⁴ For example, a developing country will sign a bilateral investment treaty in order to “[signal] its willingness to protect all foreign investment.”²¹⁵ Also, the EU might announce its commitment to unilateral emission reductions as a signal of credible international leadership.²¹⁶

The signaling theory also serves as a general explanation for the limited departure from multilateralism and the formation of bilateral preferential trade agreements (PTAs). For instance, the signing of the Caribbean Basin Initiative in 1982 signaled the beginning of a fundamental shift in the conduct of U.S. trade policy, from GATT multilateralism to alternative state-to-state contractual arrangements. This process may also explain why the U.S. signed bilateral trade agreements with, for example, Chile and Singapore,²¹⁷ not for “direct, quantitative balances of the costs and benefits of trade liberalization,”²¹⁸ but rather as a recognition of “international power relations,”²¹⁹ as a method for “[r]ewarding and supporting domestic market-oriented reformers,”²²⁰ and as a means for “[s]trengthening strategic partnerships.”²²¹

Signaling shows how “a country's actions may reveal information about the country's preferences.”²²² Furthermore, “the decision of whether or not to cooperate with a trade agreement can reveal private information about a country's ability to commit to trade liberalization.”²²³ As mentioned above, AAs are signals of a party's

²¹⁴ See, e.g., Josh Ederington & Phillip McCalman, *Signaling in Trade Agreements* (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=304962 (demonstrating that preferential trade agreements are important for multilateral trade negotiations, because they allow signatory states to signal their commitment to trade agreements).

²¹⁵ Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 *WORLD DEV.* 1567, 1572 (2005).

²¹⁶ See, e.g., Miranda A. Schreurs & Yves Tiberghien, *Multi-Level Reinforcement: Explaining European Union Leadership in Climate Change Mitigation*, *GLOBAL ENVTL. POL.*, Nov. 2007, at 19, 19–20 (showing the active steps the EU took in positioning itself as one of the international agenda setters with regards to climate change mitigation).

²¹⁷ Sidney Weintraub, *Lessons from the Chile and Singapore Free Trade Agreements*, in *FREE TRADE AGREEMENTS: US STRATEGIES AND PRIORITIES* 79, 83 (Jeffrey J. Schott, ed., 2004).

²¹⁸ Richard E. Feinberg, *The Political Economy of United States' Free Trade Arrangements*, 26 *WORLD ECON.* 1019, 1020 (2003).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² Ederington & McCalman, *supra* note 214, at 1.

²²³ *Id.*

intention to formalize its relations, establish a mutual economic agenda, comply with bilateral obligations, or even build trust regarding future multilateral projects.²²⁴

Signaling, in the context of the present discussion, is a way to regionally communicate with political allies. Israel and the EU chose to ground their relations in a written bilateral treaty. Written treaties are costly commitments. Aaron Hoffman contends in *Building Trust* that the costly nature of written treaties derives from two factors that neatly apply to our case:

[f]irst, by undertaking public agreements, states place their reputations at risk. Parties that abandon their public agreements will be branded unreliable, making others hesitant to cooperate with them in the future. Second, by hard-wiring provisions, such as monitoring devices and penalties, into written agreements, states communicate their willingness to faithfully implement their treaty obligations[.]²²⁵

When parties sign a BLT they cannot avoid being distantly tested by third parties in the larger international community. Non-parties to a BLT will examine the success of the agreement prior to entering into any such commitment themselves. Credible BLTs, then, convey to the international community necessary information about the agreement and may create incentives for other prospective states to commit to similar agreements.

The interplay between signals in *Brita* sends a complex matrix of messages. For example, the Court signaled to Member States that it is the final arbiter in regional agreements and reemphasized that these agreements form a part of EU law; the EU signaled to Member States that it would allow the Court's intervention in cross-border disputes despite the existence of express dispute settlement mechanisms in BLTs; the EU used the Court to signal to the international community that the EU's trading partners had to meet certain standards that the EU considered fundamental to regional justice and global norms of trade; the Court signaled that it would allow preliminary ruling procedures if these standards were unmet; and the Union's institutions and Member States signaled that they preferred the Court's cold legal intervention over dealing with unresolved regional politics. One of the risks in a complex signaling matrix is the presence of mixed signals that may affect "legal

²²⁴ Indeed, the EU's affection for FTAs with Mediterranean countries demonstrates "how preferential agreements can serve as a 'building block' to multilateral trade negotiations by providing a means by which countries can signal their commitment to trade negotiations. Indeed . . . some countries might actually prefer signaling such commitment through a regional trade agreement rather than . . . multilateral tariff reductions." *Id.* at 3. In the Euro-Mediterranean context, signaling by the EU can be divided into two levels. The first level refers to individual BLTs that were signed between the EU and Mediterranean countries. Each agreement was tailored to the political, demographic, and economic situation of the signatory state. Each agreement was an independent set of contractual obligations. The EU signaled to each state that it was aware of the political situation in the region and that it respected each state's own political situation. The second level refers to the EU's announcement that it would consolidate its Mediterranean programs under one regional "multilateral ideological framework." See BARCELONA DECLARATION, *supra* note 63. This signaled its greater intention to contribute to peace and stability in the region and its hope to create a regional Union for the Mediterranean in the future. Indeed, Pascal Lamy remarked that bilateral trade agreements have been "the bedrock for peace and greater political stability." Lamy, *supra* note 48, at 5.

²²⁵ AARON M. HOFFMAN, BUILDING TRUST: OVERCOMING SUSPICION IN INTERNATIONAL CONFLICT 33 (2006).

certainty.” This, as we shall argue in the next Parts of this Article, informs prospective trade partners of the credibility of BLTs signed with the EU.

The matrix of signals emerging from *Brita* can be divided into two categories: political signaling and judicial signaling. The former relates to signals designed to preserve both internal and external political stability. External signaling is directed at the international family of nations. Internal signaling is directed at Member States and their populations. As Assaf Likhovski remarks, “signals are not exchanged merely across state borders”²²⁶ but can also be used to inform “internal groups about the power of the ruling elite.”²²⁷ Political signaling strives to balance criticism against certain policies and build trust in local quarters in relation to those policies.

The second category relates to signals sent by the ECJ to local and international communities. One group of signals concerned the Union's social and legal commitment to adjusting ill-defined laws and policies. The other group of signals concerned the ECJ's role as the highest judicial organ entrusted with the interpretation of EU laws, including those in cross-border disputes. In other words, the Court wanted to signal “to outside actors [information regarding] the Court's interests and the possible direction that it wishes to take the law.”²²⁸

2. Costly Signals

An additional reason for EU-Israel cooperation, whether in the form of the AA or other programs, is to signal that the parties are worthy of cooperation, are offering stable and strong trade relations, and are trustworthy. This signal is a costly one because it requires the investment of scarce financial and human resources to adjust laws and other policies according to mutual obligations. As such, the signal serves as a “reliable indicator of the inner quality” of the parties and communicates their willingness to cooperate with other countries.²²⁹

Biologist Amotz Zahavi's analogy suggests that, just as a peacock's splendiferous tail demonstrates its strong genes,²³⁰ so too does carrying out one's multilateral or bilateral obligations convey a clear message of credibility.²³¹ Indeed, costly signaling is a common phenomenon in international relations and politics. Countries are willing to pay the price and invest scarce resources in signaling their membership in a community of nations. One way countries do this is by

²²⁶ Assaf Likhovski, *Argonauts of the Eastern Mediterranean: Legal Transplants and Signaling*, 10 THEORETICAL INQUIRIES L. 619, 627 (2009).

²²⁷ *Id.*

²²⁸ PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 6 (2010).

²²⁹ Likhovski, *supra* note 226, at 623. If a signal is not costly, it can be easily faked. Therefore, it becomes unreliable. On the difference between costly and costless signals, see generally Joseph Farrell & Matthew Rabin, *Cheap Talk*, 10(3) J. ECON. PERSP. 103 (1996). For an examination of costly signals, as contrasted with “cheap talk,” in the context of contracts, see Jason Scott Johnston, *Communication and Courtship: Cheap Talk Economics and the Law of Contract Formation*, 85 VA. L. REV. 385, 404–39 (1999).

²³⁰ See AMOTZ ZAHAVI & AVISHAG ZAHAVI, THE HANDICAP PRINCIPLE: A MISSING PIECE OF DARWIN'S PUZZLE xiv (1997).

²³¹ A good example of costly signals in international law is the appointment of judges to courts of human rights to signal that new or developing democracies have joined the international community. See, e.g., Eric Voeten, *The Politics of International Judicial Appointments*, 9 CHI. J. INT'L L. 387, 392–94 (2009).

transplanting the norms of a foreign legal system into the local system.²³² For example, the Turkish parliament abolished the death penalty in 2002 and legalized education and broadcasting in Kurdish, in the hopes that it could improve the country's chances of joining the EU.²³³ Japan passed tobacco-control laws to signal its conformity with Western norms and to demonstrate its "civilized" nature.²³⁴ The U.S. Congress adopted European protections for copyrights under the Copyright Term Extension Act (CTEA) so that American authors and artists could receive similar terms of protection as their European counterparts.²³⁵ Similarly, Andrew Kydd's study shows that signals by the Soviets that their motivations had changed helped lead to the end of the Cold War.²³⁶

Eric Posner has applied signaling theory to explain norm adherence, which he views as a costly signal of an individual's willingness to cooperate over a long period of time.²³⁷ This could explain the adoption of multilateral treaties in various legal traditions because countries can use these treaties to signal their interest in cooperating with the international community.²³⁸ It could also explain the Israeli and European adherence to bilateralism as the model to substantiate their long-term trade relations. An empirical study conducted by Lisa Martin found that treaties serve as a more costly signal of intent to comply than other international agreements (e.g., executive agreements).²³⁹ Prior to signing the AA, the dialogue between the EU and Israel sent a costless signal of their intentions to collaborate with other countries; the EU also used this dialogue to send a signal that it intended to work with non-European countries. Once the AA was signed, the signal acquired added value because the agreement expanded financial and human resources to approximate local laws, dealt with political disagreements between Member States, and established institutions to manage the AA.²⁴⁰

²³² On legal transplants, see generally ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed. 1993); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 441 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Ugo Mattei, *Efficiency in Legal Transplants: An Essay in Comparative Law and Economics*, 14 *INT'L REV. L. & ECON.* 3 (1994).

²³³ See, e.g., Gamze Avci, *Turkish Political Parties and the EU Discourse in the Post-Helsinki Period: A Case of Europeanization*, in *TURKEY AND EUROPEAN INTEGRATION: ACCESSION PROSPECTS AND ISSUES* 194, 200–03 (Mehmet Uğur & Nergis Canefe eds., 2004).

²³⁴ See, e.g., Eric A. Feldman, *Mixed Reception: Culture, International Norms, and Legal Change in East Asia*, 27 *MICH. J. INT'L L.* 743 (2006) (arguing that the norm of conformity set the process of legal change in motion).

²³⁵ See Sonny Bono Copyright Term Extension Act of 1998, Pub L. No. 105–298, 112 Stat. 2827 (1998).

²³⁶ ANDREW H. KYDD, *TRUST AND MISTRUST IN INTERNATIONAL RELATIONS* 230 (2005).

²³⁷ ERIC A. POSNER, *LAW AND SOCIAL NORMS* 5 (2000).

²³⁸ See, e.g., Daniel A. Farber, *Rights as Signals*, 31 *J. LEGAL STUD.* 83 (2002) (asserting that investors can obtain useful signals from enforcement of general human rights instruments); David H. Moore, *A Signaling Theory of Human Rights Compliance*, 97 *NW. U. L. REV.* 879, 904 (2003) (suggesting that failing to ratify a treaty is an indication of antagonism towards other participants); Charles K. Whitehead, *What's Your Sign? International Norms, Signals, and Compliance*, 27 *MICH. J. INT'L L.* 695, 712 (2006) (describing the impact of the Basel Accord on bank regulatory capital and claiming that "[a] preexisting norm of cooperation among regulators has provided states with a strong incentive to enter into global instruments").

²³⁹ Lisa L. Martin, *The President and International Commitments: Treaties as Signaling Devices*, 35 *PRESIDENTIAL STUDS. Q.* 440 (2005).

²⁴⁰ See PARDO & PETERS, *supra* note 54, at 48–51.

This signal had the potential to upgrade the bargaining power of both partners with other parties, to prove the credibility of their bilateral commitments, and to further develop their reputation as cooperative actors.²⁴¹ Just as “[e]ntering into an FTA with the United States would signal to investors a more stable policy climate and a warmer and more predictable business climate,”²⁴² Israel and the EU could achieve the same objectives through mutual cooperation. However, by ignoring the parties’ agreement on conflict resolution and denying the political element in the dispute, the *Brita* decision discounted the benefits associated with signaling. It also destabilized the delicate balance between credibility and mistrust inherent in many BLTs.

VI. THE ECJ AND MIXED AGREEMENTS

The ECJ “has played an active and at times activist role in EU external relations.”²⁴³ This role has resulted in the Court’s involvement in various conflicts emerging from the Union’s—or its Member States’—obligations under international treaties including, in more recent cases, requests for the Court’s interpretation of the relationship between international law and the domestic constitutional order of the Union.²⁴⁴

As international treaties, AAs between the EU and third countries have not escaped the Courts activism.²⁴⁵ AAs are the biggest and the oldest group of mixed agreements, termed as such because they are signed and concluded by both the EU and by all EU Member States. They normally contain references to political dialogue. Accordingly, they cover areas where the Member States retain independent treaty-making power and touch on issues that are beyond the exclusive competency and authority of the EU.²⁴⁶ The EU’s structure of simultaneous competence—Union

²⁴¹ See, e.g., Andrew T. Guzman, *The Promise of International Law*, 92 VA. L. REV. 533, 549 (2006) (arguing that, when states comply with legal rules, they develop a reputation as cooperative actors); Beth A. Simmons, *Money and the Law: Why Comply with the Public International Law of Money*, 25 YALE J. INT’L L. 323, 325 (2000) (“Governments comply with their legal commitments largely to preserve their reputation for providing a stable framework for the protection of property rights and to enjoy future economic benefits on favorable terms.”).

²⁴² Feinberg, *supra* note 218, at 1026.

²⁴³ PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES AND MATERIALS* 213 (4th ed. 2008).

²⁴⁴ See, e.g., Joined Cases C-402/05 & C-415/05, *Kadi v. Council of the European Union*, 2008 E.C.R. I-6351. See generally Gráinne de Búrca, *The European Court of Justice and the International Legal Order After Kadi*, 51 HARV. INT’L L.J. 1, 49 (2010) (asserting that, in its decision, “the ECJ adopted a strongly pluralist approach which emphasized the internal and external autonomy and separateness of the EC’s legal order from the international domain”).

²⁴⁵ A special case, as Marc Maresceau explains, is the 1997 EC-PLO Interim Association Agreement. This agreement, which refers to “association,” is not mixed and is based on Article 307 of the TFEU and on EC Treaty provisions regarding development cooperation. Originally, it was supposed to be rapidly replaced by a genuinely mixed Euro-Mediterranean Agreement, but this replacement has not taken place. Marc Maresceau, *A Typology of Mixed Bilateral Agreements*, in *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* 11, 19 (Christophe Hillion & Panos Koutrakos eds., 2010).

²⁴⁶ Mixed agreements are of enormous legal significance for the international relations of the Union, as they preserve the autonomy of both the Union and its twenty-seven Member States. See generally *MIXED AGREEMENTS REVISITED: THE EU AND ITS MEMBER STATES IN THE WORLD* (Christophe Hillion & Panos Koutrakos eds., 2010); Nanette A. Neuwahl, *Joint Participation in International Treaties and the Exercise of Powers by the EEC and its Member States: Mixed Agreements*,

and Member States—has required the Court's intervention in many situations,²⁴⁷ because, by their nature, mixed agreements “cause a number of both legal and practical difficulties.”²⁴⁸ The expansion of the Union's jurisdiction over external relations with the passage of the Lisbon Treaty,²⁴⁹ and its vocal presence in global affairs, will indubitably create more situations in which the Court will be expected to intervene and resolve disputes involving mixed agreements with third countries. *Brita* was the Court's latest intervention in such cases.

In a series of earlier cases, beginning with *Haegeman*, the Court held that AAs are within its jurisdiction.²⁵⁰ In the case of *Demirel*, which concerned the EC-Turkey AA,²⁵¹ the Court held that:

Since the agreement in question is an association agreement creating special, privileged links with a non-member country which must, at least to a certain extent, take part in the Community system . . . the question whether the court has jurisdiction to rule on the interpretation of a provision in a mixed agreement containing a commitment which only the Member States could enter into in the sphere of their own powers does not arise.²⁵²

The Court's holding did not extend to matters that fall within the exclusive competence of Member States. A decade later, in *Hermès*, the Court reiterated its jurisdiction to interpret international agreements and to ensure that a provision is “interpreted uniformly, whatever the circumstances in which it is to apply[.]”²⁵³ Alan Dashwood explains:

28 COMMON MKT. L. REV. 717 (1991) (discussing the basic features and problems of mixity in relation to international treaties). For a discussion of mixed agreements in the Euro-Mediterranean context, see PAUL JAMES CARDWELL, *EU EXTERNAL RELATIONS AND SYSTEMS OF GOVERNANCE: THE CFSP, EURO-MEDITERRANEAN PARTNERSHIP AND MIGRATION* (2010).

²⁴⁷ See, e.g., Alan Dashwood, *Preliminary Rulings on the Interpretation of Mixed Agreements*, in *JUDICIAL REVIEW IN EUROPEAN UNION LAW: LIBER AMICORUM IN HONOUR OF LORD SLYNN OF HADLEY* 167, 174 (David O'Keefe & Antonio Bavasso eds., 2000) (“The Court's position is based on the eminently practical ground of the need to ensure that provisions of international agreements, which fall to be implemented in both the Community and the national legal orders, receive consistent interpretation.”).

²⁴⁸ Stefan Griller & Katharina Gamharter, *External Trade: Is There a Path Through the Maze of Competences?*, in *EXTERNAL ECONOMIC RELATIONS AND FOREIGN POLICY IN THE EUROPEAN UNION* 89 (Stefan Griller & Birgit Weidel eds., 2002).

²⁴⁹ On the EU's external relations after the Lisbon Treaty, see generally Jan Wouters, Dominic Coppens & Bart De Meester, *The European Union's External Relations after the Lisbon Treaty*, in *THE LISBON TREATY: EU CONSTITUTIONALISM WITHOUT A CONSTITUTIONAL TREATY?* (Stefan Griller & Jacques Ziller eds., 2008).

²⁵⁰ Case 181/73, *Haegeman v. Belgian State*, 1974 E.C.R. 449, ¶ 6 (concluding that the ECJ has jurisdiction over the 1961 Association Agreement made between the European Economic Community and Greece).

²⁵¹ Case 12/86, *Demirel v. Stadt Schwäbisch Gmünd*, 1987 E.C.R. 3719.

²⁵² *Id.* ¶ 9.

²⁵³ Case C-53/96, *Hermès International v. FHT Marketing Choice BV*, 1998 E.C.R. I-3603, ¶32 (holding that, “where a provision can apply both to situations falling within the scope of national law and to situations falling within the scope of Community law, it is clearly in the Community interest that . . . that provision should be interpreted uniformly.”). Later, the Court further strengthened its claim to jurisdiction over the interpretation of mixed agreements. Joined Cases C-300/98 & C-392/98, *Parfums Christian Dior SA v. TUK Consultancy BV*, 2000 E.C.R. I-11307, ¶ 42 (“[A] provision of an agreement entered into by the Community with non-member countries must be regarded as being directly applicable[.]”).

The logic of the reasoning in *Hermes* is that the Court has jurisdiction to interpret all of the provisions of a mixed agreement falling within the exclusive or the non-exclusive competence of the Community, regardless as to whether, where the option existed for the Member States to conclude the agreement under their own powers, they in fact did so.²⁵⁴

In this Article, we claim that before the Court exercises its jurisdiction, it needs to be attentive to certain stipulations that mixed agreements might contain. Indeed, as Panos Koutrakos once remarked, the Court's interpretation of mixed agreements suffers from "the absence of a clearer line of reasoning . . . [t]his is all the more [regrettable] as the limits of the Court's jurisdiction are so ill-defined."²⁵⁵

European legal history portrays an activist and assertive Court; one that has taken upon itself the task of defining the "European project," furthering integration during the foundational stages of the Community, and crafting landmark doctrines justifying the supremacy of European law.²⁵⁶ In other words, the ECJ is a court, as Judge Federico Mancini remarked, that has continuously generated doctrines that bolster the "making of a constitution for Europe."²⁵⁷ The EU would not have become what it is today without the activist role of its judiciary.²⁵⁸ We agree that "[l]egal interpretation usually has a political element to it."²⁵⁹ In fact, because of the nature of the EU, the ECJ cannot escape politics in many of its rulings. As a result of this, we have argued that there are situations in which the Court's interpretation of bilateral obligations must take account of the wider political situation and avoid the "thin justification [it] offers in support of its most crucial choices."²⁶⁰

Brita is the first post-Lisbon Treaty case in which the ECJ widened its jurisdiction over acts of European institutions relating to bilateral relations. *Brita* is also a landmark decision in that it is the first preliminary reference the ECJ delivered on a mixed agreement that concerned disputed areas in the volatile Middle East. Although from general moral and political perspectives, we find ourselves in agreement with the rationale underlying the Court's decision in *Brita*, we suggest that the Court did not fully and coherently attend to the political entanglements of the region—an approach that proved wrong. The mixed agreement between Israel and the EU cannot be interpreted as a simple case of state-to-state bilateral expression of legal and economic commitments. In *Brita*, the Court did not fully acknowledge that the case involved a dispute that moved between the thin lines of law and politics, local justice and bilateral obligations. On the one hand, *Brita*

²⁵⁴ Dashwood, *supra* note 247, at 174.

²⁵⁵ PANOS KOUTRAKOS, *EU INTERNATIONAL RELATIONS LAW* 201 (2006).

²⁵⁶ On the role of the ECJ, see generally ANTHONY ARNULL, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (2d ed. 2006); THE EUROPEAN COURT OF JUSTICE (Gráinne de Búrca & J.H.H. Weiler eds., 2001).

²⁵⁷ G. Federico Mancini, *The Making of a Constitution for Europe*, 26 *COMMON MKT. L. REV.* 595, 595 (1989).

²⁵⁸ The overall public visibility of the Court, then, as J.H.H. Weiler rightly predicted, was bound to grow and to incite public debates "of a breadth and depth it [was] unaccustomed to." J.H.H. WEILER, *THE CONSTITUTION OF EUROPE: 'DO THE NEW CLOTHES HAVE AN EMPEROR?'* AND OTHER ESSAYS ON EUROPEAN INTEGRATION 207 (1999).

²⁵⁹ ALTER, *supra* note 19, at 30.

²⁶⁰ Vlad Perju, *Reason and Authority in the European Court of Justice*, 49 *VA. J. INT'L L.* 307, 310 (2009).

reminded us of the important role that regional and supranational courts play. On the other hand, it has exposed the flaws inherent in misreading the political boundaries of bilateral accords and subjectively applying norms of procedural justice.

VII. CONCLUSIONS

Bilateral trade relations are premised on a set of norms and standards that define their scope and effective enforcement. Their management constantly sends signals to local and international communities about the credibility of the partners to a given agreement. In this Article, we looked at the contours of procedural justice and the anatomy of judicial behavior in bilateral relations involving complex politics. We examined bilateralism and its set of norms, as applied to the relationship between the EU and Israel. We argued that, while the ECJ correctly realized that *Brita* centered on the question of the effective territory of the State of Israel, it failed to identify the political magnitude of this case.

The Court's finding that the territories of the West Bank and Gaza Strip do not form a part of the territory covered by the AA was based on a weak legal infrastructure. It is commonly understood that the "[r]esolution of the Arab/Israeli conflict is a strategic priority for Europe."²⁶¹ The Union believes that "[w]ithout this, there will be little chance of dealing with other problems in the Middle East."²⁶² Therefore, the EU wishes to "remain engaged and [is] ready to commit resources to the problem until it is solved."²⁶³ However, by overpowering high politics with weak law, the ECJ in *Brita* has harmed the peace camp in Europe, Palestine, and Israel, making it possible for political sensitivities to be similarly ignored in the future, leading to further dissatisfaction with the EU's involvement in the Middle East peace process. More importantly, *Brita* sends a warning to current and future partners to BLTs with the EU—especially to partners from regions with border issues.

Robert Keohane once noted that the preservation of a liberal trade order requires "institutional innovations that will respond to the international bargaining realities and domestic political pressures of our day."²⁶⁴ This does not mean that parties are free to act in ways that conflict with the spirit of a BLT. Rather, it means that bilateral relations require parties to rely on the agreed-upon bundle of norms and constantly rethink these definitional boundaries. Unilateral actions inhibit bilateralism. Sending misleading signals by preferring unilateral judicial problem-solving techniques will have a detrimental effect on any political entity that chooses to adopt this technique. Highlighting the importance of regional relations for the EU, Charlotte Bretherton and John Vogler wrote:

It is through its relations with candidates and neighbours, more than in any other area of its external activity, that the collective identity of the EU will be constructed. For it is here that the Union's value and interest-based personae, and its exclusive and inclusive practices, are most evidently at

²⁶¹ EUR. COUNCIL, A SECURE EUROPE IN A BETTER WORLD: EUROPEAN SECURITY STRATEGY 8 (2003), available at <http://www.consilium.europa.eu/uedocs/cmsUpload/78367.pdf>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ JOSEPH M. GRIECO, COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE 14 n.44 (1993) (quoting Robert Keohane).

odds. Here, too, the EU faces some of the key political issues of our times . . . [t]hus, the conduct of regional relations, over the next decade, will have profound implications for the fundamental character of the Union, its physical borders and its reputation as an actor.²⁶⁵

The EU should be more attuned to the virtues of bilateralism, especially in politically-sensitive regions. It would be reasonable to expect the Union's judiciary, as the institution entrusted with the interpretation of the law, to more rigorously attend to the rationale that "[a]mong the virtues of practice there is the ability to adapt, on a case-by-case basis, the legal reality to the political reality, and hence the ability to find *flexible* solutions that cannot be expressed in 'hard' rules."²⁶⁶ At the same time, the ECJ should develop a coherent and stable normative theory of bilateralism that meets the Union's values regarding international relations and trade practices. The political credibility of the EU as an international and regional power, as well as the institutional strength of its judiciary, are dependent on the Union's ability to revisit some of its most important legal and political foundations.

²⁶⁵ CHARLOTTE BRETHERTON & JOHN VOGLER, *THE EUROPEAN UNION AS A GLOBAL ACTOR* 137 (2d ed. 2006).

²⁶⁶ Enzo Cannizzaro, *Unity and Pluralism in the EU's Foreign Relations Power*, in *THE FUNDAMENTALS OF EU LAW REVISITED: ASSESSING THE IMPACT OF THE CONSTITUTIONAL DEBATE* 193, 234 (Catherine Barnard ed., 2007) (emphasis added).